



THE CONSTRUCTION LAW BULLETIN

JANUARY 2007

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BACK TO BASICS: CHANGE ORDERS

Every contractor who has worked on a public or private construction project, whether large or small, has encountered change orders. Change orders are a necessary part of the construction process. They are the tools by which the owner makes changes to the work as the project progresses. This article will cover the basics of change orders and will give the contractor the information necessary to help it get paid for work performed under change orders.

What is a Change Order?

A change order is a written order to the contractor signed by the owner, engineer and/or architect, issued after the contract has been signed, authorizing a change in the work or an adjustment in the contract sum or the contract time. Change orders are modifications to the original contract.

Every construction contract contains a provision permitting the owner to order

changes in the original scope of the work. The owner is permitted to add, delete or change the work, so long as these changes do not alter the scope of the underlying contract. Change orders fall into the categories of "add" or "deduct" change orders. "Add" change orders pay extra compensation to the contractor for doing work that was not originally required by the contract. "Deduct" change orders reduce the contractor's compensation by giving the owner a credit when some part of the original work is deleted from the project.

Why is it important to agree to Change Orders in advance of performing the work?

Both the owner and contractor benefit when they can agree on a change order in advance of starting work on changes. The owner will know exactly how the changed work will affect the schedule and how much it will cost. The contractor will be assured of being paid for the work and does not have to proceed at its own risk, on the chance it won't be paid.

Why do changes to work occur?

Changes to a contractor's work occur for many reasons, including unforeseen or changed conditions on the project site, change in the price of materials or an owner who simply decides it wants something different. Not all changes require a change order. Some changes are small enough that they do not involve extra cost and do not impact the project schedule.

It is important to note the difference between a "change" to work and an "extra" work item. A "change" is a modification to work that was included in the original scope of work under the contract. An "extra" is an item of work beyond that originally included in the contractor's scope, which broadens the scope of work. The contractor should

get a change order for work that is a “change” or an “extra” where completion of that work will affect the project’s cost or will impact the schedule.

What should the contractor do when it needs a Change Order?

When faced with the need for a change order, the contractor’s first step should be to determine what is required by the contract’s change order procedures. The contract’s change order provision will set forth the procedures that a contractor must follow in order to obtain an increase in its contract sum or contract time.

When negotiating a change order, the contractor submits a written proposal for the owner’s approval. This proposal must include all elements of cost or time involved in the change order, including all material, labor, overhead costs or costs for loss of productivity. If the changed work or extra work item will impact the project schedule, the contractor should include a request for an extension of time. Where there are costs that cannot be determined prior to completing the work, the contractor should reserve the right to add these costs later. It is important to include all possible costs so that the owner’s prior written approval accurately reflects all of the relevant costs.

What happens when the owner and contractor can’t agree on the Change Order?

The owner may direct the contractor to proceed with changed or extra work even when the owner and contractor cannot agree on the cost of the change order. If this happens, the contractor should carefully maintain records showing all time spent and costs incurred so that it can prove these costs if it must file a claim at a later time.

Under an AIA contract, if the owner and contractor cannot agree to the terms of a change order, the owner may issue a “Construction Change Directive” which requires the contractor to proceed with the changed work or extra work item despite the lack of agreement on some terms of the change order. The AIA contract provides methods for determining the compensation paid to the contractor for work performed under a construction change directive.

The need for prior written approval.

To be entitled to extra compensation or an extension of time, construction contracts typically require the contractor to get prior written approval for the change order. When working on public construction projects, the contractor must strictly adhere to these requirements or it will be denied compensation for changes. The Pennsylvania Courts have denied recovery on public projects where the contractor failed to get written approval from the owner, even where there may have been oral approval for the change. Where the public owner does not give prior written approval, the contractor proceeds at its own risk if it performs the work.

The courts have not been as strict where contractors are working for private owners. On private projects, the courts have held that owners must pay for changes or extra work where they orally approved the work, knew that the contractor expected to be paid for the work and allowed the contractor to proceed.

Nevertheless, the contractor should always follow the contract’s change order procedures. The contractor should get a written change order before starting work on any changes or extra work items, whether on public or private projects. Where any owner refuses to give prior written approval, the

contractor should send a letter to the owner before starting work, stating that the work constitutes a change, stating the cost of the change and demanding payment upon completion of the work. The contractor may also protect itself by demanding a construction change directive where the owner will not give a written change order prior to starting work.

What about notice of claims provisions?

The contractor must also be aware of the link between the contract's change order provisions and the provisions requiring notice of claims. Most contracts will require the contractor to file written notice of a claim when it seeks to be paid for changes or extra work items without a written change order. This notice must be sent within the time limits set forth in the contract's notice provision, which is usually twenty-one days from the date the claim arose. Therefore, within twenty-one days of the completion of the change or extra work, the contractor should send written notification to the owner stating the contractor's intention to file a claim if it is not paid.

Typical notice provisions also require the contractor to submit supporting documentation or "substantiation" of its costs within a certain time after having given written notice of the claim. Failure to do so may bar recovery on a claim even where initial written notice was given. This is especially true on public projects where the courts demand strict adherence to the contract's procedures.

Conclusion.

Contractors can quickly find themselves in the difficult position of being confronted with an owner who insists that the contractor proceed with changes to the

work or extra work items without giving prior approval of a change order.

To best protect its own interests, the contractor should insist on written prior approval of change orders whenever possible. The next best alternative may be to obtain a construction change directive. At the very least, the contractor should closely track its time and costs when doing any extra work and be prepared to file timely notice of a claim upon completion of the work.

However it must proceed, the contractor should always follow the contract's requirements to the letter. Failure to do so can bar any recovery for work performed without an approved change order.

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