

**J. Kevin Bridston**

Partner and General Counsel
303.295.8104
Denver
kbridston@hollandhart.com

The Risky Business of Playing Chicken with Change Orders

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May a contractor stop work, or threaten to stop work, if an owner fails to issue a change order to which the contractor is entitled? Imagine a typical scenario on a construction project. The architect issues "clarifications" to project plans and specifications. The contractor concludes that the clarifications are in fact "changes" that involve extra work. Therefore, the contractor issues a change order request. The owner disagrees or defers the decision and does not approve the requested change order.

What should the contractor do? If a contractor proceeds with the work without an agreement (an executed change order) for additional compensation, the contractor may never recover the increased cost of the work. Rather, at the conclusion of the job a settlement of the contractor's claim may be negotiated at a fraction of the actual value and/or cost of the work, in part because of the high cost and uncertainty of litigation or arbitration.

Often, under these circumstances, a contractor will threaten to shut the job down unless the question of extra work and/or change orders, and compensation for the same, is resolved. This is somewhat akin to playing a game of chicken, and is extremely risky. This is particularly true under the typical AIA dispute clause, which provides that work shall proceed diligently, even in the face of a dispute over whether extra work is involved, pending resolution of the claim in the claims process.

The standard AIA A-201-1997 clause reads as follows:

4.3.3 Continuing Contract Performance.

Pending final resolution of a claim except as otherwise agreed in writing..., the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

That clause provides tremendous leverage to the owner. Will the courts enforce such a clause? Generally, the answer appears to be yes. A contractor who refuses to perform disputed work may be guilty of anticipatory breach of the contract, even if it ultimately is held by a court that the contractor was correct (e.g., the work was extra and the contractor was entitled to a change order). Under such circumstances, the owner may be justified in terminating the contract for cause – failure of the contractor to diligently perform.

For example, in applying similar Continuing Contract Performance clauses under federal contracting law, boards of contract appeals have repeatedly held that a contractor's refusal to proceed with the work, unless the owner meets the contractor's request for a change order, gives the owner the right to summarily terminate the contract for cause. See, e.g., *Swiss Products, Inc.*, ASBCA No. 40,031, 93-3 BCA ¶ 26,163 (1993). This is true even if the contractor's interpretation of the contract requirements, and its entitlement to a change order for additional compensation, is correct. *Brenner Metal Products Corp.*, ASBCA No. 25,294, 82-1 BCA ¶ 15,462 (1981).

On the other hand, in *Meinhardt v. Investment Builders Properties Co.*, 518 P.2d 1376 (Colo. App. 1973), the court held that a contractor did not breach the contract when it attempted to renegotiate the total contract price because of changes and additions by the owner that went substantially beyond the scope of the original contract. The court held that a "repudiation of the contract must consist of a *present, positive, unequivocal refusal to perform the contract*, and a mere threat alone to abandon is not a 'repudiation.'" Significantly, despite its effort to renegotiate the contract, the contractor continued work until the owner locked him out. Moreover, because an oral contract was involved, there was no clause requiring that the disputed work be performed pending resolution of a claim.

There is a fine line between being firm in insisting on appropriate change orders and improperly threatening to stop work. Of course, where the owner makes substantial changes to the original scope of work, a contractor is justified in seeking to negotiate a change order.

Simply requesting such new terms, or asserting that a change order should be executed, without making threats, should not constitute breach of contract. On the other hand, if in the process of negotiation the contractor threatens to stop work or implements a meaningful slowdown on the job, he may be found to have breached the contract, thus giving the owner grounds to terminate for cause.

The distinction is somewhat subjective, but given the possible consequences, contractors are advised to exercise caution when attempting to obtain additional payments for disputed extra work. The consequences of a termination for cause, of course, include lost revenue to the contractor and quite possibly damages owed to the owner.

The key to successfully navigating the situation is to comply with the terms of the contract while recognizing the common law rights of termination that an owner may have.

Practical Points

The situation discussed above creates a bit of a Catch-22 for contractors. Contractors do not want to perform work without adequate assurance of payment. At the same time, the standard contracts do not have a good mechanism to force owners to approve change orders, or even make a timely decision on change order requests. There are a few things that may

help:

- Negotiate a claims dispute clause that permits work stoppage if disputed change orders aggregate over a certain dollar threshold. As an example, such a clause might permit work stoppage until resolution of claims when the combined value of unapproved change order proposals exceeds \$500,000 (or whatever threshold the parties agree upon).
- Make clear when seeking a change order or contract modification that the work on the job will continue.
- Carefully segregate and document all extra costs incurred on any work that might be characterized as extra.
- Don't wait until the end of the job to initiate the claims procedure (e.g., mediation or arbitration).

While none of the above suggestions will absolutely protect any contractor, they will make life somewhat easier if a change order dispute arises.

Kevin Bridston is a partner in Holland & Hart LLP's Construction and Real Estate Litigation Group.

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