Through the Change Order Maze

Until a Contractor Gains Know-How in Change Order Management, Being Paid For Addition Work or Extras Will be a Problem

Extra work or changes beyond the contract requirements that increase the cost of performance of the contract, may arise in many forms which entitle contractors to an increase in their contract price.

The job a contractor bids is not the job the contractor will build. Its scope will probably be changed. Legal knowledge of the contractor rights to claim and be granted increases in the contract price and time extensions is essential. Ultimate success in obtaining an increase to the contract price for extra work or changes depends upon the contractor's prompt recognition of the facts which give rise to the claim and preserving those facts for ultimate presentation in support of a claim for increase in the contract price.

Until a contractor has sufficient legal knowledge to recognize and identify the situations for which it is entitled to extra compensation or extension of time, the contractor cannot obtain any relief for performing additional work or extras.

(Editor's Note: McNeill Stokes is General Counsel for AWCI. His book, Construction Law In Contractors’ Language, published by McGraw-Hill, provides much of the basis for this comprehensive article . . . and is an invaluable aid for contractors concerned with the legal aspect of other construction contractual areas.)

By McNEILL STOKES
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When a project is delayed, two claims are required—one for an extension of time and one for extra cost. A common error of contractors who perform extra work is to claim only an adjustment of the contract price and neglect to claim an extension of time. If the change in the work delays the contractor and the contractor forgets to claim an extension of time, the contractor may be forced to accelerate at its own expense or face liquidated damages.

Written Orders

If the general contract requires that a change order be issued in writing by the owner, then the contractor should obtain a written order from the owner or his authorized representative. If a subcontract requires a change order to be issued in writing by the general contractor prior to the performance of the work as changed, the subcontractor involved should be careful to follow the contract procedures of obtaining an appropriate written order from the general contractor or its authorized representative.

Often, the general contractor does not follow the procedure set out in the contract for ordering changes and extra work. Instead of a written order in advance by an authorized representative, an oral order from the general contractor’s field superintendent may
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be issued. Although the subcontractor’s foreman may be tempted to perform the extra work in expectation that the subcontractor will be paid the reasonable value of the work, the subcontractor should not perform extra work ordered orally.

The general contractor may dispute the fair value of the work performed, or may reject the claim entirely because it was not authorized in advance in writing by the proper officer, as required by the contract. The subcontractor should abide strictly by the procedure set out in the contract for complying with change orders if he wishes to preserve his right to compensate for extra work performed. Specifically, the subcontractor should obtain written authorization for the changed work on a form that identifies itself as being an order for changed or extra work.

Many general contractors and subcontractors supply their field supervision with a supply of extra work authorization forms with instructions that their field personnel should not perform any extra or changed work without obtaining the signature of an authorized representative of the party ordering the extra or changed work. If the claim clearly indicates that the scope covers “authorization for extra or changed work” and it is signed by an authorized representative of the party ordering the work, the signed form is the legal basis entitling the contractor to extra compensation for the extra or changed work.

Within the Scope

In order for an owner to be able to unilaterally order the contractor to perform a change, the proposed change must normally be within the general scope of the contract. The line between whether or not a change in work is within the general scope of the contract is a difficult one to define because it is based on the facts of each situation.

For a proposed change to be within the general scope of the contract, the change in the work must be one that would be regarded as fairly and reasonably within the contemplation of the parties when the contract was entered into. The elimination or addition of an entire building would not normally be held to be within the scope of the contract, whereas minor structural variations would. It is sometimes said that a “cardinal change” is not within the scope of the contract.

Claims Procedures

The typical construction contract change clause contains a requirement that the contractor or subcontractor give written notice that it considers a particular item to be a change or extra and that unless this written notice is given within a specified time, the contractor or subcontractor may be barred from claiming additional compensation under the contract. This written notice requirement is one of the many pitfalls which await an unwary contractor.

If the contractor neglects to give the required notice, the contractor may
lose a great deal of money performing extra work and be unable to recover, particularly if the other party was prejudiced because of lack of notice.

However, a contractor or subcontractor who performs extra work and is otherwise entitled to be paid for it may not automatically lose its money just because he has failed to follow procedural technicalities in the contract. Experience has shown that the courts hesitate to deny a just claim because of such technicalities. Instead, they have recognized several areas which will allow a general contractor or subcontractor to recover for extra work, changed work, or delays even though no written notice was ever given.

If the contract expressly exempts the owner from liability for extra work unless there is a proper written authorization, the contractor may not be permitted by the courts to recover for the extra work. But, if there is adequate proof that there is an oral direction for the work to be done and that the owner has knowingly received and accepted the benefits of the work, the contractor may be awarded the reasonable value for the work notwithstanding the contract provision requiring a written change order.

Many companies give their project managers, superintendents, and foremen detailed instructions on what notices are required by the particular contract for the specific job on which they are working. The jobsite personnel are instructed in the correct contractual method of reporting any changes, extras and delays. Contractors who establish a methodical system which consistently recognizes circumstances requiring written notification to the owner will not have to absorb the cost of changes because of procedural technicalities in the contract.

The notice provision which a subcontractor should follow may not be in its subcontract. Rather, it may be in the general conditions, which are a part of the specifications and which are often incorporated into and made a part of the subcontract by reference only. Therefore, in preparing supervisory personnel for commencement of work on a new project, it is not enough to look at only a contract or subcontract. Every part of the subcontracts, general contract, general conditions, supplementary conditions, plans and specifications must be examined, and a list must be made of every place in those documents where notice is required.

The contractor should make its claim in writing for extra compensation for a change in work for which a price has not been determined in sufficient detail to clearly and persuasively present the facts necessary to demonstrate his costs and his position that he is entitled to an increase in the contract price for the change in work. No specific form is required for the actual claim. However, it should be logically organized and contain a factual statement of the claim in as much detail as necessary to present the contractor’s views persuasively.

Pricing Changes

The pricing of the changed work may be based on a negotiated price, a cost-plus formula (on a fixed or percentage fee), or unit prices, or the price may be determined under the disputes clause. The contractor who is required unilaterally to perform a change must have a fast remedy under the disputes clause in the contract documents in order to fix the price of the changed work because the financial needs of the contractor require that the price for changed work be determined quickly to ensure that the contractor has adequate funds to meet the financial burdens of performance of the extra work. The procedure in the disputes clause must be subject to speedy resolution insofar as the contractor is concerned; otherwise he will pay out of his pocket for the cost of his required performance for a substantial period of time.

A contractor is well advised to negotiate the price of a change before the change is performed rather than afterward. This is termed in the construction industry as the “call-girl principle” after another ancient profession
in which their services are worth more before the service is performed than after. Negotiating a lump-sum price for a change before the change is performed will give both the party requesting the change and the contractor performing the change assurance of the exact amount of the cost and payment of the change, so that there will be no surprise after the work is performed. Negotiating a lump-sum price before a change is performed will also normally result in the contractor receiving payment for the change more quickly than if the price has to be settled after the work is performed.

If, under the AIA change clause, the owner and contractor cannot agree on the price of a change, the disputes clause provides that the architect must determine the cost based upon a reasonable cost plus overhead and profit. If dissatisfied with the value assigned by the architect, the owner or contractor may have the option of demanding arbitration. Under the AIA General Conditions, a contractor should not allow an owner to “starve” the contractor into agreeing to the owner’s price for a change. The terms of the AIA change clause dictate that the owner must pay at least the amount certified by the architect for the change, so that the contractor may have the use of that amount while the parties work through the final resolution of the dispute.

### Keep Documentation

Unless the price of the change can be agreed upon in advance, the contractor must preserve the evidence of facts as to the costs and details of the performance of the changed work. For a contractor to be successful in obtaining full compensation for the original contract work as well as the changed work, the contractor must be able to prove his costs. The best evidence of expenses is a complete set of invoices, purchase orders, receipts and accurate records of wages paid to employees.

Also very helpful in presenting a successful claim for extra compensation for changed work is the existence of a jobsite log in which the job superintendent records anything and everything that may be considered extra work.

Notes or memoranda should be kept of oral and telephone conversations. The content of each contract with representatives of the owner or other contractors should be noted. Then, as soon as possible, these notes should be translated into written memoranda for the file or a confirming letter to the other party to the conversation. The confirming letters have the dual purpose of implying agreement by the other if he remains silent after receipt of the confirming letter, and also preserving a written record.

In addition to the job log, photographs showing the nature and location of the changed work, should also be made part of the file. Photographs can be the ultimate help in documenting the exact factual situation and may even furnish details previously unnoticed or not noted elsewhere. An instant-development type camera is useful, so that additional photographic pictures can be taken before the site conditions are altered, if for any reasons the initial photographs do not clearly depict what needs to be shown.

Depending on the magnitude and complexity of the claim, experts may be needed to produce expert opinions, analyses and reports on the subject matter of the change. An expert can serve the dual purpose of supporting the claim and advising the contractor on the specifics of the claim. The contractor should not formulate his claim and then hire an expert at the last minute before presenting the claim. Rather, calling in an expert should be, among the first steps, when it becomes clear that a substantial claim for extras may exist.

Also relevant in presenting a claim is evidence of the customs and practices of the trade of a particular contracting field. These customs or trade practices amplify plans and specifications and are implicitly incorporated into a contract provided they are not contrary to the expressed provisions of the contract. In addition to “fleshing out” the terms of the plans and specifications, proof of customs and trade practices may be an absolute necessity when questions arise about the standard of workmanship.

The timely issuance of changes can prevent excessive costs, delays, and hard feelings on the project. To prevent late changes in construction plans, owners can help by continually reviewing the plans and specifications. The architect and contractor can also continue to review work in advance of construction to reduce conflicts and last-minute revisions. The earlier the change is made, the less the cost involved.