

Lessons Learned

Give me an Aspirin – Change Work is a Headache: a primer on the difficulties a contractor faces when dealing with change work

Written by...

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A. The Traditional Setting

1. **The Relationship** - In this setting, there is no contract between the general contractor and architect but rather only contracts between the owner/general contractor and owner/architect. This creates a triangular relationship that often leads to tension. This is because the construction process seldom unfolds as anticipated. Things change – especially in construction – and this is the subject of our article.
2. **The Standard Contract** - The American Institute of Architects (“AIA”), among many other things, sells construction contract forms which all the various trades utilize. Because of their popularity, we use AIA forms as our examples in this article.
3. **The Work Begins** - With a complete design, and with bidding finalized, contractors are chosen and the work begins. Thereafter, the need for numerous changes almost certainly arises. Why? The reasons are endless. Examples include design conflict, change of owner preference, out of sequence construction, and problematic physical condition(s). After generating questions to the designers, the various trades then submit proposed changes to the construction administrator.
4. **Change Work** - Change work is typically done by way of a written modification to the contract; most often as a change order. The AIA’s general conditions define “Modifications” as (1) a written amendment to the contract signed by both parties, (2) a change order, (3) a construction change directive or (4) a written order for a minor change in the work issued by the Architect. Per the AIA, a change order shall be based upon agreement between the developer, contractor, and architect. The AIA requires the architect to prepare the change order and the developer to sign it, indicating an agreement as to (1) change in the work, (2) the amount of the adjustment, if any, in the contract sum and (3) the extent of the adjustment, if any, in the contract time. An unsigned change order may mean the general contractor does not get paid.
5. **Schedule** - Perhaps most important to any developer is the project’s schedule and change in the work tends to affect that schedule. This is why construction contracts typically provide for liquidated damages, which are damages to which parties contractually stipulate as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.

B. The Conundrum in Contracting

1. **Changes Tend to Disagree with the Schedule** - Given the importance of the schedule and the potential for damages, should a contractor stop the work to get the change order signed? In other words, does the contractor proceed with the work, or should it wait for the signed change order?
2. **Risk Management** - While there are no simple answers to these questions, there are protections the contractor can put in place to better manage this dilemma, which include:
 - i. Minimizing disputed change work based upon ambiguities, errors, omissions, or discrepancies in the bid documents. These disputes often arise because of design conflict, as in a mechanical plan conflicting with a structural plan because, say, a drainage pipe cannot run through a structural beam. Owners often take the position that contractors should properly study the design during the bid phase and therefore refuse to pay for change work and attendant project delays based upon a design conflict. Modification to the contract documents during the bid phase can serve to eliminate, if not minimize, these design conflicts.
 - ii. Address this dilemma at a pre-construction conference and build protections into the contract. Meeting minutes should be kept and signed by all the parties present to confirm accuracy.

iii. Prepare detailed change order proposals to reduce the time associated with questions from the construction administrator regarding the change order. Price and schedule analyses should be enclosed in the proposed change orders.

iv. Document the file. While the contractor may be confident, even certain, that the change order will be signed, it can never be too sure. When in doubt, document the file. When not in doubt, document the file.

So the contractor has sent its letter memorializing why the change order is necessary and detailing its efforts to get it signed without delaying the work. But what should be done in the meantime? If the contractor proceeds, it may not get paid for that work. If it doesn’t proceed, it may be in breach of its contract and face a lawsuit for construction delays. The practical approach is to (1) submit the detailed proposed change order, (2) enclose within the submission the documents showing the changes (e.g., the architect’s revisions), and (3) and specify that the project will be delayed, through no fault of the contractor, until the change order is signed.

v. Beware of field orders. The architect issues these orders to clarify specifications, deal with technical execution problems, or resolve site access difficulties. The architect has the authority to order minor changes in the work not involving adjustment in the contract sum or extension of the contract time and not inconsistent with the parties’ intent. Such changes shall be done in writing and shall bind the owner and contractor. If the field order increases costs or time, it should lead to a change order.

vi. If there is disagreement or delay on the change order, demand a construction change directive (“CCD”). The AIA defines a CCD as a written order prepared by the Architect and signed by the developer and architect, directing a change in the work prior to agreement on adjustment, if any, on the contract sum or contract time or both. CCDs are used in the absence of a total agreement on a change order. The architect resolves disagreements about CCDs, per the AIA. The AIA, in fact, provides that, pending final determination of the CCD’s cost, the contractor may request payment for CCD work, subject to the architect’s interim determination. Because the AIA requires the architect to prepare the CCD, a contractor may attempt to modify that language to state that the contractor shall prepare the CCD.

vii. Agree to a third-party decision-maker, other than the architect, to make onsite determinations. Dispute over change order work typically arises because the owner and/or architect believe (1) the proposed change work was part of the contractors’ initial scope, (2) the cost of the proposed change is unreasonable, (3) the additional time necessary to complete the change work is unreasonable, or (4) a change is deemed minor and the contractor disagrees. Someone, other than the architect, may arguably be more objective with respect to these disputes.

viii. Require that someone with authority to sign off on change orders remain at the site.

ix. Utilize two-part change orders to separate the portion of the estimate about which the parties disagree and the portion about which the parties agree.

x. Enter into a guaranteed maximum price (with open books) contract and share in the savings so as to incentivize everyone to finish the project expeditiously.

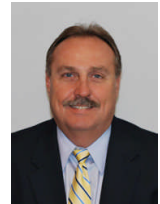
xi. Consult a construction lawyer. The manner in which a contractor may protect itself will vary with virtually every project. A qualified construction lawyer should be able to assist with a thoughtful and deliberate approach to a contract that preliminarily addresses most of the contractor’s change work concerns.

C. Conclusion

Although problematic, there are measures that can be put in place, preferably early in the process, that can make the change work process more manageable. That said, construction contracts will always be a minefield ripe for conflict. So, document your file and try to avoid performing work on an unsigned change order.



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If you would like to submit an article for the “Lessons Learned” section of the newsletter, please contact Kim Stanley at kimms@ufl.edu.