



SHEAR BULL



Affiliate of FRSA and NRCA

July 2014 Volume 27 - 7

No July Program

FRSA's 92nd Annual
Convention and
the Florida Roofing &
Sheet Metal Expo

"Developing Industry
All-Stars"

July 10-12, 2014

Hyatt Regency Orlando
& Orange County

Convention Center
Orlando, FL

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THE VERBAL CHANGE ORDER: THE CONSTRUCTION LAWYER'S RETIREMENT PLAN

By Bruce Loren, Esq. and Michael St. Jacques, Esq. of the Loren Law Firm

Change order disputes take up a large portion of a construction lawyer's day. Almost half of all lawsuits (and attorney's fees) in construction law involve the issue of the right to payment for verbal or unsigned change orders. Was the extra work necessary and reasonable? Was the extra work authorized? Can the contractor include these charges in his construction lien? Is a verbal promise to later execute a change order binding, and if so, for how much?

Instead of paying attorneys to deal with these issues in a lawsuit, we suggest some practical ways to avoid these disputes. At a minimum, you can strengthen your position even if you have no choice but to record a lien or file a lawsuit. These suggestions apply to general contractors seeking payment from an owner, as well as to subcontractors seeking payment from general contractors (even though there are some differences between the two situations). Governments have other defenses for public projects that will not be discussed here.

The typical contract provision dealing with change orders includes requirements that: (1) only certain people can authorize change orders (typically officers, not PMs or supers); (2) the change order must be in writing and signed to be enforceable;

(3) the change order can only be for extra work directed by the owner/GC and not for work that can be inferred from the original scope; (4) the contractor must give notice of the claim for extra work within a short period of time after discovering the claim; (5) the subcontractor is not entitled to payment unless the GC is paid by the owner for this extra work; and (6) the contractor must perform the work even if there is a dispute over the change order.

Subcontractors who perform extra work without a written and signed change order often hear these defenses from the GC:

- We never knew you expected to claim extra money. You never gave notice. Now, it is too late for us to seek payment from the owner.
- Sure, we knew it would be some extra cost, but had we known how much this was going to cost, we never would have asked you to perform the work.
- Our project manager did not have the authority to agree that you would be paid for this extra work.
- Only if and when we get paid for from the owner, we will pay you for your share of the money collected.

Continued on page 3

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MESSAGE FROM THE PRESIDENT

Traveling around the county I see a lot of new construction and re-roof work going on. I also see what I saw starting in the big building boom in the 90's, cheap, unskilled, inexperienced labor that drove out skilled labor and has caused a lot of problems that are making the lawyers and consultants a lot of money. Public work that mandates awarding contracts to the low bidder, not lowest qualified bidder, and when there are failures it causes the taxpayers more money to correct them. Property owners are sometimes their own enemy by shopping price rather than what they are getting for their low bid and how qualified the workers are and not the salesman they dealt with. Is the contract they signed code compliant and inclusive or in the hidden print does it give way for additional charges that should have been included in the project to start with and now is rising the cost possible higher than the other bidders. Is everyone working on your roof covered by workers compensation? are they day labor off the street? Employee leasing personal listed to that company and covered by their insurance at a rate of pay over \$100.00 per week? These are questions everyone from public to private work should be asking before the fact instead of afterwards, or if there is an injury or death.



This leads me, in a round about way, to the FRSA's 2014 Roofing Convention in Orlando July 10th to 12th at the Orange County Convention Center where they will be holding seminars for Superintendents, Forman and Workers on subjects from Hazard Communications to Tile installations. It's time to train our employees whether it's an apprentice program, in house program, a course with FRSA or another reputable organization. And when getting new hires remember our returning Veterans and use E-Verify to keep Americans working.

Hope to see everyone at the convention and at our next General Membership meeting.

Respectfully Submitted

Joe Byrne

President

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General contractors often hear similar defenses from the owner, including:

- The work was not extra; it was inferred from the plans.
- You are not entitled to a change order because the plans stated that the GC would use "first class material" or that, in the event of any contradicting provisions, the "most stringent requirement would apply."

Avoid getting to the point where you have to argue about whether you should be paid for the change order. Start with the negotiation of the contract. Because the contract often states that claims for extra money or time are not binding unless they are in writing, it is reasonable for you to add language such as: "Contractor shall not be required to begin any extra work without a change order executed by all parties."

After the work begins, typical scenarios include:

Scenario Number 1: In the field, the owner or the GC directs you to perform work that you believe entitles you to extra money and/or time, but the work needs to be done now and there is no time to prepare a written change order or wait for the change order to be signed. The GC or subcontractor should:

- Hold off on performing the work as long as possible as if you were playing a "game of chicken." You may be at a stage that you can refuse to call for inspections that will "slow" down the project. The experienced contractor knows that, once they complete the work without a signed change order, your leverage is gone and parties will find excuses not to pay you.

- If you must begin with the work, immediately send the owner/GC a confirming email stating: "Without a signed change order, you have directed us to perform _____, which we believe entitles us to extra compensation and/or time. The cost and/or extra time are unknown at this time. We will continue to perform the work and make a formal claim for which the owner/GC will be responsible after the cost and time become known. If this is inaccurate in any way, let us know in writing immediately."

- Send the owner/GC a proposed change order as soon as possible, but certainly within the time required by the contract, even if you don't yet know all the costs or time impact. To be safe, instead of stating "zero" in the request for extra time, insert "Unknown at this time." However, when costs and time become known, send a revised proposed change order immediately.

- Follow the contract requirement for calculating cost. Most likely, this will be cost plus a percentage or unit price. You need to keep great records of your costs, including keeping separate time records for the extra work and having the owner or GC's representative sign the time records each day.

Scenario Number 2: You submit a proposed change order, but there are delays in signing and the owner/GC directs you to start work. The GC or subcontractor should:

- Send this email: "You have directed us to begin the work in proposed change order ___ despite the fact that we have not yet received a fully executed change order. We will proceed as directed in reliance that the proposed change order is acceptable to you. If this is inaccurate in any way, let us know in writing immediately."

Scenario Number 3: Progress payments and partial releases. It is not uncommon for owners or GCs to require a "clean" release. In other words, a release with no reservation of any outstanding claims. To avoid a waiver of your claim for extra work not yet agreed to, first, try to insert a statement that: "This release does not waive any claims for extra work arising from _____". If the owner or GC refuses to pay you with this language added, send the partial release with a separate email or letter stating the same. This is not great, but at least gives you an argument.

Scenario Number 4: You are subject to liquidated damages for failure to achieve a certain milestone, typically substantial or final completion. But, you never delivered proposed change orders requesting additional time. Or, you first raise these owner delays at the end of the project when the owner or GC are trying to set off liquidated damages from your last payment. In this case:

- Most likely, you are taking a discount on the money you have rightfully earned. Learn from your error and, for the next project, be diligent and send proposed change orders to increase the contract time as soon as the cause for the delay occurs.

- Respect the time deadlines for notice in the contract. If your claim is made timely, it avoids the argument that "we can't check the validity of the claim now, months later" or "it is too late to back charge another contractor for the delay".

Overall, create a strict procedure for your company to make claims for extra work or time. Who will be responsible for making sure that these requirements are complied with and how? Follow the contract requirements for authorized signature, timing of notice, and calculation of the claim. All of these items are within your control and failure to comply just gives the other party (and its attorney) an easy excuse to dispute the claim. If you have no choice but to perform the work without an agreed signed change order, then do the next best thing to strengthen your claim -- make disclaimers, send emails and letters, and try to resist the new work as long as possible.

With a smart plan in place to avoid change order disputes, you can also avoid contributing to your construction law attorney's retirement plan.

Bruce Loren, Esq. and Michael St. Jacques, Esq. of the Loren Law Firm are based in Palm Beach Gardens, Florida and devote their practices to construction law. Mr. Loren has achieved the title of "Certified in Construction Law" by the Florida Bar, exemplifying the Bar's recognition of this expertise. The firm's construction clients include owners/developers, general contractors, specialty contractors in every trade, suppliers and professional architects and engineers. Mr. Loren and Mr. St. Jacques can be reached at bloren@lorenlawfirm.com and mstjacques@lorenlawfirm.com or by phone at 561-615-5701.



June 25th Meeting Photos



Speaker Michael St Jaques Esq., Loren Law Firm, discusses Construction Leans & Payment Bonds



Top: Third from left Mark Terlep of Mark Terlep Roofing gives an update on planned meeting with building inspectors



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Industry Websites

- ASTM - www.guidance-inc.com/~roofroof/
- American Consulting Engineers Council - [acec.org](http://www.acec.org)
- American Institute of Architects - [aia.org](http://www.aia.org)
- American Society of Civil Engineers - [asce.org](http://www.asce.org)
- Building Officials Association of Palm Beach County - www.boapbc.org & www.boapbc.org/links
- Cedar Shake & Shingle Bureau - www.CEDARBUREAU.org
- Construction Industry Management Council (CIMC) - www.cimcpbc.com
- Construction Specifications Institute - <http://www.csinet.org>
- Copper Development Association - <http://www.copper.org>
- Division of Workers' Compensation - <http://www.wc.les.state.fl.us./DWC/>
- Florida Roofing, Sheet Metal & Air Conditioning Contractors Association - www.Floridarroof.com
- Galvalume Sheet Producers - www.steelroofing.com
- National Roofing Contractors Association (NRCA) - <http://www.nrca.net>
- National Society of Professional Engineers - [nspe.org](http://www.nspe.org)
- Roofing Contractors Association of South Florida (RCASF) - www.rcasf.org
- Roofing Industry Education Institute- <http://members.aol.com/RIEIROOF/classes.htm>
- Roof Tile Institute - www.rooftile.org
- Sheet Membrane and Component Suppliers to the Commercial Roofing Industry (SPRI) - www.SPRI.org
- Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) - <http://www.smacna.org>
- The Council of American Building Officials (CABO) - <http://www.cabo.org>

From networking events, informative meetings, and website listings,

membership has it's benefits.

Invite your friends, colleagues and acquaintances to join.



August 2014

| | Mo | Tu | We | Th | Fr | 1 Sa | 2 |
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| 3 | 4 | 5 | 6 | 7 | 8 | 9 | |
| | | | CIMC 7:45 AM | | | | |
| 10 | 11 | 12 | 13 | 14 | 15 | 16 | |
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| 17 | 18 | 19 | 20 | 21 | 22 | 23 | |
| | | | BCAB 2:00PM | | | | |
| 24 | 25 | 26 | 27 | 28 | 29 | 30 | |
| | | | General Member Meeting 6:30PM | | | | |
| 31 | | | | | | | |
| | | | | | | | |



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August Meeting

Vergie Bain, OSHA Safety Issues

August 27, 2014

General Member Meeting

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