

## **A CONTRACTOR'S ENTITLEMENT TO BE PAID FOR EXTRA WORK**

*by Maria C. Reimer*

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As a general statement, a contractor is entitled to be paid for work which it has performed which is not contemplated by the contract (either expressly or by implication), such as work that is substantially different than what the contract originally envisioned, or work that is ancillary to the work described in the contract.

Difficulties can arise however in determining whether work is an "extra", and thus requires additional compensation. Parties should review the terms of the subject contract, examine the scope of work provided and all other surrounding circumstances. The contract may also specifically provide that no extra work is to be performed (or compensation paid in respect thereof) unless specifically covered in a further written agreement.

It is up to the contractor to prove that it has been requested to do more than the contract calls for. If it does not discharge this burden, it is not entitled to receive more than the price for which the parties originally contracted. Unless the contract otherwise provides, the contractor's remedy is to refuse further performance of the additional work, and if this position is rejected by the owner, possibly to refuse to perform the work specified by the contract altogether by treating the contract as repudiated. If the contractor does submit to performing the disputed extra work without the issue of compensation being addressed, no further compensation will be payable. Certain possible exceptions may exist however:

- The contractor may negotiate for the right to perform the disputed work but reserve that payment be determined at a later date. The contractor can carry out the work and sue for the value of it later;
- A contractor may argue that an owner has failed to fulfill a positive covenant to prepare the site or perform other types of work, being necessary conditions precedent to the contractor's work; or
- The contractor may argue that it was induced to perform the extra work with an implied promise of payment.

The contractor's decision to submit, refuse to submit or negotiate in respect of the extra work being requested will require an examination of amongst other things, (i) the terms and conditions of the subject contract (especially where a subcontractor is the one being asked to perform the extra work), (ii) how close to completion is the project, and (iii) the cost of the change in proportion to the total contract. Finally, contractors should be aware that as plaintiffs suing for extras they may be required to produce all of their documents relating to the work up of their bid price. This may be unpalatable to contractors because of confidentiality concerns that disclosure of the same may give competitors an unfair advantage. Contractors as plaintiffs suing for extras should expect their pre-contract documents leading up to their bid and negotiated price will be produced.

*Note: This summary is of a general nature only and is not exhaustive of all possible legal rights or remedies. Solutions provided in standard form Canadian construction contracts are not discussed above. Readers should consult a legal professional for specific advice in any particular situation.*

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