

BRICKS IN THE WALL

Building Toward a More Cost-Effective and Efficient Construction Project

Get a Change Order

Have you ever performed extra work on a construction project and not been paid for it? Many contractors have unwittingly increased the value of a project because they did not understand the change order process. Have you ever thought you were staying within the original scope of the contract, but your subcontractor disagreed and sued you for cost overruns? Let's see how you might be able to save yourself some headaches.

What are the problems that might arise? What constitutes the scope of work, what work was authorized, and who has to absorb the cost overruns are questions often asked during the typical project, and the answers involve money. The process of getting a change order may help reduce the costs. In one example concerning a home builder's claims for additional work, the builder could not recover costs that exceeded the original contract price because the parties "have not expressly or implicitly agreed upon a reasonable price nor have they agreed upon a practicable method of determination of price." *Vatt v. A.L. James*, 180 S.W.3d 99, 109-09 (Tenn. Ct. App. 2005).

Just spending the time to include a detailed change order procedure in your contract, though, is not all that you should do. You may waste your time if you do not read your contract because a contract's written change

order procedures may be waived *if* they are not followed correctly:

The waiver of a written change order requirement by an owner is not always required to be in writing but may be the result of the parties' conduct on the job. Thus, it is not uncommon for courts to find that an owner has waived a written notice requirement in cases where extra work has been ordered verbally by the owner or the extra work has been performed with the owner's knowledge and without its objection.

Vatt, 180 S.W.3d at 103. This is important! Don't be like the general contractor who had to pay its subcontractor over \$170,000 when the general contractor ordered the subcontractor to perform extra work, but the general contractor failed to follow the parties' elaborate written change order procedures. See *Amprite Electric Company v. Tennessee Stadium Group, LLP*, 2003 WL 22171556, at p. *1 (Tenn. Ct. App. Sept. 22, 2003).

It pays to think about what you are doing. Even when you inform the owner of cost increases, and the owner tells you that the project should continue, you still might fall short. One contractor was denied its cost overruns because the contractor never submitted a single written change order, and the contractor consistently and repeatedly affirmed the original contract price on various documents, including multiple pay applications. See *Retail Builders,*

Inc. v. Latham, 2005 WL 3508013, at pp. *9-*10 (Tenn. Ct. App. Dec. 22, 2005).

Why should you have a written change order? A change order is not always written; a change order can be made orally at the project site under a variety of different circumstances. Many construction industry professionals are accustomed to surprises, but if there is a way to reduce the chances that a surprise will become a problem, wouldn't you want to know about it? A written change order request is one such way. The process of getting a change order can help steer you away from problems later in the project because it helps you to identify where problems on the project are hidden or where extra work may be needed.

[A written change order] promotes a more definite understanding between the parties and thus, helps to avoid potential controversies.... It benefits the owner primarily because it provides formal notice that a claim is being made thereby giving the owner an opportunity to take appropriate corrective action or to prepare a proper response to the claims.

Moore Construction v. Clarksville Dept. of Elec., 707 S.W.2d 1, 12-13 (Tenn. Ct. App. 1985).

A change order is intended to modify your existing contract, and the rules governing the formation and

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interpretation of contracts apply. In other words, everyone must agree on what the change order says. There must be “a meeting of the minds of the parties in mutual assent to the terms.” A change order’s substance must be sufficiently definite, or an enforceable contract may not be formed. The parties’ duties and obligations must be easy to perceive and understand. *Jane Doe, et al. v. HCA Health Services of Tennessee, Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Higgins v. Oil, Chem., and Atomic Workers Int’l Union*, 811 S.W.2d 875, 880 (Tenn. 1991).

There are some practical pointers here: get in the habit of sending a change order request, or responding in writing to a change order request. Even though you may not agree on the terms of the change order, and it may not become a fully executed part of your contract, having it in writing will help you accomplish several things:

- You will not be waiving your rights.
- You will be collecting information to support your reason for the change.
- You will be stating your position clearly.
- You will be identifying a potential problem.

This information is provided for informational purposes only and does not constitute legal advice. It is intended to give you a broad overview of very limited issues; it is not intended to apply to every situation or to address every circumstance that may arise.



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Bricks in the Wall is a publication series, each issue on a topic of interest to the construction industry. Listed below are previous issues and their topics.

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