Limitations Upon the Owner's Ability to Delete Work Under the "Changes Clause"

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Nearly all contracts in both the private and public sector contain provisions reserving to the owner a right to make changes in the work. Indeed, without such a provision, an owner who orders any alteration in the scope of work agreed to under the contract will be in material breach. The typical Changes Clause states as follows:

> *The Engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the Contractor agrees to perform the work as altered.*

The remaining language in the Changes Clause sets forth the means the parties will use to adjust the contract sum to account for such damages.

The intent of the Changes Clause is to provide flexibility to the owner in the event alterations in the work are necessary to ensure the finished project functions as the owner originally intended. But, does the Changes Clause provide to the owner unfettered authority to add or delete work as it sees fit? A recent case decided by the Georgia Court of Appeals demonstrates that the plain language of the typical Changes Clause prevents an owner from deleting work when its motivation to do so is improper or is motivated by a desire to take economic advantage of the contractor.

In *Savannah Airport Commission v. Higgerson-Buchanan, Inc.*, the prime contractor entered into a unit price contract with the owner for expansion of the Savannah Airport. The prime, in turn, hired a subcontractor, Caffrey Construction Co., to perform clearing and grubbing, which involved over 500 acres. When it bid the project, the prime simply took Caffrey's unit price per acre and marked it up an unspecified amount to cover its overhead and profit.

Caffrey's bid price per acre was actually based upon the weighted average of several individually-estimated prices because approximately 28% of the clearing area was heavily wooded; 41% was lightly wooded; 13% involved swamp land; and 18% was grassy area. The problem occurred when Caffrey was nearly complete with all clearing and grubbing except the grassy areas, which constituted the easiest and, therefore, least costly clearing work.

The owner apparently did not realize that the grassy areas of the project had been included by its engineer in the quantity of acres applicable to the "clearing and grubbing" bid item. Accordingly, when viewed in isolation, it appeared that the price the owner was paying for grubbing the grassy areas was excessive. What the owner failed to realize was that the inclusion of the grassy areas in the total area to be cleared actually lowered the unit price for clearing and

grubbing overall. Nevertheless, in an effort to avoid paying the clearing and grubbing unit price for the grassy areas, the owner relied upon the Changes Clause to delete the remaining work from the contract. That clause provided that the owner "reserves and shall have the right to make such alterations in the work as may be necessary or desirable to complete the work originally contemplated in an acceptable manner."

The court disagreed with the owner's position and determined that the Changes Clause applies only to those changes within the general scope of the original plans and specifications and necessary to complete the work originally contemplated by the contract.

The Changes Clause cannot be used to delete work that is still necessary in order to complete the project. In this case, the court determined that the owner's motivation was improper and was for the purpose of simply securing an economic advantage. Indeed, the grassy area had been subsequently stripped of grass and topsoil and improvements were being made upon that portion of the project by other trades. Hence, the owner never intended to delete the grassy area from the scope of the project – it merely was trying to avoid application of the clearing and grubbing unit price to the grassy area. By doing so, it was denying Caffrey the opportunity to realize the profit it had built into the overall unit price for clearing and grubbing.

The court's decision in *Higgerson-Buchanan* is consistent with court cases interpreting local government, federal and private construction contract cases and was dictated by the plain language of the Changes Clause. Like the typical clause at the beginning of this article and the clause in *Higgerson-Buchanan*, most Changes Clauses apply only to changes necessary to complete the work. An owner cannot rely upon the Changes Clause to delete work from a contract if such work is required in order to provide a complete project.

When confronted with an attempt by an owner to delete work from a contract a contractor should:

- Read carefully the applicable Changes Clause to confirm that changes under the clause must be "necessary" or "to satisfactorily complete the project."
- Attempt to determine the owner's reason for seeking to delete the work.

If the purpose of the change falls outside the scope of the Changes Clause or is otherwise suspect, the contractor should consult legal counsel immediately so that a determination can be made over whether to challenge the owner's order.

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