

# Protecting Your Right to Payment

By Jerry Negrete

Scope changes are a regular occurrence on many projects. Some changes are reflected in well-planned, negotiated change orders that are finalized before any additional work begins. However, other changes are suddenly thrust upon a contractor mid-project, and contractors are expected to perform the work before any agreement on price is discussed or finalized, and before a change is issued for the work. How contractors respond to on-the-fly changes such as field directives will determine whether and how securely they protect their right to payment for that work. Below are tips and tricks to help protect a contractor's right to payment while maintaining a professional and working relationship with the owner.

## Know Your Contract

Read every word in the contract and ensure employees understand the key provisions affecting their work. Does the contract contain provisions allowing the owner to issue field directives, change directives, or time and material forced account work? If not, do not perform additional work without a formal change order or other contractual modification to the scope of work and pricing terms. Performing additional work without formal documentation risks creating a course of performance obliging the contractor to perform additional work without a change order in the future, and certainly puts the cost of that work in question. Explain to the owner the contract does not provide

authority or outline the procedure to issue additional work, and then do not begin the work without issuance of a change order dictating the scope and price of the additional work.

If the contract does allow the owner to issue field directives or otherwise force performance of work without a prior payment agreement, understand how the contract governs payment for that work, and follow those steps. Straying from the procedure outlined in the contract risks establishing a new payment process not contemplated or negotiated in the contract and may compromise future requests for payment. If the contract does not outline how to get paid for such forced work, follow the tips below to remain a cooperative contractor while still protecting your right to payment.

## Maintain Contemporaneous Documents

Contemporaneous documents are created at the time the subject event occurs. Make it a habit to write down the work performed each day, including any agreements reached with the owner during the day about pricing or sequencing. These records do not need to be formal, but they need to be consistent. Contemporaneous documents are inherently trustworthy and safeguard against losing important details due to passage of time.

At the very least, send an email to the owner memorializing the field directives received, the work that was performed, and the unit rate or lump sum expected for the work. Send the email at the time

the work is performed or, at the latest, the evening after the work is performed. Be as specific as possible: include who directed the work, what payment methods were discussed and agreed upon, what work was performed and by whom, and what challenges or delays were encountered while performing the work. Emails are a simple way to record events as they are occurring. However, it is best practice to follow up with a more structured narration of the events to ensure consistent information is reflected and maintained.

Do not rely on an owner's email or weekly summary to reflect the contractor's activities on the job site. Such one-sided reporting may lack important information necessary to support a contractor's request for payment or may erroneously characterize work as original scope as opposed to additional scope. Internal reporting and record keeping creates an accurate and predictable record of the work performed and is an important tool to support your right to payment.

## Use Change Order Requests

If the owner requires a contractor to perform work without a change order or other formal reflection of the additional work, prepare and submit a change order request to the owner. Change order requests memorialize the work performed and the cost the contractor expects to be paid for that work, to demonstrate the contractor believes this work falls outside the original scope and expects additional payment for this work. Change order requests should be created at the time the work is directed or requested. In addition to creating a paper trail supporting the contractor's claim for payment, change order requests start the pricing conversation early and reveal any potential disagreement surrounding scope or payment. If the disagreement cannot be resolved, the contractor will understand the owner's position and decide whether to perform additional work or other projects for this owner in the future.

## Use Lien Waivers to Your Advantage

Texas law requires lien waivers follow the language outlined in the Property Code, which permits contractors to exempt disputed work from its waivers. By utilizing carve out language to exempt disputed work and payment claims from lien waivers, contractors will not unknowingly waive a right to recovery. Lien waivers are strictly construed, and any unintentional waiver can prevent a contractor from recovering payment for work already performed.



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## Follow a Document Retention Policy

All companies should maintain some form of a document retention policy. At a minimum, every contractor should keep all project documents until the project is complete and final payment has been issued. Even better, contractors should maintain all project documents until the applicable warranty period for the project expires, or until any audit timeline from the contract expires, whichever is later. The contract may contain more onerous retention requirements than those maintained by the contractor. Understand what rules, if any, are contained within the contract and be sure to comply with those rules. Any failure to do so can open a contractor up to backwards-looking payment claims. If a contractor is unable to support the cost of its work through contemporaneous documents or other project records, it risks losing project dollars and, ultimately, not being paid for work properly performed.

Contractors should not let their interest in being a team player undermine their right to payment for work performed. By following these tips, contractors will help protect their right to payment while also being a cooperative member of the project team.

