



PROJECT CHANGE: DEAL WITH IT

By Chris Harvey

Every construction project, regardless of its size, inevitably encounters change. Changes can be minor, such as field rerouting of pipe to avoid an interference, or they can be major, such as a massive acceleration effort costing millions of dollars for additional personnel and overtime premiums. Managing change is an important aspect of construction project management and successful project completion. This article is the first in a two-part series that addresses issues relevant to managing change and handling unresolved change orders from a contractor's perspective. The second article will look at mitigating change and managing claims from an owner's perspective.

Nearly every project a construction claims expert encounters occurs as a result of the parties' failures to effectively manage change. This article addresses several key factors in effective change order management that help mitigate the impact of changes and increase the probability that change orders will be resolved. It also provides some tips for submitting an effective claim in the event the parties are unable to resolve the issues surrounding the change order.

UNDERSTANDING AND FOLLOWING CONTRACT CHANGE ORDER PROCEDURES

First and foremost, the contract is the controlling document that governs the parties' responsibilities and provides a framework for handling change orders. It is important for all parties to understand the contractual requirements for submitting legitimate change orders, including, but not limited to:

- notice provisions and timing;
- structure of the change order;
- information required to support the change order; and
- acceptable pricing for the changed work.

It is important for the parties to consistently follow the change order procedures in the contract. Failure to do so may set a precedent for handling change-related situations outside of the contract, or may be perceived as a waiver of contract requirements.

BEING AWARE OF KEY CHANGE ORDER LANGUAGE

Because they modify the terms of the original contract, change orders are a part of the contract. As such, it is important to be aware of the information contained on the actual change order form. Depending on the type of contract and the nature of the change, pricing for change orders may be performed for a lump sum price, unit rates, or a time and materials (T&M) basis. If the

change order pricing methodology is not specifically addressed in the contract, it is important that it is agreed upon prior to performing the change and is included as part of the change order.

The time impact or delay associated with the change should always be included on the change order. In many cases, however, it is not feasible to establish the schedule impact at the time the change order is executed. In these cases, it is prudent to include language communicating that the schedule impact cannot be determined at that time. The parties should reserve the right to make this assessment and request a time extension at a later date once more information becomes available.

Some change orders include boilerplate language, which may state that the change order is full and final payment for all work associated with the change, including any productivity impacts, inefficiencies, or issues related to the cumulative impact of changes. It is often difficult, if not impossible, to recognize and quantify these impacts and inefficiencies at the time the change order is signed. Such boilerplate language can limit the contractor's ability to make a claim for these impacts later in the project, and is often overlooked until it is too late and the change orders have been signed.

DESIGNATING A SINGLE CHANGE ORDER REPRESENTATIVE

It is important to designate a change order representative at the beginning of the project. The person in charge of the change order process should consistently monitor the project status and be aware of potential areas of change. The project manager possesses the most knowledge of the overall scope of work and is in the best position to recognize changes to the work, or to notice where an authorized change is affecting another aspect of the work. However, other job responsibilities can make it difficult for the project manager to spend the time necessary to adequately monitor the work and recognize potential changes. The change order manager or representative should regularly inspect the work being performed and keep in close contact with the project supervisors and foremen supervising the details of the work and the construction means and methods.

Two potential points of dispute can be resolved by delegating single-point responsibility for authorizing changes. First, the owner's personnel know who has the authority to sign off on changes and that changes cannot be authorized by anyone other than the designated representative. Also, having a person dedicated to handling changes may result in fewer changes going unnoticed and undocumented. Often, a contractor's project supervisors or foremen may not have detailed knowledge of the entire scope of work. They might be so focused on going forward

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with the project that changes go unreported. Designating a change order representative addresses this issue.

MAKING DOCUMENT CHANGES

As soon as a change is recognized, it should be documented in writing. Claims consultants often encounter "he said, she said" disputes where there is not adequate contemporaneous project documentation to support either side's position. It is important to ensure that all communications are documented and all verbal agreements or instructions are later confirmed in writing. This includes situations that may not necessarily change the scope of work, but may affect both the means and methods of performing the work.

Also consider establishing a separate cost category for change-order work, even if the work is not being performed under a time and materials basis (in which case all costs would be tracked separately). This will assist with tracking costs associated with the changes, as well as ensure that pricing for later changes is more accurate. There will be times when the parties will not agree that the work is actually a change. Discretely calculating the actual cost of the change may help in a claim situation or if the issue escalates into other dispute resolution forums, such as mediation, arbitration, or litigation.

UNRESOLVED CHANGE ORDERS

In the event the parties are unable to reach agreement on a change order, it may be necessary to submit a formal claim. An effective claim document should provide a clear and concise

written description of the facts. It may help to provide graphics to illustrate key points or to clarify more complex issues. The claim should include all relevant contract clauses that support a party's stated position; however, companies should be prepared to address contractual language that may not necessarily support their claims. In legal settings, ambiguous contract language and contract documents are typically construed against the drafter of the contract or specific language.

It is important for companies to respond to all communications and requests for additional information in a timely manner, and they should be prepared to provide all relevant supporting data. It is a good idea to start a separate file for each claim issue where all relevant material and contemporaneous documentation can be assembled easily. A central claims folder can expedite the resolution process if the contractor is prepared, organized, and able to locate and provide necessary supporting documentation. It also allows the key project personnel more time to devote to the actual work instead of spending unnecessary time managing the claim.

The most important factor in resolving claims is to prevent the claim from affecting other work activities. The contractor should continue performing the work and make a reasonable attempt to mitigate any impact the claim issues have on the remainder of the project. This helps to maintain positive relationships with the other parties involved, which can facilitate a more timely and equitable resolution of claim issues, as well as avoid more time-consuming and costly claims later in the project. At the end of the day, it is just business, and change and claims are a part of that business. ♦

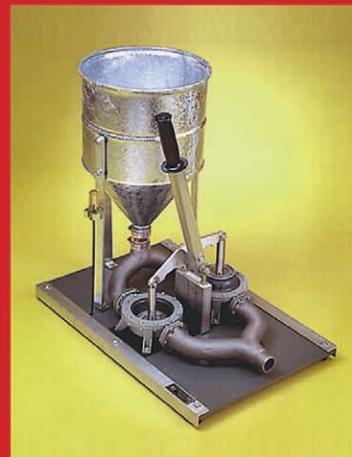
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