



CONTRACTS BULLETIN #98

Change Orders and Extra Work: Tools for Change

“Nothing endures but change”
- - Heraclitus (540-480 BC)

CHANGE IS EVERYWHERE

In today’s construction world, a project is seldom accomplished from start to finish without change. These changes may originate with an owner, finding some aspect of the project needs to be modified for aesthetic, economic or functional purposes; or, they may originate with a contractor who determines changes are necessary to correct errors in the site plan, or to comply with evolving building codes. Regardless, changes in projects frequently occur, and a contractor cannot treat changes as afterthoughts – changes directly impact a project’s bottom line.

Projects beset with a flurry of changes can become mired in confusion, if not handled in an orderly manner. In the construction industry, there are two contractual provisions to manage change: Change Orders and Extra Work Requirements. Both are effective tools to ensure a project goes smoothly, and to permit the expectations of the parties to be clearly defined.

This article will discuss the basics for effectively implementing and incorporating changes into agreements, and will address how standard contracts, such as the American Institute of Architects (“AIA”) and ConsensusDocs standard form agreements, address project changes.

CHANGE ORDERS

Importance. A “change order” is essentially a “new contract” between the parties. Unless the agreement between the parties provides otherwise, a change order must be in a written form and signed by all parties to be legally enforceable. Parties to a construction agreement have no inherent right to change the terms of a contract, unless the contract itself contains provisions allowing for changes. Assuming an agreement provides for change orders, it is best to properly follow established procedures for implementing the change. Change orders that are effectively administered will usually result in fewer disputes and will protect a contractor if problems later arise regarding the scope of work or the right to payment.

Contractual Implications. Prior to originating a change order, it is a good idea to review the original contract to determine the steps required to institute the change. Unfortunately, determining what is classified as a “change” is often far from clear in a contract. Therefore, before entering into a contract, the parties should make every effort to define what constitutes a “change.” This extra step in the beginning will help reduce potential disputes regarding changes that will require written and signed change orders. The change order clause should not only define the change, but also identify who is authorized to review and approve change order requests.

The better a contractor knows what is required by the change order clause, the less likely it will slip up and breach its agreement. More importantly, proper drafting and understanding a change order clause can save money in the long run by avoiding disputes.

Process of Instituting a Change Order. In AIA contracts, owners typically use the standard Proposal Request (AIA Document G709-2018) form. ConsensusDocs does not publish an equivalent request form for its form contracts. The AIA G709-2018 form identifies what the change is and all of the parties to the contract. Essentially, this form is a request for a price and time proposal for carrying out the proposed change.

However, contractors using the AIA G709-2018 form must realize that it is not an authorization to do the work. It is not an official change order. It is merely a request for information needed by the owner and/or architect in making a decision to go ahead with a change.

The Associated General Contractors of America, American Subcontractors Association, and Associated Specialty Contractors suggest that, at minimum, contractors include the following information in a change proposal request:

1. The reason for the proposed change, a reference to the plans and specifications, the benefit to the owner and the project, and the effect of the change on the project sequence;
2. The effect of the proposed change on the contract time and price in sufficient detail to permit proper evaluation by the contractor, the owner, and the owner's agent; and
3. A reasonable but definite time period for the owner to accept or reject the change proposal without interruption or delay in the project schedule.

The Associated General Contractors of America, American Subcontractors Association, Inc., Associated Specialty Contractors, Guidelines for a Successful Construction Project (2008).

The Change Order. If a Proposal Request is acceptable to the owner, or becomes acceptable after adjustment and negotiation of the contract price and time, the change order can be prepared. A good form change order to use is ConsensusDocs 202, which covers all the necessary details to ensure a smooth transaction. After the change order is executed by the required parties, it becomes a modification of the original agreement. The change order will authorize the contractor to do the extra work and require the owner to pay the agreed upon price. It is crucial to include or attach any additional specifications or drawings to the change order to clearly define the scope of work.

Changes in Contract Time and Price. Owners may question a contractor's change order pricing because it may be assumed that the contractor has the owner "over the barrel." The fact is, however, that work will always cost more when not done in sequence with the original work.

In fact, typically it is common to charge 10 to 15 percent more than if it had been included in the original bid. Reasons for this include:

1. Lack of competitive environment;
2. Inability to easily fit the change into the existing schedule; and
3. Massive amounts of paperwork and delay that can be experienced by the contractor.

Any changes in the contract price, up or down, should always be specifically listed in the change order form. Similarly, any changes in contract timing or completion dates, up or down, must always be agreed upon and reflected in the change order. If there is no change in time to be made, be sure to place zero (0) days in the blank.

Construction Change Directives. Some change orders will be acceptable to the owner, but not to the contractor. The contractor could be dissatisfied with the change in work, contract price or time, or a combination of issues. Depending on how the agreement is drafted, it is possible the contractor will be obligated to go ahead with the work, even though it has not signed the change order form. This type of change should be issued via a construction change directive (e.g, AIA Document G714-2017).

The AIA General Conditions (Document A201-2017) obligates the contractor to proceed with the work, even without reaching a full agreement as to the terms of the change. The AIA contract authorizes the architect, not the contractor, to determine any price and time adjustments by utilizing guidelines set forth by the agreement (Document A201, Article 7.3). If at any time the contractor agrees to the adjustments made by the architect, it is then deemed to be a change order. However, the AIA standard contract (Document A201, Article 15) does provide the contractor with recourse: mediation or arbitration of the disputed terms.

ConsensusDocs 200 also requires that the contractor proceed with its work under a construction change directive before reaching full agreement as to the terms of the change (referred to as an "Interim Directive" in ConsensusDocs 200, Article 8.2). If the owner and contractor dispute the cost of the contractor's work, the owner must pay the contractor 50% of the contractor's actual incurred costs to complete the work. The Owner and the contractor can then follow the dispute resolution procedures (ConsensusDocs 200, Article 12) to determine responsibility for the remaining 50% of the cost. Notably, the architect plays no part in the construction change directive process under ConsensusDocs 200.

Minor Changes. Sometimes during the course of a project, minor changes will arise. Construction agreements should address how these minor changes will be handled. The AIA General Conditions (A201-2017) standard contract entitles the architect to make minor changes in the work that do not involve the contract price or time. By comparison, ConsensusDocs 200 allows the owner to make these types of changes. In both cases, these changes must be consistent with the contract and must be in writing. A change order could still be issued in this instance to preclude either the owner or contractor from asserting later claims based on the scope, price, or timing of the change.

Change Order Log. If an architect or owner has a role in construction, it is a good idea to require the architect or owner to maintain records relative to changes in the work. Although neither the AIA A201 nor ConsensusDocs 200 require that a change order log be kept by the architect or owner, a change order log offers a good solution for the parties to manage and track change orders. The log should record the dates and status of all change order requests, proposals, reviews, and approvals. The main objective of the log is for all parties to know the status of the overall contract price and time, as well as any updates on change orders in process.

Informal Changes. Changes can occur outside the formal processes set forth by the contract. These types of changes are very risky and should be avoided if at all possible.

Contractor's Unauthorized Changes. Contractors may find it more efficient to solve practical problems without first consulting with the owner or architect. Unfortunately, there is little chance of the contractor getting paid for this type of work if the owner or architect discovers and disputes the change. Contractors should refrain from making any unauthorized change, even if the change would not require an increase in the contract price. If a contractor makes an unauthorized change that materially affects structural integrity or design intent, the contractor could be liable to the owner or architect in the form of deductive change orders. See 6 Bruner & O'Connor on Construction Law § 19:42.

Unwritten Change Orders. All too often, owners and contractors have informal discussions regarding the project that result in some informal oral change agreement. The owner's verbal assent, and relying on "trust," is not supported by the contract, case law, or common sense. Especially when performing work for residential customers, contractors are held to a higher standard and may be prohibited from enforcing oral agreements.

Whether a judge or arbitrator will enforce an oral change order in a commercial project is far from clear. What is certain is completing written change orders places the contractor in a strong position in stark contrast to the "verbal change."

EXTRA WORK

Many issues that arise during the course of a project may already be addressed and included within the agreement. These types of changes are considered "extra work requirements," and absent any direct allowance within the agreement, may be included in the contract price. Thus, it is very important for contractors to fully realize the scope of work and understand what is or is not compensable under the agreement.

When a contractor or subcontractor has allegedly completed extra work, disputes often arise as to whether the contractor or subcontractor is entitled to additional compensation for the work. A contractor or subcontractor may recover the reasonable

value of extra work that is beyond what was originally contemplated by the parties, and outside the scope of the contract, as long as sufficient authorization was received for performance of the extra work.

Extra Work. In order for a contractor to recover compensation for extra work, the work must, in fact, constitute “extra work” under the terms of the contract. Extra work refers to work

not contemplated by the parties at the time of the contract and entirely independent of what is required in the performance of the contract. In other words, extra work is not contemplated by the parties and not controlled by the contract. If the work falls within the scope of the work covered by the contract, it is not extra work. Where the work consists of materials and services above and beyond or outside the scope of the work considered by the contract, it is extra work for which additional compensation may be recoverable.

Scope of Work. In some situations, changes can be anticipated in advance by both parties. In such instances, the extra work required is assumed to be within the scope of the work. All work, responsibilities, and risks assumed by the contractor in consideration for the contract price fall within the scope of the work, and any additional expense would be the contractor’s responsibility. The terms of the contract should define as clearly as possible what constitutes a change within the scope or work.

Determining the parameters of the scope of work is no easy task. Thus, absent any direct language determining what changes are within the scope of the work, courts may look to implied terms and conditions, including:

1. Typical trade custom and practice;
2. Public policy;
3. Legal defenses for nonperformance; and
4. Degree of the change—minor changes that neither impact the contract price nor time are deemed expected, and thus within the scope of the agreement.

The determination of whether work is extra work is made by comparing the scope of work referenced in the contract and building specifications with the details of the work that the contractor or subcontractor claims is extra. The contract fixes the scope of the contractor’s undertaking and the price it is to be paid for carrying out the contract.

Compensation for Extra Work. Courts perform a case-by-case analysis of the particular circumstances presented to determine whether or not a contractor or subcontractor is entitled to compensation for extra work. Courts may look at: the nature of the particular work claimed as extra; any stipulations in the contract regarding authorization for extra work; the effect of such stipulations on the right to recover compensation for the work alleged to be extra; the nature and extent of the alleged authorization for extra work; and the manner in which it was allegedly given to the contractor or subcontractor.

Authorization and Contractual Implications. When work performed constitutes extra work under the contract, the recovery of compensation for the extra work is limited to those items for which the owner, or general contractor in the case of a sub-contract, gave authorization. Where there is no express or implied agreement authorizing the performance of extra work, a contractor or subcontractor generally cannot recover compensation for the extra work performed.

Most contracts contain provisions that written orders are required for extra work performed. When a contract does not contain an express stipulation providing that extra work must be authorized in writing, sufficient authorization for extra work may be established by any manner of words or conduct indicating the owner’s request, approval, or knowledge of the extra work performed.

Allowance. Extra work that could cause great expense during construction is often covered by an allowance. This helps reduce the risk for contractors when problems are possible and even anticipated, but the specifics are unknown. Be sure that any extra work provisions include a sufficient allowance for anticipated problems whose scope is unknown.

The contract may provide that extra work is covered by an allowance for which the contractor can apply for reimbursement. Such extra work may include matters like underground interference associated with excavation. For example, if a contractor is performing work and there is the possibility of additional expense to be incurred, an allowance may be set up

which provides that the contractor may seek reimbursement for such interference subject to approval by the engineer and/or architect. The advantage of such a system is that a "change order" need not be approved by the owner, but rather the "change" is contemplated by the original agreement and subject to comparatively easy reimbursement with the approval of an engineer and/or architect.

Remedies. Where a contractor performs extra work, and the owner refuses to pay compensation for the extra work performed, assuming the extra work was authorized, the contractor may bring a lawsuit against the owner seeking damages for breach of the contract, seeking foreclosure of a mechanic's lien, or the contractor may seek recovery in quantum meruit.¹ The same is true for a claim by a subcontractor against the general contractor for nonpayment of extra work authorized by the general contractor.

CONCLUSION

Any agreement should fully spell out the change order process or extra work requirements to avoid future disputes. It is important to define the scope of work prior to commencement of the work. Finally, always obtain a signed and written change order.

¹ "Quantum meruit, which literally means 'as much as he deserves,' describes a cause of action seeking recovery for the reasonable value of services nongratuitously rendered, but where no contract exists to dictate payment." *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill.App.3d 961, 979, 931 N.E.2d 810 (2010).

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