

The Importance of Change Orders

By Brian J. Trowbridge
& Bryant H. Byrnes

This month's cautionary tale is an oldy but goody. Almost every year we run into the problem of missing or unsigned change orders. Here are two scenarios we have recently seen, and in fact are more common than we would like to admit.

First Scenario. A general contractor takes on what was originally a complete paint job, including minor repairs, of the exterior of a building or home. As the job progresses, the Owner decides to have the Contractor do some minor repairs inside the building/home. Everything seems to be fine as the job progresses, and many of the changes to the scope of the project are discussed directly by the Contractor and Owner during joint walk-throughs of the building.

However, as the job progresses disputes arise as to one thing or another, maybe the quality of work, the cost, or a whether a certain "change order" is incomplete. As the lawyers become involved, both sides want to see the change orders. If there are any, they were produced by the contractor but not signed. The result is a very messy situation over what Change Orders were actually approved, and what work was incomplete or missing.

Second Scenario. A general contractor takes an extensive home remodel project for a seemingly informed and active homeowner. The contractor prepares an extensive set of drawings, a proposal with detailed scope of work, and of course, a code compliant contract. Work begins. The owner likes to stop in and see how the project is progressing. While onsite, the owner suggests a few modifications and the contractor agrees to the changes and proceeds. Because the changes are small and the contractor and owner agreed directly, no change order is prepared.

However, the owner continues to request modifications at the construction site and the contractor complies. At this point, the contractor may even think to prepare change orders. But when presented to the owner, he/she fails to sign because he/she feels it is

unnecessary because of the working relationship. In order to keep the project on track the contractor continues with the work but by the time the project is complete the owner has made extensive changes to the original scope and plans. The final invoice arrives and the owner is shocked at the expense and begins to dispute the changes.

The common denominator in these instances are that **written** and **signed** change orders were not provided to the client during the project. Now the owners balk at the amounts or dispute the scope of work.

The other common denominator is the prospective legal costs. Homeowners are often the first to lawyer up where there are disputes about scope of work and billing.

Importance of Change Orders. Change orders are important because they affect the contract price and/or the time of completion. Time and money are two major aspects of the owner's perception of the success of a remodeling project.

Guess what else. It is not only smart, but statutorily required that the parties' agreement is memorialized in writing before proceeding with the change. We all know this. Section 7159(d) of the Business and Professions Code is emphatically clear on the subject of change orders:

"A home improvement contract and **any changes** to the contract shall be in writing and signed by the parties to the contract prior to the commencement of work covered by the contract or an applicable **change order**..." [Emphasis added.]

The lack of written and signed change orders does not necessarily preclude payment for the work. Business and Professions Code Section 7159.6 reads:

- "(a) An extra work or change order is not enforceable against a buyer unless the change order sets forth all of the following:
- (1) The scope of work encompassed by the order.
 - (2) The amount to be added or subtracted from the contract
 - (3) The effect the order will make in the progress payments or the completion date.
- (b) The buyer may not require contractor to perform extra or change-order work without providing written authorization.
- (c) **Failure to comply with the requirements of this section does not preclude the recovery of compensation for work performed** based upon legal or equitable remedies designed to

prevent unjust enrichment.” [Emphasis added.]

The courts have also recognized that the parties’ conduct during the project can in some cases demonstrate waiver of the requirement for a written change order. The courts will also find compensable damage where there is an oral change order and the work has been completed.

Are written and signed change orders needed with time and materials / cost plus fee contracts? Yes. Although time and materials / cost plus fee contracts are by definition a series of change orders (and not favored by the Contractors State License Board), such contracts usually include a scope of work. If and when there is a major change in scope, a written signed change order is a good idea.

In conclusion. You can proceed with changes with just an oral agreement by the homeowner and the court will **likely** find in your favor that the changed/extra work is recoverable. However, this will take significant time and legal fees to resolve. It is much easier to put the change order in writing in the first place and have your client sign it. This is a case of an ounce of prevention being worth more than a pound of cure.

For Bryant’s previous articles, please visit SFBA NARI’s website and click on the link “In the News/Newsletter” under “For the Trade.” They are also available on his website under “Articles,” and on Brian’s website under Publications. As always, these articles are summary discussions only - to simply give you a heads up on various construction topics.

Bryant H. Byrnes, Esq. practices construction law in the San Francisco Bay Area and is counsel to the SFBA NARI Board of Directors.

Brian J. Trowbridge of Trowbridge Law Office practices construction law in the San Francisco Bay Area. Questions? Bryant’s website is www.bryantbyrnes.com. Feel free to contact him by email at Bryant@bryantbyrnes.com. Brian’s website is www.trowbridgelawoffice.com and you can email him at btrowbridge@trowbridgelawoffice.com.