



CARDINAL CHANGE HAS MAJOR IMPLICATIONS

By Richard A. Stockenberg

For some people, a Cardinal Change is the retirement of baseball slugger Mark McGwire. For others, a Cardinal Change is the pope's appointment of new members to the College of Cardinals. For contractors, a Cardinal Change may be a drastic modification or fundamental alteration of the scope of a contract, resulting in severe legal consequences.

Contracts typically permit owners or general contractors to unilaterally order modifications without canceling or abandoning the contract. A certain number of changes are usually expected, and virtually every such construction contract anticipates changes to the work by including a change order process. There are, however, limitations on the amount of changes that can be ordered without canceling the contract.

What is a Cardinal Change?

A Cardinal Change is a breach that occurs when the owner (usually the government) or the general contractor makes an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. No exact formula determines a Cardinal Change, and each case must be analyzed on its own facts. Just consideration must be given to the magnitude or quality of the changes ordered, and the cumulative impact upon the project as a whole. The standard is whether the modified contract is essentially the same work as the parties bargained for when the contract was awarded.

Not all of the law surrounding the Cardinal Change doctrine involves government contracts. Courts also have applied the doctrine in the context of private projects, although frequently not using the term "Cardinal Change." Cases that involve dramatic changes to private contracts are normally couched in terms of "abandonment" of the contract. Both abandonment and Cardinal Change may properly be utilized to establish a basis of recovery outside the original contract in cases where the contractual obligations of a contractor or subcontractor vary materially from the original expectations of the parties regarding the scope and manner of work.

Can a Cardinal Change excuse a refusal to perform?

Generally a contractor will proceed with the change in the work instead of refusing to perform, because of the risks in determining whether the contractor could invoke the Cardinal Change doctrine. If the determination is later made that the magnitude of the change orders did not amount to a Cardinal Change, the contractor runs the risk of defaulting. Obviously, the greater the magnitude of the changes, the safer it is for the contractor to suspend work.

For example, in one case the specifications called for a two-phase operation of backfilling, which would permit the excavating subcontractor to excavate first and then complete the backfill after other subcontractors installed pipes and conduits. The general contractor changed the operation by instructing the subcontractor to perform the work in three phases in order to work around other subcontractors. The subcontractor refused to perform the work, however, unless it received more money, because the changes were beyond the scope of the subcontract.

The general contractor claimed unjustified abandonment by the subcontractor and sought to recover the costs of completion. The court determined that the changes were beyond the scope of the subcontract. The change to a three-phase operation increased the difficulty of the operations, raising the costs of the backfill three-fold and the costs of the overall contract by half. [Peter Kiewit Sons' Co. vs. Summit Construction Co., 422 F2d 242 (8th Circuit, 1969)].

A contractor is justified in suspending performance when the owner or the contractor fails to agree to compensate for the change order work. In *Cleveland Wrecking Co. vs. Central National Bank in Chicago*, 576 N.E. 2d 1055, the contractor suspended performance on the demolition of a hotel because the engineers issued a change order for the front wall of the hotel ballroom to remain. In order to keep the wall, the contractor had to change the work sequence and make several additional changes to other portions of the demolition. The contractor

refused to perform further work without a written change order and additional compensation for retaining the wall. The court held that the scope of the demolition work changed in a major way, resulting in repercussions to the work sequence and entitling the contractor to a written change order acknowledging the additional costs.

Lessons learned

No single test determines whether changes to a project fall within the doctrine of Cardinal Change. A number of factors determine whether there has been one. These include the nature and extent of physical changes to the work; failure to provide adequate drawings at the start of the project; delay in providing the drawings; the amount of redesign needed, including daily changes; an excessive number of changes; the complexity of the changes and whether there has been a sufficient increase in the contract price; a departure from contractual obligations that fun-

damentally alter the contractor's undertaking; and changes in the plans, means, and methods of performing the work. ■

EDITOR'S NOTE: This article is reprinted, with permission, from the January 2002 "Legal Insights" column of Building Design & Construction.

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Roof trusses have traditionally dominated shipments of factory-built housing components, accounting for over one-half of total shipments in 2001. Sales gains will be limited through 2006, however, by the high level of penetration already achieved by the products. In 2001, there were over \$7 billion in factory-built roof trusses shipped in the U.S.

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