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IN THE
COURT OF APPEALS OF INDIANA

MARK VALENTI d/b/a MARK OF QUALITY CONSTRUCTION,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 46A04-0905-CV-254
LOUIS E. BUTCHER, JANICE M. BUTCHER, and NATIONAL CITY MORTGAGE	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas Alevizos, Judge
Cause No. 46C01-0802-MF-70

April 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Mark Valenti d/b/a Mark of Quality Construction (Valenti) appeals from a judgment entered in favor of Louis (Lou, when referred to individually) and Janice Butcher (the Butchers, collectively) on Valenti's complaint for foreclosure of a mechanic's lien. Valenti presents three issues, which we consolidate and restate as follows:

> 1. Did the trial court err by entering judgment in favor of the Butchers and against Valenti?

The Butchers present the following restated issue on cross-appeal:

> 2. Did the trial court err by entering judgment in the amount of $10,585.10?

We affirm.

In March 2007, Valenti entered into a contract with the Butchers for the construction of an addition and remodeling to their home for the stipulated sum of $225,940.00. The contract was embodied in a standard form agreement referred to as AIA document A-101-1997. The architect for the project was Roger Potratz of dh2w, inc., and the architect's design plans and specifications as well as blueprints were incorporated into the contract. The contract also adopted by reference AIA document A201-1997. The Butchers made a down payment of eighteen percent of the stipulated sum (i.e., $40,669.20). Upon receipt of the down payment, Valenti began work on the project. Pursuant to the contract terms, the work was to be completed by August 31, 2007.

Prior to signing the contract, Lou advised Valenti that his ability to pay for the project was dependent upon his ability to obtain the necessary financing from National City Bank. Below his signature on the contract, Lou noted "Pending Nat. City Approval". *Plaintiff's Exhibit 1* at 7. Additionally, on the memo line of his deposit check, Lou likewise noted "subject to Nat. City approval." *Defendant's Exhibit A.*

Soon after beginning the project, Valenti encountered a problem regarding a utility pole that was not included in the architect's plans but would inhibit access to the driveway if the addition to the home was built according to the plans. As a result, Valenti prepared a change order—change order 1145—to extend the floor plan of the house by approximately six feet and issued an invoice indicating the work to be done and the amount of the work to be $11,000. Lou and Valenti signed the invoice for change order 1145 on March 30, 2007.

At that same time, Valenti presented Lou with a policy statement that provided, "[i]t is the policy of The Mark of Quality Construction that all change orders shall be signed by the Owner and the Builder and paid before the work can commence." *Appendix* at 815. Lou signed the form but informed Valenti that he was not adhering to the policy. Lou consulted the architect about change order 1145 but thereafter dismissed the architect and did not replace him.

During the course of construction, Valenti prepared a total of sixteen change orders.[1] Many of the change orders were signed after the work had been completed and some did not

[1] These change orders, numbered 1145-1146, 1148-1155, and 1157-1162, occurred between March 26, 2007 and August 23, 2007 and totaled over $84,000.

include a specific amount for the cost of the work to be done. Due to the number of change orders, the Butchers did not close on their construction loan with National City Mortgage (the Bank) until July 25, 2007, four months after the construction project had begun. At the time of the Butcher's construction loan closing, eight change orders—totaling $36,300.47—had been prepared and submitted to the Bank as part of the loan amount. At the time of the closing, the Butchers had already paid Valenti $82,169.20 (down payment of $40,669.20 and additional payments totaling $41,500). As part of the construction loan closing, Valenti received his first construction draw, totaling $46,328.63.[2]

Thereafter, additional change orders were issued, including change order 1155 that was prepared to remove the concrete floor that Valenti had already poured in the basement because the basement ceiling height was merely six feet, seven inches instead of the eight-foot ceiling height as bid by Valenti. Change order 1155, which Valenti invoiced as costing $14,483, was precipitated in part by an error in the architect's blueprints and in part by Valenti's reliance on those blueprints and failure to do any field measurements prior to commencing the work.

During the course of construction, Lou had concerns about the solvency of Valenti's business. Lou made two payroll advances to Valenti and paid for materials when Valenti did not have sufficient credit. At the beginning of August 2007, Valenti sent the Butchers a letter, requesting payment for the change orders and indicating his difficulty in continuing to

[2] Meridian Title was charged with disbursing any construction draws.

work without payment for the change orders. Valenti then filed a notice of mechanic's lien for $164,000 against the Butchers' property.

By the end of August 2007—the scheduled end date of construction—the project was only sixty percent complete and not all of the change order work had been done. At that same time, Valenti submitted his request for his second construction draw, in which he included a request for payment of approximately $15,000 for subcontractor, Pioneer Lumber. Valenti obtained the second construction draw, which totaled $28,899, but he did not pay Pioneer Lumber from that draw. Thereafter, Pioneer Lumber filed a notice of mechanic's lien for $16,617.41 against the Butchers' property.

On October 8, 2007, the Butchers sent Valenti a letter, notifying him that they were terminating the contract for cause and citing Valenti's failure to pay subcontractor Pioneer. By that point, the Butchers—through both direct payments and payments via construction draws—had paid Valenti $166,440.83.[3]

On February 26, 2008, Valenti filed a Complaint for Foreclosure of Mechanic's Lien, naming the Butchers and National City Mortgage, a division of National City Bank, as defendants.[4] On April 21, 2008, the Butchers filed their answer and counterclaim, in which they sought damages for breach of contract, breach of warranties, negligence, and

[3] Valenti states, "The parties are in agreement that the amount paid to Valenti by the Butcher's [sic] is $165,440.83." *Appellant's Brief* at 14. That, however, does not seem to be so. The evidence at trial, the trial court's findings and conclusions, and the Butchers' brief all indicate that the Butchers paid Valenti $166,440.83. *Transcript* at 40; *Plaintiff's Exhibit 9*; *Appendix* at 19; and *Appellees' Brief* at 7.

[4] By his complaint, Valenti sought to recover the amount of the mechanic's lien of $164,000.

constructive fraud. The Butchers also filed a cross-claim against National City Mortgage. The two claims were bifurcated for purposes of trial.

A two-day bench trial commenced on March 2, 2009, during which the parties presented evidence with regard to Valenti's complaint and the Butchers' counterclaim. The parties presented evidence regarding the change orders, the termination of the contract, and the cost to complete the project. Valenti argued, in part, that he was entitled to payment for the change orders because Lou had signed his policy statement regarding prepayment of any change order. As part of their counterclaim, the Butchers sought $30,000 in damages based on their evidence that the cost to complete the project was $117,874, which they asserted was $30,000 more than the original contract amount.

At the conclusion of the evidence, the trial court took the matter under advisement. On April 6, 2009, the trial court issued its judgment, complete with findings and conclusions as requested by the Butchers. The trial court determined that the Butchers had terminated the contract for cause because Valenti had failed to pay the subcontractor, failed to carefully study the contract documents and take field measurements prior to beginning portions of construction, and failed to timely complete the project. The trial court determined that Valenti was not entitled to payment on all the change orders because the policy statement was not an amendment to the contract and was not binding on the Butchers. The trial court determined the change orders were controlled by the contract and incorporated contract documents, which did not require advanced payments and required change orders to be in

writing, signed by the parties, and identify the change in work and any change in the contract sum and contract time.

In relation to the change orders, the trial court found that Valenti had failed to comply with the contractual requirements for many of the change orders and made the following findings of fact and conclusions of law:

> A. Change Order 1145 – Unlike most other Change Orders, 1145 was signed by the Butcher's [sic] prior to work beginning. It also had an agreed to amount written on the document prior to his signing. Also, there were no misrepresentations on Valenti's behalf. Therefore, although experts gave reasonable testimony that the amount should have been less than the agreed upon $11,000. Valenti is entitled to the agreed upon amount.
>
> B. Change Order 1146 – This change order was based on an error by Valenti in reading the Contract Documents and therefore, should not have been charged to the Butchers. The Contract Documents correctly showed the top of the foundation wall and garage finish floor elevations on sheets A-I, A-4 section AA, and A-6 section CC of the blueprints. Although Mr. Butcher did sign this Change Order in advance of the work being done, his consent was obtained by Valenti's misrepresentation that this was not his fault. Valenti is entitled to nothing for 1146.
>
> C. Change Order 1148 – It is undisputed that Valenti is entitled to the amount claimed [for removal of an existing footing for a chimney that was underground and not discovered until after construction started].
>
> D. Change Orders 1149-1150 – Change Orders 1149 and 1150 involve the cost of tearing off the existing roof and installing new plywood over the existing roof deck. Valenti admitted that he failed to correctly read the Contract Documents and the cost for tearing off the existing roof should have been included in the base bid. Therefore, Valenti is entitled to the amount claimed minus $1,320 ($300 for dumpster rental and $1,020 for tear off).
>
> E. Change Order 1151 – Change Order 1151 involved the construction of taller walls to accommodate the eave line of the new roof. The work described in this change order was not completed and only longer studs and plywood were installed. The Butchers are credited $3,300.00 for the unfinished work and Valenti's claim for Change Order 1151 is reduced from $4,300.00 to $1,000.00.
>
> F. Change Order 1152 – This involved a change in the roof system from rafters to trusses due to errors and inconsistencies in the blueprints. The

change was necessary to avoid time delays, the original rafter system was much more complicated and involved the installation of steel beams. The cost to install trusses was offset, at least in part, by the cost to install the originally designed roof, which could have been much more labor intensive. Evidence was submitted as to the difference in material costs for each system. The installed system was cheaper materially. Therefore, the amount asked for by Valenti is excessive. Valenti is entitled to $2700 on Change Order 1152.

G. Change Order 1153 – This involved the installation of a new disconnect for electric. The work was never done. Valenti is entitled to nothing for Change Order 1153.

H. Change Order 1154 – This is not in dispute and Valenti is entitled to $3,462.800 for this Change Order [that increased the allowance for windows].

I. Change Order 1155 – This involved the lowering of the concrete floor in the basement to correct errors made by Valenti and inconsistencies and/or errors in the Contract Documents. The blueprints indicate that the finish floor elevation of the basement is to be at elevation 91'0", which is 9 feet below the finish floor. The contractor is also required to verify that the new basement finish floor matches the elevation of the existing basement finish floor. The ceiling height in the basement was less than the 7 feet required by code. Even if the basement was built to code, Valenti should have known that there was a problem before he poured the basement floor. Valenti relied solely on the blueprints to bid the Work and did not do any field verification prior to bidding the job. Based on the measurements described in the blueprints, Valenti bid an eight foot basement. Valenti knew or should have known, when he dug the foundation, that the ceiling height in the basement would be less than eight feet. Valenti knew or should have known, when he set the forms, that the concrete walls were going to be less than the 8 feet that he bid. Valenti went into the existing basement of the Butcher residence after he bid the job and knew or should have known that the new basement was going to be less than 8 feet if he was going to match the finish floor elevation of the existing basement. Before he poured the basement walls, and well before he poured the basement floor, Valenti had multiple opportunities to see that there was an inconsistency in the Contract Documents and that there was an inconsistency between the 8' basement that he bid and the 6'7" basement that he was constructing. This problem was, initially, due to the architect's error. Valenti is also partially responsible for this Change Order since Valenti had the duty and opportunity to address the problem before it reached the point of requiring a great deal of extra work. It was a misrepresentation of the responsibility and fault for this required Change Order by Valenti that led to Butcher's initial consent. Valenti should take only $7,241.50 (1/2) for Change Order 1155 due to his share of the fault.

J. Change Order 1157 – This involved shifting the staircase further South within the family room and reconstructing the roof line. Valenti informed the Butchers that he would move the staircase at no cost. He then moved the stairs before the roof trusses were in place. When Valenti began installing the roof trusses he realized that the new location of the stairs created a problem with headroom that he had not anticipated before the roof was in place. Valenti failed to anticipate the obstruction that the roof would cause once the staircase was moved, and the Butchers relied upon his representation that there would be no additional cost involved in moving the staircase. Even if the changes were not attributable to Valenti's error, the amount charged the Butchers was excessive. Valenti also failed to provide a credit for the simplified master bedroom floor framing. Valenti is entitled to nothing for Change Order 1157.

K. Change Order 1158 – This involved the finishing of the staircase in the family room. This work on this Change Order was never started. The Butchers are credited the full cost of Change Order 1158 in the amount of $9,800.00 is denied [sic].

L. Change Order 1159 – this involved the extension of the chimney because the chimney as shown in the Contract Documents was 2'6" short of the code required height for clearance above the adjacent roof. The 5'6" height described in the Change Order is for the total height of the chimney and not for the additional 2'6" needed. The cost of the Change Order is excessive. The cost for extending the chimney should not exceed $1000.00. The cost of stone for the chimney was paid for by the Butchers and was not delivered or installed by Valenti pursuant to the Change Order. Valenti is entitled to $1000 for 1159.

M. Change Order 1160 – This involves shortening and/or extending the roof overhang to match the existing eave line. The Construction Documents are accurate. Matching the existing eave line is the responsibility of Valenti and should have been taken into consideration when framing the addition, rather than attempting to correct the 6" difference between the existing eave and the addition after he built the addition. The Butchers should be credited the full amount of this cost and Change Order 1160 in the amount of $4,600.00 should be denied [sic].

N. Change Order 1161 – This involves changing the size of fascia board. This change order was the result of Valenti misreading the Contract Documents which detail #2 on Sheet A6 of the blueprints shows 2X8 fascia boards. The Butchers are credited the full amount of the change order. Therefore Change Order 1161 in the amount of $383.00 is denied.

O. Change Order 1162 – This involves raising the family room window to match the existing bay window, as indicated in the Contract Documents. As the change order resulted from Valenti's failure to match the

> window, the Butchers should not pay to correct work which was negligently performed. The Butchers are credited the full amount of the change order. Therefore Change Order 1162 in the amount of $2,120.00 is denied.

Appellant's Appendix at 12-16. The amount of the allowed change orders totaled $30,291.77.[5]

When assessing the amount due to the parties at the termination of the contract, the trial court determined that Valenti was entitled to sixty percent of the original contract price—or $135,564—based on his completion of sixty percent of the project plus $30,291.73 for allowed change orders, resulting in $165,855.73 due to Valenti. However, because the Butchers had already paid $166,440.83 to Valenti, the trial court determined that Valenti owed the Butchers $585.10. Additionally, the trial court found that the Butcher's estimate of the cost of completion included upgraded costs not included in the original contract and determined that the Butchers had only proved damages of $10,000, not $30,000 as argued by the Butchers. Thus, the trial court entered judgment in favor of the Butchers and against Valenti in the amount of $10,585.10. Valenti now appeals, and the Butchers cross appeal.

1.

Initially, we observe that judgment was entered after a bench trial in which the trial court made special findings of fact and conclusions thereon upon the request of the Butchers.

[5] The trial court divided the amounts for allowed change orders into two categories: (1) those occurring prior to the construction loan closing (which totals $18,587.47 but was found by the trial court to total $18,587.43); and (2) those occurring subsequent to the construction loan closing (which totals $11,704.30). Thus, in Finding 35, when the trial court assessed the amount due as part of the judgment, it miscalculated the amount of the allowed change orders by four cents and found the amount to total $30,291.73. Additionally, the trial court miscalculated the amount of the allowed change orders in Finding 22 and listed the total to be $35,406.56. The trial court, however, did not use this $35,406.56 amount when assessing the amounts due as

The standard of review for findings of fact and conclusions thereon issued pursuant to Indiana Trial Rule 52(A) is one of great deference. *S-Mart, Inc. v. Sweetwater Coffee Co., Ltd.*, 744 N.E.2d 580 (Ind. Ct. App. 2001). In reviewing the judgment, the court must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. *Id*. The court will not set aside a judgment unless it is clearly erroneous. *Id*. A judgment is clearly erroneous only if a review of the record leaves the court with a firm conviction that a mistake has been made. *Id*. The court may affirm the judgment on any legal theory supported by the findings. *Id*. In our review, we will consider only the evidence most favorable to the prevailing party and will not reweigh the evidence or judge the credibility of witnesses.

Valenti argues that the trial court erred in granting judgment in favor of the Butchers.[6] More specifically, he argues that the erred by determining that he breached the contract, that he could not recover the cost of all the change orders, and that the Butchers were entitled to $10,000 in damages for the cost to complete the contract.

We first address Valenti's argument that there was no evidence to support the trial court's determination that he breached the contract and that it was instead the Butchers who breached the contract. When entering judgment in favor of the Butchers, the trial court

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part of the judgment and instead used the $30,291.73 amount. For purposes of this appeal, when referring to the allowed change order amount, we will use the trial court's calculation of $30,291.73.

[6] Valenti also argues that the trial court erred by failing to address the priority of his mechanic's lien in relation to the Bank's mortgage. Because the trial court did not enter judgment in favor of Valenti on his mechanic's lien complaint, there was no need for the trial court to address this issue and thus no need for us to review it on appeal.

determined that they had terminated the contract for cause because Valenti had failed to pay the subcontractor, failed to carefully study the contract documents and take field measurements, and failed to timely complete the project.

The contract between Valenti and the Butchers—specifically, AIA document A201-1997, which was adopted as part of the contract—provides that an owner may terminate the contract for cause if, among other reasons, the contractor "fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and Subcontractors" and "otherwise is guilty of substantial breach of a provision of the Contract Documents." *Appendix* at 716. Additionally, section 3.2.1 of AIA document A201-1997 provides, in relevant part:

> Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that port of the Work, as well as the information furnished by the Owner . . . , shall take field measurements of any existing conditions related to that portion of the Work[,] and shall observe any conditions at the site affecting it.

Id. at 685.

Evidence was presented that Valenti's failure to review the contract documents and take field measurements resulted in various change orders, that the construction project was only sixty percent complete by the contractual end date of August 31, 2007, and that Valenti did not pay subcontractor Pioneer Lumber from his second contract draw despite the fact his submission for payment included a request for payment for Pioneer Lumber. Thus, we cannot say the trial court erred by determining the Butchers terminated the contract for cause based on Valenti's breach. Valenti's argument that it was the Butchers and not him who

breached the contract amounts to a nothing more than a request for this Court to reweigh the evidence, which we cannot do.

Turning to Valenti's challenge to change orders, Valenti contends the trial court erred by selectively reducing or excluding the amounts Valenti could recover on certain change orders. Specifically, Valenti argues the trial court erred in awarding varying sums based on the level of responsibility chargeable to Valenti.

Section 7.2.1 of AIA document A201-1997 provides that a change order must be signed by the owner and contractor and must state their agreement upon the "change in the Work; the amount of the adjustment, if any, in the Contract Sum; and the extent of the adjustment, if any, in the Contract Time." *Id.* at 700 (original formatting altered).

At trial, the trial court considered the testimony of Valenti, Lou, the Michigan City Building Inspector (Don Przybylinski), and an expert architect (Scott Falk) with regard to the appropriateness, normal costs, and fault associated with the sixteen different change orders. The trial court, after reviewing each of the change orders, found that Valenti had failed to comply with the contract provision for change orders and had failed to comply with contractual requirements such as reviewing the blueprints and taking field measurements prior to starting a portion of the work. The trial court also determined that Valenti was not entitled to recover payment for change orders that were not completed, were not signed by the Butchers, were the result of Valenti's error, or were excessive. In the end, the trial court concluded that Valenti was entitled to $30,291.73 for change orders.

When arguing that the trial court erred by reducing or prohibiting payment on change orders based on his errors, Valenti cites to one sentence in section 3.2.3 of AIA document A201-1997, which provides:

> The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

Id. at 686. Valenti argues the trial court erred by reducing or prohibiting payment on certain change orders based on his error because the Butchers failed to show that he recognized and knowingly failed to report any error, and he contends the trial court should have allowed him to recover for change orders that were premised on errors in the architect's blueprints.

Here, the trial court acknowledged that some of the change orders were precipitated by underlying errors in the blueprints but still concluded that Valenti was not entitled to recover the full amount of the change order because he had failed to comply with some of the contractual provisions, such as sections 3.2.1 and 3.2.2 of AIA document A201-1997. Furthermore, the preceding sentence of section 3.2.3 cited by Valenti provides, "If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations." *Id.* at 686. The trial court found that Valenti had failed to comply with these obligations, and Valenti does not specifically challenge those findings on appeal. Because Valenti's failure to review contract documents and take field measurements resulted in various change orders and because he failed to comply with the contractual

requirements for change orders, we cannot say the trial court erred by reducing or prohibiting payment on certain change orders.[7]

Next, Valenti argues there was no evidence to support the trial court's determination that the Butchers were entitled to $10,000 in damages for the cost of completion of the contract.

Section 14.2.4 of AIA document A201-1997, which addresses payment when an Owner terminates a contract for cause, provides:

> If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses mad necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

Id. at 717.

Here, the original contract was $225,940, the trial court allowed Valenti to recover $30,291.73 for change orders, and the Butchers paid Valenti $166,440.83. At trial, the Butchers sought $30,000 in damages and presented evidence that the cost to complete the project was $117,874.00. The trial court found that the Butcher's estimate of the cost of

[7] Valenti also questions the Butchers' failure to use the contractual provision regarding resolution of claims (architect review followed by mediation and/or arbitration) to resolve the amounts of the change orders that the Butchers disputed. The Butchers counter that, to the extent Valenti is attempting to raise a right to arbitration, he has waived such right. Although Valenti asserted an affirmative defense regarding dismissal of the Butchers' counterclaim based on arbitration, he never asked the trial court to compel arbitration or formally moved to dismiss the Butchers' counterclaim and instead proceeded to trial. Therefore, he has waived any challenge to the change orders based on the arbitration provision, and we will not address this argument. *See Finlay Prop., Inc. v. Hoosier Contracting, LLC*, 802 N.E.2d 453 (Ind. Ct. App. 2003) (explaining that a party may waive its right to arbitration by subsequent actions that are inconsistent with that right).

completion included upgraded costs not included in the original contract and determined that the Butchers had only proven damages of $10,000. Although the trial court did not set forth its exact calculation to arrive at the $10,000 amount for the cost of completion, there is indeed evidence that supports the trial court's determination that the Butchers were entitled to $10,000 in damages for the cost of completion of the contract.[8] Accordingly, we decline Valenti's invitation to reweigh the evidence in regard to the damages amount.

2.

Finally, turning to the Butcher's cross-appeal issue, the Butchers contend the trial court erred by entering judgment in the amount of $10,585.10. The Butchers contend that the trial court's calculation that they were owed $508.10 for overpayment was based on the trial court's finding that Valenti was owed $35,406.83 for change order work. They further reason that if the trial court had used the proper amount due to Valenti for change orders—or $30,291.73—then they would be owed $5,114.83. The Butchers are mistaken. As noted above, despite the trial court's reference to the $35,406.56 amount, the trial court used the $30,291.73 amount, not the $35,406.56 amount, when calculating the amounts due as part of the judgment. Accordingly, their cross-appeal issue is without merit.

Affirmed.

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[8] Valenti contends the trial court should have included the amount of all the change orders into the contract cost when calculating the cost of completion of the contract. At trial both parties included some portion of the cost of the change orders into the contract price when calculating the cost of completion of the contract. While the trial court's findings and conclusions do not specify the amount of change orders it included when calculating the cost of completion, it is clear that the trial court did include a portion of the change order amounts in the contract price.

NAJAM, J., and BRADFORD, J., concur.