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Construction Newsletter

[Presented by the Baron Law Group]

Legal News for Construction Industry

Construction Change Orders

Change orders are very common on most construction projects, but they continue to be one of the largest problem areas for owners and contractors.

Contractors invariably count on change orders, especially in this economic climate, to keep from losing money on a project. Contractors bid a job knowing that some work will fall outside the scope of the contract because plans are inaccurate or changes occur during the life of the project. Often times a Request For Information (RFI) will elicit direction from the general, owner or architect that requests work to be done that is not in the scope of the original contract.

A change order is a written request for compensation for work which was directed to be performed either via a change directive or verbal directive of the owner, architect, general contractor or government official. Many change orders are done after the work is already performed and never signed until long after the material and manpower have been expended.

When a change order is submitted after the work is performed or not signed before the work is performed there is a basis for dispute. While it is often impractical to get a change order issued and signed prior to the work, there needs to be some guidelines for change orders agreed to in advance.

Owners, generals and subcontractors should endeavor, whenever possible, to include in their contracts clauses which govern change orders and change directives.

The more savvy owners and general contractors will include a clause that provides if the contractor is directed to perform work outside the scope of the contract either orally or in writing by the owner, owner's representative, architect, or government official, that the owner accepts such direction as a change in the scope of work and will compensate the contractor for it if the appropriate steps are followed. Further, the clause should set a time limit, to protect the owner, as to when such change orders must be submitted in writing to the owner (i.e. within 10 days of the work being requested or performed). Likewise, the clause should provide a time limit in which the owner must accept or reject the change order and/or dollar amount (i.e. within 30 days of receipt of the change order) and a means to mediate the dollar amount if there is a disagreement and a time limit in which to do so.

Without these clauses in a construction contract the work, if it proceeds, becomes on a time and materials basis and claims are made which are hard to verify or document after the work of improvement is finalized. Such late claims always end in a dispute.

If the general or subcontractor does not proceed with the construction change directive the entire project can be held up which creates delay claims up and down the chain by both the owner and contractors.

While owners may think it is to their advantage to float the subcontractors until the end of the project, in these economic times that may be the worst thing they can do. If the subcontractor can not afford to do the work or if it cuts corners to perform the work, ultimately, the delay on the job or the shoddy performance is what the owner gets.

The savvy owner and contractor must determine if there is a provision in the contract so that change orders are not delaying payment until after completion and if there is no provision and the owner/general do not agree to one then the cost of the float of such extra work must be built into the contractor pricing. This does not benefit the owner and may skew the bidding to a contractor who is not cognizant of the issues and thus going to cause problems with delay and cost

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over runs on the project down the line.

Many generals and subcontractors do not believe that they can afford to build the cost of carrying the change orders until the completion into their bid/contract price because the market is so competitive. However, why would you want to take on a project, that you cannot afford to perform on, in the hopes that someone who will not negotiate a fair contract clause before you start will pay you a fair and timely price after you have performed the work?

Likewise, why would an owner want a contractor working on their project that may not be able to complete the project or cause delays which will cost them money?

While everyone wants the most for their money both owners and contractors have to be willing, in advance, to work out a reasonable means for compensation and payment of legitimate change orders.

Deadline is February 2, 2012 for Posting OSHA Summary of Injuries and Illnesses

OSHA Standard for Reporting and Recording Occupational Injuries and Illnesses which is contained at 29 C.F.R. section 1904, requires that employers who had ten (10) or more employees in the company at all times last year must track and post a summary of injury and illnesses of their employees from the previous year from February 1 to April 30. Non hazardous industries (i.e. retail, service, finance, insurance or real estate - for a complete list go to 20 C.F.R. section 1904 Appendix A) are exempt from the record keeping and reporting. However, construction is not exempt and construction companies must keep the records and reports and post the summary.

This requires that the construction employer gather data regarding any employees work-related injuries and illnesses that occur during the year that result in loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid.

It should be noted that time away from work for the regulations purposes commence on the day after the injury, so that if there is time missed in seeking first aid treatment it would not trigger a recordable incident. Interestingly, a heart attack on the job is considered a recordable incident.

Employers must use the OSHA Form 301, Injury and Illness Incident Report, to log each such incident within seven days of its occurrence. OSHA Form 301 requires information about the employee, the treatment received, what the employee was in the process of doing when the injury occurred, how the injury took place and what type of injury occurred. The information must also be entered into the OSHA Log, Form 300.

The employer must complete an OSHA 300A Summary and verify that all entries are complete and accurate. A company executive must certify that he or she reasonably believes, based upon his knowledge of the process by which the information was gathered and recorded, that the Summary is complete and correct.

The person certifying the Summary must be an owner of the company (if the company is a sole proprietorship or partnership), an officer of the company, the highest ranking official working at that location, or the supervisor of the highest working official at that location.

The Summary must be posted in a conspicuous location where notices to employees are customarily posted. It must be posted no later than February 1 and remain in place until at least April 30.

The three forms, OSHA 300, 300A and 301 must be retained by the employer for a minimum of five years.

Further, an employee, former employee or employee representative who requests in writing or in person access to the employer's 300 Logs or a 301 Report, describing the employee's injuries, must be given a copy free of charge by the end of the next business day. Also, an agent under a collective bargaining agreement may request and the employer must provide copies of the 301 Reports, with only the "tell us about the case section" not redacted within seven calendar days.

It should also be noted that work related deaths, or hospitalization of three or more employees, within thirty days of an incident occurring trigger a requirement to contact OSHA within eight hours of the employer learning of the death or hospitalizations.

The Baron Law Group now has both Orange County and Park City Offices. Ashley Baron, a U.S.C. undergraduate and law school graduate, has been a lawyer for the past 30 years. Ms Baron has tried over 100 cases, arbitrated and mediated many more. The firm provides arbitration, entity formation, contract drafting and review, labor law training, investigation, defense and litigation support for developers, general contractors, material suppliers, subcontractors, banks, title companies and other businesses in Orange, Riverside, San Bernardino, Los Angeles and San Diego Counties. For further information contact us at (714) 974- 1400 or e-mail us at ashleybaronesq@yahoo.com. Please take a look at our all new web site at: www.ashleybaron.com where you can learn more about our firm, can read and review our past newsletters and our blog of current information.