

Verbal change orders — actions speak louder than words



Construction Law

By PAMELA J. SCHOLEFIELD

Question: We are a general contractor specializing in ground up construction of chain restaurants. The project owner is an out-of-state corporation, one who ultimately sells the property and improvements to a franchisee once the project is completed.

Typically, during the construction phase the franchisee periodically inspects the jobsite and observes progress. The corporate owner has a local project manager who acts as the owner's representative and we deal directly with him for everything.

Our contract, as is typical with most contracts we enter into, requires change orders to be in writing and must be signed before any of the work is performed. It is spelled out in the contract that if we are to get paid for these extras, we must follow the procedure.

On this particular project, the franchisee was more involved than he should have been. Initially, he would arrive and make suggestions for simple things, which we were willing to do, but told him that he must first have the project manager issue a change order to make it official.

We got change order documents

for some of the work and those are not in dispute. But things got a little sloppy and we just ended up with a lot of verbal approvals from the project manager, with the paperwork following a week or so later. These are not in dispute either.

As the project started to take on a recognizable form, the franchisee's change requests increased in frequency and intensity.

To make matters worse, the project got delayed because of an equipment delivery problem, which was no fault of ours.

The project manager asked us to help him get back on schedule by performing numerous changes requested by the owner without waiting for the written change order documents. He assured us that he would create the necessary paperwork to match the completed changes after things settled down.

Then, as the project got back on schedule, we even started getting email change requests from the franchisee, which we forwarded to the project manager. If the project manager was at the jobsite, he would sometimes tell our foreman to go ahead with the franchisee's extras.

A couple of times, our crew first went ahead and did the extras because the work was ready to go forward, and then showed the project manager what they had done and he seemed okay with it.

Now the project is nearly over and we were told that we were not going

to get any additional money for the changes requested by the owner or the franchisee because we didn't get it in writing ahead of time.

The project manager told us his corporate management won't budge on this, despite our good faith efforts to follow the project manager's directions.

We feel we got tricked by the project manager, whether it was intentional or not, and we are out approximately \$75,000 for the extra work.

The whole situation doesn't seem right, but we did sign a contract and we did knowingly go against the contract terms. Do we deserve payment, or should we let it go and chalk it up to a hard lesson learned?

Answer: Your story is one that I am sure many readers can identify with. First, you need to understand the difference between true "change orders" and "extra work". A change order alters the original contract by increasing, decreasing, modifying or eliminating some aspect of the contracted work. True "extra work" means work that is outside of, and entirely independent of, the contract. The parties did not originally contemplate "Extras" when they made the contract and not controlled by the contract. In reality, it is not often clear-cut and the words are used interchangeably in the industry. An example of a true extra may be if your scope of work did not include landscaping, and the owner came to you later and asked you to

do that work. Agreements to do true extras may be considered separate contracts. If the extra work is successfully argued to be a new agreement and not part of the original contract then it would not be subject to the contract's written change order procedure.

Also, many contracts expressly allow an owner to add to, or expand, the scope of work relating to the project. So, in the example above, a contract with that type of language may allow the addition of the landscaping under the original contract.

But, even if you are dealing with true change orders, all hope is not lost. While it makes life easier to get all change orders in writing before you do the work (even if the contract does not require it) there may be two strong arguments that you should be paid despite the lack of written change orders.

First, the project manager's suggestion to temporarily suspend the written change order requirement can be considered a modification to the contract's change order procedure.

A written contract can be modified orally if the parties carried out the oral agreement. In your case, you both agreed to do the work before the change order papers were prepared. And, both parties carried out the oral agreement to modify the procedure — he verbally ordered the

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PrimeCo awarded ROEL paint contract for South Peak

The Daily Transcript

SAN DIEGO — **PrimeCo Painting** has been awarded the contract to paint exterior components of the South Peak common area, located in Laguna Niguel, an official said.

Overlooking the Salt Creek Corridor Regional Park, the community is managed by John Felder of **Seabreeze Management**, located in Aliso Viejo.

Brett Wells of **Frazee Paints** was responsible for development of paint specifications and color selection for the community.

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ROEL

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he said.

ROEL Construction just celebrated its 90th anniversary, and Hickey sees himself as part of the 100-year celebration as well.

"I just truly want to be the best contractor," he said. "I want to bring the company to its full potential."

He strives to make ROEL a great place to work by placing his employees where they use their strengths and feel empowered. Employees get their birthdays off too, said Hickey, who is always trying new things to encourage retention and satisfaction.

Though the construction market is slowing, ROEL isn't worried. The company is diverse, skilled in tenant improvement work, and armed with a surety support team that can take over distressed projects and offer expert testimony. When the market becomes soft,

Hickey said contractors often bid too low on projects, and then they fail. In those cases, ROEL is prepared to take over.

"We will always be your solution; we will never be your problem," Hickey said, emphatically.

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Miramar

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Arts & Humanities Building; and the Technology Building designed by **NTD Architecture**. These facilities are currently in the design phase and are slated for construction beginning in 2009.

A key element of the plan includes references to the college's historic past as Hour Glass Field. A new large commons area will have a large open lawn with a flagstone outline, resembling the layout and orientation of the old hourglass-shaped airfield that previously occupied the site.

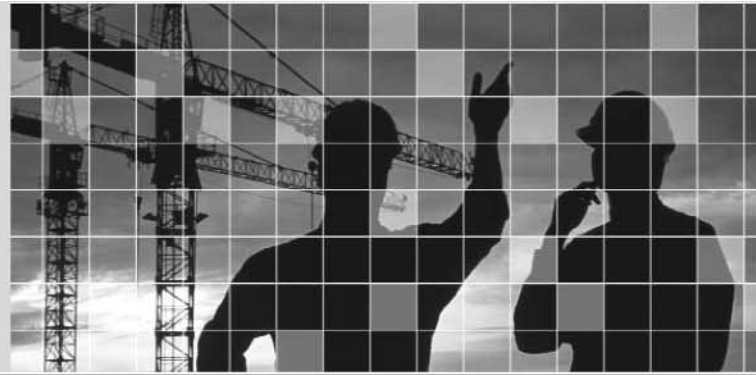
Other elements include preservation of 12 acres of biologically sensitive land at the campus' northwest corner, a new tree lined entry drive, pedestrian walkways, parking areas, and extensive campus landscape improvements.

All of the buildings are anticipated to be certified Silver LEED status at their completion.

Send your comments to Natalie.Wardel@sddt.com

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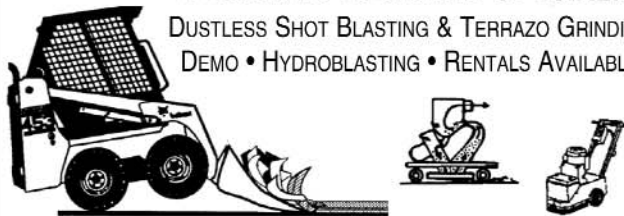
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changed work, and you performed the changes without the paperwork.

Second, the project manager's conduct may have waived the owner's right to enforce the written change order requirement for the franchisee's changes. It is established in construction law that the parties, by their conduct, can waive the written change order requirement by assenting to a change in the contractor's work.

In your favor are the emails that you received and forwarded to the project manager. Thus, he was aware of the change requests made in advance of your performance. And, then he either gave a verbal approval for the work to be done, or viewed the work that was done after it and accepted it without complaint.

So, in effect, you could approving argue that his conduct (approving the work before or after it was done) showed assent to the changed work and thus, waived the requirement for written change orders.

Unfortunately, many contractors don't realize that these, as well as other laws, exist. They think they have no rights if they fail to get written change orders when required by contract. If you want to get paid, you need to firmly stand up for your rights and offer to resolve the matter, perhaps suggest mediation.

If they do not agree, let the owner and franchisee know that you are not afraid to file a lawsuit to collect. Throughout this process, you need to keep in mind the deadlines for recording a mechanic's lien and then foreclosing on it, which you will want to do along with any breach of contract type lawsuit you may file.

Disclaimer

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