

EXTRA! EXTRA! MAKE SURE YOU HAVE READ ALL ABOUT IT

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We are often asked to advise owners and consultants on claims submitted by contractors for extras on construction projects. Most construction contracts include clauses stating that extra work will not be paid for unless it has been approved in writing prior to the commencement of such work. Not unreasonably, then, owners and their consultants are often surprised to learn that extras can still be successfully advanced even when the contract terms and conditions are not strictly complied with. When such circumstances occur, a claim for extras can significantly strain what was an otherwise successful venture. Proper management and documenting of extra work, however, can help to avoid disputes.

Generally, the courts will uphold a contractual requirement that a contractor is not entitled to collect for extras performed without prior written approval. However, the courts also acknowledge that the parties' practice on a project might not strictly follow this requirement, and the conduct of the parties may indicate that a contractor is entitled to compensation for extra work.

In British Columbia, the courts have developed the following guidelines to determine if a claim for extra work is payable:

- First, was the work that was performed actually “extra” work? Did it fall outside the scope of work originally contemplated in the construction contract?
- Second, if the work was “extra”, did the owner or the owner’s agent give instructions, either expressly or by implication, to do the work?
- Third, was the owner or the owner’s agent informed or aware that the extra work would increase the cost of the contract?
- Finally, did the owner or the owner’s agent waive the requirement that changes be made in writing, or otherwise acquiesce in ignoring the requirement?

If a contractor establishes all of these elements, an owner will likely be liable to pay a reasonable amount for the extra work.

Most disputes in this area centre on whether the owner and the contractor both willingly ignored the requirement for extras to be pre-approved in writing. This will always depend on the particular circumstances. In a 1996 case, *Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn Ltd.*, and, more recently, in *Fast Trac Bobcat & Excavating Service v. Riverfront Corporate Centre Ltd.*, the Supreme Court of British Columbia provided some useful examples of circumstances where the courts may find that extras were approved or not approved.

Circumstances likely to lead to approval

- The owner sends a letter to the contractor directing extra work to proceed but it is not in the form of a formal change order.
- The contractor submits a daily work sheet for the work promptly after the work is conducted.
- There is a pattern of practice during a project where the owner issues a change order or a purchase order after the work is done.
- Other independent contractors on the project confirm that the owner directed that particular extra work proceed.
- An owner is satisfied with an aspect of the completed project that the contractor worked on, even though it differs materially from the original contractual documents.

Factors likely to lead to extras not being approved

- The contractor does not submit any documentation to the owner for the extra work.
- The contractor does submit work sheets for the work but not immediately. They are provided after the contractor has left the site or when the relationship between the owner and the contractor has deteriorated.
- Suspecting that the contractor is performing extra work without approval, the owner writes to the contractor to reaffirm it must pre-approve all additional work.
- Work sheets submitted by the contractor do not distinguish between work under the contract and extra work to prove that the latter was, in fact, carried out.

In summary, where extra work is not pre-approved in writing, there needs to be clear evidence that the parties nevertheless agreed that it be done. If a dispute arises, the courts look at whether there are documents to support or refute a contractor's claim for extras; importantly, they take into account the timing and content of such documents.

Owners and consultants should ensure that they have a system in place for authorizing, in writing, instructions for any extras. For those occasions on a project where urgent, oral instructions for extra work are required, the owner or consultant should confirm those instructions in writing to the contractor as soon as possible. Such occasions should be the exception. It is also important that all of the owner's representatives at the site adhere to the approved procedures with contractors. Last but by no means least, an owner should immediately notify a contractor in writing when disputing extra work that the latter is claiming for.