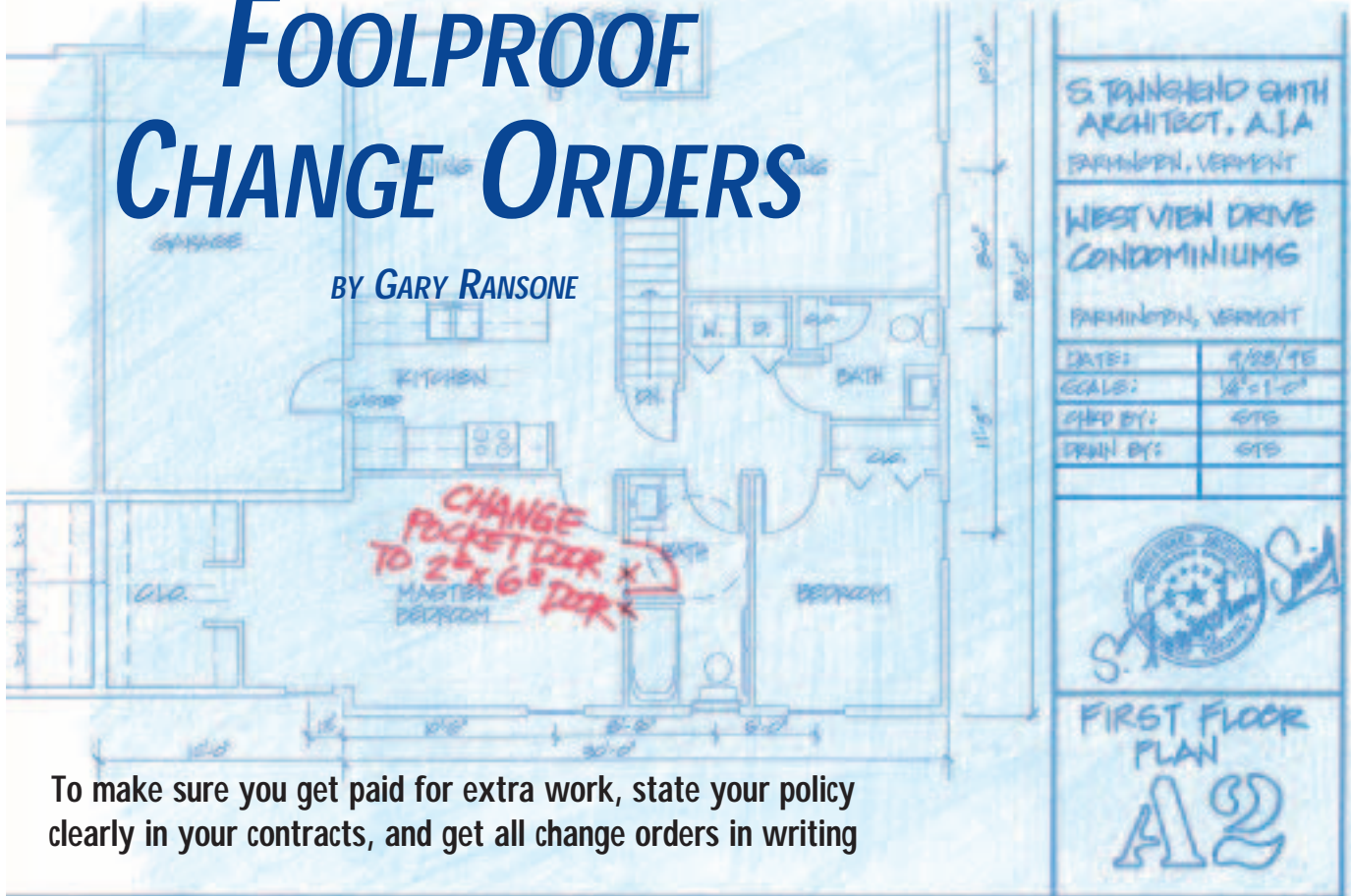


FOOLPROOF CHANGE ORDERS

BY GARY RANSONE



To make sure you get paid for extra work, state your policy clearly in your contracts, and get all change orders in writing

Every experienced contractor knows that the owners who tell you on Monday to finish the extra work at all costs (“Just get it done, whatever it takes!”) may not feel the same way about paying for the extra work the following Monday when they get your invoice.

In my experience, the most common owner/contractor dispute is over change orders. Change order disputes often result in the contractor losing money, as well as the trust and confidence of the owner (and sometimes his subs). If there have been other areas of dispute with the owner, disagreeing about change orders often pushes the contractor closer to the brink of litigation.

The best way to avoid disputes over change orders is to establish a clear policy in your agreement on how “additional” or “extra” work will be identified, carried out, and paid for when it is encountered during the project.

Get it in writing. Once in litigation or arbitration, owners almost always challenge claims of verbal change orders by the contractor. However, written change orders that are signed

by the parties before the work is done are only very rarely raised as a claim against the contractor.

What does this tell you? Don’t do change order work without first writing up the change order and getting the owner’s signature. Stick to the policy of getting extra work approved in writing by the owner before you do the work. Occasionally, you’ll do some work before the owner signs the change order — just to keep the job moving — but 95% of the time, it’s possible to get that signature first. A signed change order will almost entirely eliminate arguments over the owner’s obligation to pay for the work.

Excuses, Excuses

I don’t know a single residential contractor who hasn’t “eaten” hundreds or even thousands of dollars of legitimate change order work at the end of a job just so he could get the owner to release his final check.

Why would a contractor do this? The main reason is that he never put these legitimate change orders in writing. Why weren’t they in writing? Good question. Let’s have a look at a few of

my favorite excuses for donating “free” change order work. (I hate to admit that I’ve used a few of these myself, and always regretted it later.)

The first line is what the contractor was thinking when he decided not to put the change order in writing. The text in italics is what he was thinking after he discovered he would never be paid for the additional work.

♣ “I’m just too busy right now to take the time to write this up.”

“Man, this lawsuit is sure taking a lot longer than it would have taken to write up that \$7,000 in change orders the owner said he would pay.”

♣ “I’m a nice guy, and the owner seems fair-minded. He won’t have a problem paying for legitimate work later.”

“Now I remember what Dad always said about “nice guys.” Why didn’t I listen when he told me that business is business and personal is personal, and never to cross the lines?”

♣ “I really don’t want to rock the boat and give the owner a change order just early in the project (even though it is le-

Be sure to date and number all your Change Orders. You need some type of reference to the original or primary contract between the Owner and the Contractor. The Scope of Work description should be fairly detailed so that there is no question about the exact nature of each item of additional work.

I usually combine profit and overhead with the direct costs and show just one lump sum number (or total price) for each Change Order. If Change Orders have more than one item of extra work, I show a total price for each line item.

It is absolutely critical that you add additional time for each Change Order so that your contract completion date is moved ahead. If you fail to add extra time for extra work, the owner may become upset and think that you are behind in your work when you are actually right on schedule. Adjusting contract completion dates with each Change Order will alleviate this problem.

This clause makes it clear that payment is due whenever the work in the Change Order has been completed by the Contractor and an invoice for the completed work has been given to the Owner.

This clause indicates that all the terms and conditions affecting the Contractor and the Owner in the General Conditions section of your primary Construction Agreement with the Owner also govern this Change Order.

CHANGE ORDER FORM

Charlie Contractor Construction, Inc.
123 Hammer Lane
Anywhere, USA 33333
Phone: (123) 456-7890 • Fax: (123) 456-7899
Lic#: 11111

OWNER'S NAME: Mr. & Mrs. Harry Homeowner DATE: June 16, 2001
ADDRESS: 234 Lumber Lane
Anywhere, USA 33333
PROJECT ADDRESS: same

CONSTRUCTION CHANGE ORDER # 3

I. GENERAL SCOPE OF WORK DESCRIPTION

Pursuant to the Construction Agreement between Contractor and Owner dated May 14, 2001, Contractor agrees to perform the following additional work:

1. Provide excavation, framing, and materials for foundation and subframing of new redwood deck per plans by Art Architect, dated June 10, 2001.
2. Install owner-supplied 2x6 redwood decking after contractor sands, applies edge treatment, and acid washes this owner-supplied redwood decking.
3. Furnish materials and labor for stairs and stair pad per plans (no handrail or guardrail on deck or stairs; no deck sealer).

LUMP SUM PRICE FOR ALL WORK ABOVE: \$ 1,780

* Additional time needed to complete project as a result of this Change Order: 7 Days. (Add to completion date in Construction Agreement.)

II. ACCOUNTING SUMMARY

A. Original Contract Amount: <u>(5/14/2001)</u>	\$ <u>27,713</u>
B. Net Change by all prior Change Orders:	\$ <u>9,864</u>
C. Adjusted Gross Contract Amount prior to this Change Order:	\$ <u>37,577</u>
D. Amount of this Change Order:	\$ <u>1,780</u>
E. Adjusted Gross Contract Amount including this Change Order:	\$ <u>39,357</u>

III. GENERAL CONDITIONS

A. PAYMENT

Payment for this Change Order is due upon completion of this Change Order work and submittal of invoice by Contractor.

B. INCORPORATION

This Change Order, by agreement of Owner and Contractor, is incorporated by reference into the Construction Agreement between Owner and Contractor. All terms and conditions in the "General Conditions" section of the Construction Agreement between Owner and Contractor apply to this Change Order.

I have read and understood the Change Order above, and I agree to all of its terms.

Date: 6/16/01 Harry Homeowner
HARRY HOMEOWNER

Date: 6/16/01 Charlie Contractor, President
CHARLIE CONTRACTOR, PRESIDENT
CHARLIE CONTRACTOR CONSTRUCTION, INC.

Using a standard change order form will ensure that all parties understand the scope and cost of any extra work, and will specify any additional time added to the schedule. The shaded boxes on the left contain the author's comments on the legal language — they are not part of the contract.

gitimate). After all, the owner said just a couple of weeks ago in our meeting that he expected there to be no change orders on this job.”

“Wish I had rocked the boat earlier. I gave up two legitimate change orders early on, and then the owner wouldn’t agree to sign the later ones because he thought if I could afford to give away those first few, I could afford to give away the rest as well.”

♣ “No way. The owner is my (take your choice: good friend, neighbor, relative, business associate, friend of my best friend, doctor, lawyer). He would never refuse to pay for this legitimate additional work.”

“That jerk! After all this we’ll never be friends again. How could I have so badly misjudged that guy?”

♣ “I’ve got plenty of money in the job to cover a few extras in the early phases. I’m not going to be bothered right now writing up these few change orders.”

“Man, I blew it. I may have made 10% more on the foundation than I expected, but after losing 15% on the framing and finish work, I realize I underbid the job as a whole! I sure wish I’d charged for those legitimate extras when I could have!”

♣ “The owner is loaded. He wants quality work, and he’ll be willing to pay for it later. That’s why he hired me in the first place.”

“Wow, the owner really is loaded. He has his own lawyer on staff and says it won’t cost him a penny to fight me on these \$6,500 worth of change orders. How come the lawyer I talked to wanted \$3,500 up front just to take the case? Just the legal fees will crush me on this thing.”

♣ “I hate this paperwork stuff! I’m sure I’ll be able to remember these 17 changes six months from now, and I’m sure the owner won’t mind me showing these changes to him then.”

“What a fool I was again. I can’t figure out which of the receipts in this brown paper bag filing system of mine are for additional work and which are for work that was covered by the contract. The owner won’t pay me for it now anyway: We’re behind schedule and the owner is out of money and boiling mad that I never told him about the extra work until now.”

Any of these sound familiar? Put it in writing before you do the additional

work unless you really are willing to happily forget about the money you are owed. One simple trick is to have some duplicate or triplicate carbon copies of the change order form. Carry these with you in your truck or briefcase at all times. When you’re on a job and need to write the change order right away, you’ll have the forms with you and can do it right there. Then you can either get the owner’s signature on the spot, or leave a couple of copies for him to sign and then pick them up before you start the extra work.

Tracking Change Orders

Using change orders won’t do you much good if you don’t have some organized system for identifying which change order is for what work, how many change orders have been generated on a certain job, and whether or not the owner has signed a given change order.

My method of tracking change orders is to have a change order subdirectory in the computer. When a change order comes up, I copy the blank change order form to a new file name that includes a few letters of the owner’s name, the number of the change order, and the date of the change order. For example, the file name “Smith1.515” means it’s a change order for the Smith job, it’s change order #1, and the date is May 15.

Once you have made a copy of the blank change order form, fill out all the information on the new change order. Print it twice, stamp one copy “AFTER REVIEWING PLEASE SIGN THIS COPY AND RETURN TO CONTRACTOR,” and give it to the owner for signature. Keep the second unstamped copy in your project file until you get the signed version back from the owner.

For change order #2 for Mr. Smith, follow the same procedure except, rather than copying a blank change order form, copy the file named “Smith1.515” and relabel the new file to reflect the number of the change order you are now writing up and the current date.

If you can’t get a signature on the change order prior to starting the additional work, keep a phone log of the time and date of the conversation in which the owner authorized the additional work. Then, follow up the verbal

approval with a written change order ASAP. With fax machines, there is no reason not to get a written change order signed prior to or within a day or two of beginning change order work.

What If I Need to “Prove” a Change Order?

In the absence of a written change order signed by both parties, a commonly accepted definition of extra work in many states requires that the contractor prove through clear and convincing evidence the following:

- The extra work was outside the scope of work in the original contract.
- The extra work was ordered by the owner.
- The owner agreed to pay for the additional work, either by words or conduct.
- The extra work was not a gift, or given “without charge” by the contractor.
- The extra work was not required as a result of the negligence of the contractor or caused by a default of one of the Subcontractors.

If proving these five points in order to establish the validity of extra work sounds complicated, you’re right. It is extremely complicated in contrast to the simplicity of organizing your work in the field to incorporate written change orders for extra work prior to actually performing the work.

Why spend hours of time arguing over who will pay for change orders, accept unreasonable offsets in change order payments (or no money at all in some cases), or be forced into litigation or arbitration over disputed change orders, when using a simple change order procedure can prevent 98% of all of these problems from ever occurring?

Take the time to incorporate written change orders into your normal work routine and you will be rewarded with payment for extra work and better profit margins. You’ll also have greater peace of mind as a result of not having to argue with the owner, after the fact, about getting paid for extra work. ■

Gary Ransone of Santa Cruz, Calif., is a working general contractor and a practicing attorney specializing in construction law. This article is adapted from his new book, *The Contractor’s Legal Kit* (JLC Press, \$59.95; 800/859-3669).