

Getting paid for changes before construction is over



Construction Law

By PAMELA J. SCHOLEFIELD

Question: We are an electrical subcontractor who is providing rough and finish electrical to a newly constructed large manufacturing/warehousing facility.

There were changes in the power needs for the building, which required us to increase the rating of the main switchgear from 3,000 amps to 5,000 amps.

This was a significant change because the switchgear was a main-tie-main configuration, meaning it uses three (instead of only one) "main" type breakers — one for normal power, one for emergency power and the tiebreaker to isolate the normal from the emergency source of power.

Many of the transformers and panel boards also increased in size, not to mention the electrical cable and wire itself.

These changes were requested after the first round of submittals had already been done. So, the manufacturer had to redesign the switchgear and do an entirely new set of submittal drawings reflecting all the changes.

We then had to wait for the engineer to approve on the new set of submittals and for the general contractor to give us notice to release the redesigned switchgear for manufacturing.

All of this delayed the electrical portion of the project schedule, and we incurred extra costs for the increase in task labor and other costs such as volatile copper market, driving up to cost of wire.

We also had additional rental on our jobsite trailer, as well as other general conditions.

Also, the 5,000-amp switchgear took more time to manufacture than the 3,000 amps, so that caused more delays.

We finished setting the switchgear, panels and transformers, and pulled the wire about three months ago. All we really have left to do is terminate the wiring to the loads and install all the light fixtures.

The lighting fixtures have not yet been released for manufacturing because other changes in the project have delayed the finish work.

We are probably looking at another six to nine months before we are let back in to finish our work, and we have had to demobilize.

We have received our progress payments (minus retention) to-date based on the price for our original bid for the 3000 amp switchgear package, but we have had to pay our suppliers for the redesigned and more expensive equipment, plus the increased cost of the wire.

We made sure we submitted our change order requests for increases in materials costs, as well as increases in our general conditions and the extra demobilization costs within the time limits of our subcontract.

We never received anything in writing as to whether our change order requests were accepted by the owner and now are being told by the general that the owner "prefers" to wait to the very end of the project to process all the change orders.

Our subcontract is an AIA A401 (the old version) and I know that the general contractor's contract with the owner uses the AIA A201 General Conditions (the old version), although I have never seen their actual contract.

We can't finance these changes for what will realistically be close to another year.

Is there any way we can force our change orders to be addressed even if we haven't finished all the work under our subcontract?

Answer: I am assuming that you properly served a preliminary notice and that by "old version" on the AIA contracts, you mean the 1997 version as opposed to the 2007 version.

I am relieved to hear that you properly submitted your change order requests and you are aware of at least the general conditions between the owner and contractor. That is half the battle.

It also seems that you have enough written documentation to support the argument that you received construction change directives in lieu of signed change orders.

However, as is with most cases, the parties don't seem to be strictly following the entire changes in work procedure as is set out in Article 7 in the AIA A201 (1997).

This causes difficulties in providing a completely legal analysis of your situation because the conduct of the parties factors into any situation where change order procedures and claims procedure on not being followed to the letter of the contract.

Thus, the information I am providing here should not be followed blindly without a more detailed analysis of your entire situation by qualified legal counsel.

Plus, my steps here will be for a "soft" approach if you have a good relationship with the general contractor and you expect to do a significant amount of work together in the future.

In general, you should recognize that, because an amount was not agreed to prior to performing the work, under section 7.3.6, you are obligated to keep an itemized accounting with supporting documents.

Then, under section 7.3.8, you should have been paid any amounts not in dispute.

At this point, it would be wise to confirm that it is the owner who is holding up the change order approvals and payments.

This is not to say that your general contractor is not being truthful, but you need to know the exact reason you're not being paid.

If it is the owner who is holding everything up, I would ask for an immediate meeting with the owner and general contractor and explain the financial burden on your company. Perhaps the owner is not aware of the impact this is having. Bring copies of the change order requests with you, and directly if there are any issues with your work and whether the owner or general plan to asserting any offsets to your change orders.

Also, ask whether the owner currently lacks enough funding for the changes, if so, then that is an entirely different set of problems that will not

be addressed here.

If the owner will not meet, then still have the meeting with the principals of the general contractor to get a clear indication of any problems with the change orders.

If a meeting does not work, or they refuse to meet, then you may consider making a formal claim under Article 4. In my next article, I will address the claims procedure under the AIA documents and other avenues you can take to force your change orders to be addressed.

If you have a construction question, submit it to: info@construction-laws.com.

Disclaimer

The information in this article is based upon California law and is for general information only. Any information or analysis presented here is intended solely to inform and educate the reader on general issues. Nothing presented or referenced to, regarding facts, documents or applicable laws, constitutes legal advice. Before acting or relying on any information presented here, consult with a qualified attorney for your specific situation.

Scholefield holds an active PE license in Colorado, an undergraduate engineering degree from the University of Florida, and received her JD from the University of San Diego.

Source Code 20080611tca

AP IMPACT: Spotty rules govern crane industry

NEW YORK (AP) — Dan Mooney has no idea what it will take for his construction cranes to pass inspection.

The crane company owner recently asked New York City officials for a list of safety hazards that inspectors look for. He was told that information wasn't public.

"How am I supposed to know what I need if you won't tell me?" Mooney asked. "It's like not posting the speed limit."

In 35 other states, crane companies face a different problem: Operators don't need licenses of any kind.

An Associated Press analysis found that cities and states have wildly varying rules governing construction cranes, and some have no regulations at all, choosing instead to rely on federal guidelines dating back nearly 40

years that some experts say haven't kept up with technological advances.

Crane safety is getting extra scrutiny following an alarming number of crane-related deaths in recent months in places such as New York, Miami and Las Vegas. In New York City, two crane accidents since March have killed nine people — a greater number than the total deaths from cranes over the past decade.

Many states have no count of their cranes, nor do they mandate training for workers who run the equipment, or for officials who certify crane operators. Even the federal government acknowledged last month that updated standards would prevent some crane accidents.

New York City has only four inspec-

See **Crane** on 31C