

Getting paid for changes before construction is over



Construction Law

By PAMELA J. SCHOLEFIELD

SAN DIEGO — In my last two articles, I was discussing the problem an electrical subcontractor was having in getting its change orders signed (and paid for) due to a design change to increase in the power needs for the building. This increased the rating of the main switchgear from 3,000 amps to 5,000 amps.

The changes caused delays to the subcontractor during the submittal stage and during the equipment manufacturing process.

The subcontractor incurred extra costs for the increase in labor, a volatile copper wire market, additional rental on its jobsite trailer, as well as other increased general conditions.

Even though the subcontractor has been properly paid to-date on the original value of its subcontract, it has had to foot the bill for the increased costs by having to pay its suppliers for the more expensive materials.

So far, the subcontractor has not received anything in writing as to whether its change order requests were accepted by the owner and now the sub is being told by the general that the owner "prefers" to wait to the very end of the project to process all the change orders.

The issue is that, although the sub finished the majority of its work about three months ago, the lighting fixtures it is providing have not yet been released for manufacturing because other changes in the project have delayed the

finish work.

Thus, it will probably be another six to nine months before the sub is let in to finish it work, and this means the sub will have to carry the extra costs for the changes for that much longer if the owner want to wait until the end to process the change orders.

The subcontract was the AIA A401-1997 Standard Form of Agreement Between Contractor and Subcontractor, with the AIA A201-1997 General Conditions of the Contract for Construction governing the prime contract and the subcontract.

These form contracts are widely used in the industry, and even some "custom" written contracts use the language found in these forms as a base.

Even is a contract is truly custom, it will most likely have procedures for claims and change orders that should be adhered to strictly.

Based on the facts provided by the electrical subcontractor, I concluded that, despite the change orders not being signed before the changed work was performed, there is ample documentation to support the argument that the work was ordered by the contractor in writing under A401, and was also ordered by the owner under A201, section 7.3 as a construction change directive.

And, because the subcontractor submitted written change orders, it has probably sufficiently complied with the "claims" notice procedures required under the AIA form contracts.

In part 1 of this series of article, I advised that at this point it would be wise to meet with the owner and general contractor to confirm that it is really the owner who is holding up the change

order approvals and payments.

If the owner will not meet, than still have the meeting with the principals of the general contractor to get a clear indication of any problems with the change orders. If there are no disputes with the changes, then confirm that in writing.

If there is a dispute as to the value of the changes, then force the general contractor to explain what amount is in dispute and what amount it agrees is owed.

This is very important because California prompt payment statutes allow an owner or a general contractor to hold back 150 percent of the disputed amount.

Any amount held over that will subject them to a 2 percent per month penalty, as well as attorney fees, should you have to sue to get paid.

Also, under A401 section 4.7.1, the subcontractor, with proper notice to the general, can stop its work until payment of the amount owed has been paid.

If notifying the general about these prompt payment penalties and a stop work notice does not get their attention, I would not hesitate serving a "stop notice" for the amount you are owed.

For a private works projects, the stop notice must be bonded to force the construction lender to hold back the funds, but the construction lender is allowed to hold back the funds even if the stop notice is not bonded. Also, the owner must hold back the funds from the general contractor even if the stop notice is not bonded.

Some subcontractors are trigger happy and record mechanic's liens if they are not paid.

But, in this case, a lien would be premature, and therefore invalid, because a

subcontractor cannot record its lien until it has ceased furnishing its labor, services, materials and equipment to the project.

Also, the subcontractor can demand mediation as it is required under the AIA contracts.

There is no need to wait until the project is completed to make such as demand, especially when large sums of money are owed.

The same goes for getting this issue into arbitration if mediation does not resolve it. Binding arbitration is required under the 1997 AIA scheme of contracts, and this could be a quicker way to get a ruling, which can be turned into a judgment, than trying to file a lawsuit.

Except for recording a mechanic's lien, there should be nothing stopping the subcontractor to start enforcing its right to payment on the changes now — despite the fact that its work and the project are not completed.

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

General disclaimer

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El Cajon

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time," Cooksy said.

There are a number of other projects on El Cajon's plate.

In November 2004, El Cajon residents approved Proposition O, a half-cent sales measure designed to cover public safety projects for police and fire protection, and animal control.

One of the cornerstones of this effort will be the creation of a new public safety center consolidating the city's police services into a 5.7-acre facility within an 8.39-acre redevelopment area bounded by North Magnolia, East Park, Rea and Julian avenues.

The proposed project would include a five-story structure with 120,973 square feet of police services office space, 572 structured parking spaces, 89 surface parking spaces, a pedestrian

plaza and a construction staging area.

The first level of the building would be underground, and devoted to parking and a firing range.

The second and third parking levels would be constructed above ground and would wrap around the three-story building.

Uses within the center would consist of police administration, and other administrative services.

A total of 227 staff members have been assigned to the center, with about 170 working at any one time.

Nancy Palm, an assistant to the city manager, said construction drawings for the \$74 million project (including soft costs) are about 90 percent complete. **KMA Architects** of San Diego, and **MWL Architects** of Phoenix, which

specializes in police facilities, are designing the facility.

General contractors are expected to bid on the project by late October.

About a dozen other projects have either recently been completed, are under way or are planned in the near future in an area roughly bounded by Madison, Marshall, Lexington and Mollison avenues.

These projects include the Park Avenue Residential development being constructed at 345 Connecticut Ave. with El Cajon-based **Priest Development Corp.** as the developer.

Planned for 103 homes, the project has about 65 of its 1,765-to 1,865-square-foot row homes sold.

Residential development has been a key part of El Cajon's urban renais-

sance, but the city's plans have also been impacted by the housing market's collapse.

Cooksy said, if possible, he would like to take a number of the condominium conversions, renovate them and sell them as affordable units, but doesn't know when the city will have the wherewithal to make such a commitment.

"The problem is the cost of doing the work keeps climbing, and the ability to finance these projects is going in the opposite direction," Cooksy said. "It makes it all but impossible."

The new Geographical Information System database _ http://www.downtownelcajon.com/interactive_parcel_map.shtml

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