

Getting paid for changes before construction is over, Part 2



Construction Law

By PAMELA J. SCHOLEFIELD

In my last article, I was responding to an electrical subcontractor who was having difficulties 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.

Before you zone out and stop paying attention, keep in mind that many contracts you may have seen or signed probably either used an AIA 201 for their general conditions, this includes some public works contracts. Also, despite a contract not physically looking like an AIA document, many people use provisions in their custom written contracts similar to what I am about to go over. Most contracts can be confusing, boring or just dry reading, and I will be the first to admit this.

But, contracts can also help you or hurt you; it is all about understanding your contract rights and obligations.

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.

Changes to the subcontractor's work are covered in section 5.2 of the A401, and allow the Contractor to order changes in the Subcontractor's work.

Before beginning the changed work, the subcontractor is required to submit written claims "for adjustment to the subcontract sum and subcontract time" for the changed work within the requirements of the "subcontract documents."

The "subcontract documents" include the A201 and prime contract to the extent they apply to the subcon-

tractor's work.

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, section 5.2, and was also ordered under A201, section 7.3 as a construction change directive.

A construction change directive is "a written order prepared by the architect and signed by the owner and architect, directing a change in the work prior to agreement on adjustment, if any, in the contract sum or contract time."

In this case, did the contractor, architect, or owner issue formal written construction change directives? They probably didn't.

It is not unusual for the parties to conduct themselves in ways that don't fit neatly into the formal procedural requirements stated in the contracts.

But, new electrical plans would have had to been issued by the architect and passed down from the contractor to the subcontractor.

Plus, the architect formally approved the revised submittals reflecting the changes, and the contractor released revised equipment for production.

This may be enough to be deemed to be in compliance with the intent and purpose of the requirement for the issuance of written orders and directives under both A401 and A201.

The amount the subcontractor is entitled to for the changed work is vague in the A401, which states that the subcontract Sum and subcontract time shall be "adjusted accordingly."

Thus, looking to A201, payments for changed work performed before an agreement as to the cost of the change is dictated by A201, subsection 7.3.6,

which reads like a time and materials contract.

Then, under subsection 7.3.8, any amounts not in dispute for the cost of the change in work would be included in a payment application along with a change order reflecting the amount not in dispute.

The problem in this case is that no one on the owner's end of the equation has done anything to approve, or for that matter disapprove, the cost of the changes submitted by the subcontractor.

To add to the analysis of what happened here, under A401, section 5.3, the changes are considered a "claim" by the subcontractor.

And, the claims procedures found under A201, section 4.3.2 require that the contractor submit claims within 21 days after the claimant first recognizes the condition, giving rise to the claim.

But, under A401, section 5.3, the subcontractor must submit its claim to the contractor in time for the contractor to comply with the timing in the prime contract, but "not less than two working days preceding the time by which the contractor's claim must be made."

Whew! No wonder so many people hate reading contracts!

If you made it this far and are still paying attention, give yourself a pat on the back for hanging in there.

In this case, the change orders submitted by the subcontractor probably would suffice as notice of its claims.

Where does all that leave us in helping this subcontractor get paid for these changes?

The answers to these questions, and more, will be addressed in Part 3 of this series in my next article.

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

General 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.

Source Code: 20080702tea

The Daily Transcript presents

Rebuilding San Diego

As the 2007 San Diego Wildfires unfolded, *The Daily Transcript* provided up-to-date and relevant coverage. Now, throughout the year, we follow the progress as San Diego Rebuilds.

Join *The Daily Transcript* for year-round coverage on the 2007 San Diego Wildfires, it's aftermath and how San Diego is recovering, remembering and rebuilding. Reach 50,000+ business readers throughout the county online at sddt.com/rebuildingsd

Showcase your firm's expertise and support for Rebuilding San Diego.

Call us at 619.232.4381 or e-mail sales@sddt.com today!

THE DAILY TRANSCRIPT
SAN DIEGO'S BUSINESS DAILY
www.sddt.com

FIND TOP CONSTRUCTION EMPLOYEES!

Place an ad in
"Construction Employment
Opportunities"

call (619) 232-4381