

BE CAREFUL WITH EXTRAS

Document all aspects of unplanned work before starting

Extras, extras read all about them. The issue of extras in construction projects is too often poorly handled by contractors.

In a general contractor-owner situation involving a large project and a formal contract documents, the scope of work is precisely set out. Yet despite the architect's and engineer's best efforts to exactly define this scope of work, which the contractor has promised to complete for a fixed price, unplanned urgencies inevitably arise during the performance of the contract. Items such as delays, unexpected subsurface conditions and design changes can give rise to a claim by the contractor for more money.

It is amazing how more often than not the contractor, showing great "team spirit", does the right thing by doing the extra work, but at the same time does the wrong thing by completely failing to do what has to be done to ensure that he will be paid for it.

The contractor invariably fails to read and understand the contract, the general conditions of which state clearly that no extras will be paid for unless authorized in writing.

The contract further sets out an elaborate procedure for creating change orders, and where the price of the extra cannot immediately be determined, change directives may be issued to authorize the work to be done immediately with the price to be objectively determined later.

Even if the contractor knows the whole change order-change directive procedure, he often goes ahead and performs the extra work anyway because of perceived time pressures, with nothing but an assurance from the owner or his consultant that "we'll do the paperwork later."

“Later” is usually after the project is completed and when the owner is looking to cut costs and no longer relies on the contractor as much.

Then, the owner disagrees that what was discussed was an extra, the owner’s consultant dissembles, and the contractor goes to his lawyer, to start a difficult, expensive and frustrating legal claim where the deck is stacked against him because of the absence of that crucial paperwork.

General contractors must have knowledgeable employees and adequate business procedures in place to ensure that all the formalities relating to extras are complied with. If they don’t, they have nobody to blame but themselves when their claim for payment for genuine extras is refused. .

On smaller jobs not governed by a formal contract, the contract is often only a mere one- or two-page quotation. Sometimes it is a purely oral contract. The scope of work to be performed for the fixed price is only vaguely defined. Examples of these kind of jobs are home addition and renovation projects, weeping tile jobs and electrical and plumbing upgrades.

In these situations the contractor usually has more knowledge and expertise than the customer. This creates a very high onus on the contractor to tell the customer if something is going to be an extra before it is performed.

Often, simple nervousness and shyness on the part of the contractor about telling the customer that “something has come up that we didn’t expect, and I’m gong to have to do ex’ and it’s going to cost you ‘y’ dollars more”, prevent him from discussing the extra in advance and getting the customer to agree to it.

He then goes ahead with it basically betting that the customer is as reasonable and fair a person as he seems to be. It is a bet he all too often loses.

When presented with the claim for extras, the customer often takes the position – fairly or not – that what was done was not an extra, but was part of the original quote. He then reminds the contractor that he gave a fixed

price, which was all he ever expected to pay, and had he known 'x' was an extra, he "never would have authorized it".

The contractor has spoiled his own chances in this situation.

He failed to discuss the extra in advance with the customer and get his agreement to it, as he should have.

He failed to get proof of the extra in writing, even by a confirming letter or memo to the customer, as he should have.

He probably failed to keep internal business records of the extra, as he should have.

The courts have consistently placed the onus on contractors to take the lead and discuss extras openly and in advance with their customers, before doing them, and to have proper business records to prove them in case of a dispute.

Given how clear the law is on this point and how harsh the consequences are for a contractor who fails to communicate clearly and effectively about extras, it is surprising that disputes around this issue still happen so often.