

**LEGAL NOTICE – DEPARTMENT OF COMMERCE  
TARGETING WRITTEN CHANGE ORDER PRACTICES**

Over the years of working with members on customer contract and performance issues, I have become aware that it is increasingly common to use design-build or T&M (time and materials) contracts. Often these have general scopes of performance which are more defined with either specifications or changes made during the project due to changing customer preference or previously unknown conditions within the structure.

Typically, under common law, a time and materials contract would proceed on the basis that the contractor would charge a certain defined amount per hour for the labor and would receive a reasonable mark-up on his or her provision of labor and materials. This could be built into the hourly of the labor charge (which might be a blended rate for more and less skillful workers) and a mark-up on the materials. I am sure many of you have read the Stoppelworth articles on what is usual and customary mark-up.

Recently, I received a call from one our members who told me that their company was being targeted by the Contractor Division of the Department of Commerce for violation of Minnesota Rule 2891.0030, which requires change orders to be in writing. The exact text is set forth below (and can be accessed at [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us), then choose *Rules*):

**Minnesota Rule 2891.030**

**2891.0030 Written Contract Required.**

Contracts between a contractor and a customer for the performance of a licensee's services must be reduced to writing and must contain the following:

- A. a summary of the work to be performed;
- B. a description of materials to be used or a list of standard features included; and
- C. the total contract price, or a description of the basis on which the price will be calculated.

The licensee shall provide at no cost to the customer a copy of all written contracts between the license and its customer, including, but not limited to, proposals, quotations, change orders, and purchase orders at the time the document is executed.

I do not read this regulation to state that change orders in a time and materials contract needs to be filled out and signed, as the reference to change orders in the final paragraph simply requires you to provide to customers copies of such documents at no cost. That said, it probably is a better practice to be safe than sorry, and in the end will make collection of your final bill easier and less costly.

In the current situation, the customer had been told in a written contract that there would be an hourly rate of \$60.00<sup>+</sup> per hour and was given a general estimate of the overall project price expressed in a dollar range. The customer, as is not infrequent, did want changes in both design and material during the project. The project went on for four weeks and each week the contractor gave the customer the number of hours that had been expended on the job. The customer also requested changes in the materials that were somewhat more expensive. Toward the end of the job, it became apparent that the changes requested by the customer would result in the hourly charges exceeding the estimate for the project. The estimate for the materials was not exceeded. The project manager informed the homeowner by email that this situation existed and asked whether the homeowner wished to proceed. The homeowner assented. Thereafter, the homeowner changed his story and contacted the Better Business Bureau, the Department of Commerce (DOC), etc. The DOC, after review, ruled that Regulation 2891.0030 required written change orders even for a T&M contract, and proposed a consent order and an administrative penalty of \$250.00 (the penalty could be as much as \$1,000.00).

I am currently in contact with the DOC about this specific matter on behalf of the member. I believe that most contractors would be unaware that change orders need to be written up for T&M (time and materials) contracts. *That* is the very nature of a time and materials contract. My position is that the act of contacting the customer with the number of hours expended on a regular basis and warning him or her that proceeding with any specific change that would result in the total number of hours exceeding those estimated, is a written change order. I do not know the outcome of this specific situation at this writing. However, I think a word to the wise is that you should add language to your contracts that your work will cease unless there is a signed change order for any material changes in the contract; that you cite the above *Rule* in your change order forms and that you abide by the Rule with no exception! This can, of course, involve some difficulties with customers, as many people do not wish to sign change orders. If, however, the DOC chooses to interpret Rule 2891.0030 as requiring a change order for T&M (time and materials) contracts, your license and a penalty may be involved if you don't!

I would happy to answer any questions you may have.

Al Nettles