

Administering Changes and Avoiding Surprises: What Every Owner's Representative Needs to Know

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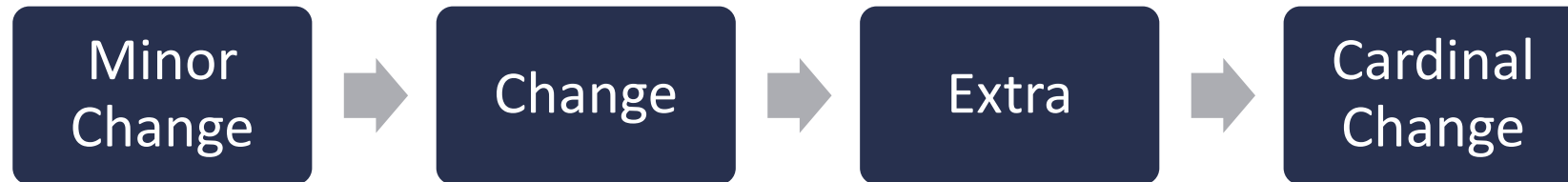
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An Overview of Changes

An Overview of Changes

GENERALLY



An Overview of Changes

MINOR CHANGE

A “minor change” is a change having a *de minimis* effect on the contractor's cost or time of performance. *Construction Disputes: Representing the Contractor*, §5.02 (Robert F. Cushman et al., eds., 2016) [hereinafter *Construction Disputes: Representing the Contractor*].

An Overview of Changes

CHANGE

“A ‘change’ is defined as an alteration to an existing contract requirement concerning work that is already required to be done.” 1A Philip L. Bruner and Patrick J. O’Connor, Jr., *Bruner & O’Connor Construction Law* § 4.1 (West 2016) [hereinafter *Bruner & O’Connor*].

An Overview of Changes

EXTRA

An “extra” . . . is an addition to the contract involving work that had not been included in the original agreement.” *Bruner & O'Connor* § 4.1 (West 2016).

An Overview of Changes

IS IT A “CHANGE” OR AN “EXTRA?”

“CHANGE”

- Increase the depth of a well
- Relocation of an existing window (assuming it has not been installed already)

Bruner & O’Connor § 4.1

“EXTRA”

- Drill a second well would be considered an extra.
- Additional window

An Overview of Changes

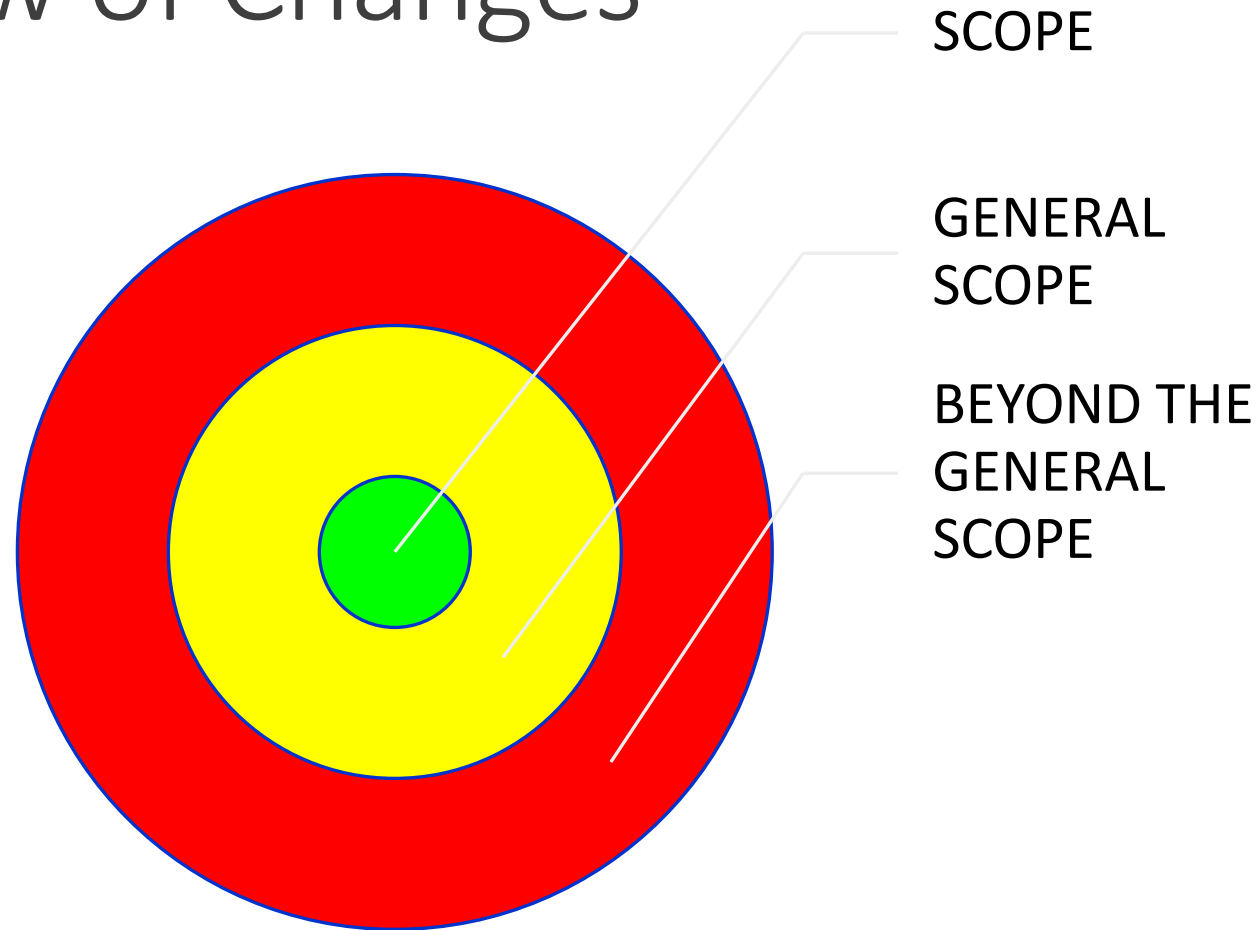
CARDINAL CHANGE

- “A ‘cardinal change’ takes effect when a scope change has been revised to such an extent that the work no longer resembles what was represented in the original contract.” It is often said that “the magnitude of the change must be so great as to represent work that is not essentially the same as that negotiated by the parties at the time that the contract was signed.”

Proving and Pricing Construction Claims § 6.04 (Robert F. Cushman et al., eds., Aspen 2016) [hereinafter *Proving and Pricing Construction Claims*].

An Overview of Changes

CARDINAL CHANGE



An Overview of Changes

CARDINAL CHANGE

- “ ‘[S]cope’ [is] defined by the contract itself and its express and implied terms and conditions, interpreted consistent with trade custom and practice, as circumscribed by public policy considerations and by legal excuses for nonperformance.” *Bruner & O'Connor* § 4.11 (West 2016).
- “The ‘general scope’ of the contract necessarily includes within its parameters all work that was fairly and reasonably within the contemplation of the parties when the contract was entered into and directly related to the work so as not to constitute a substantially different undertaking (internal citations omitted).” *Bruner & O'Connor* § 4.12 (West 2016).

An Overview of Changes

CARDINAL CHANGE

- Material increase or decrease in contract price
- Evaluated on a case-by-case basis
- Operates as a breach of contract
- Is *not* covered by the “changes clause”

An Overview of Changes

CARDINAL CHANGE

1. The significance of the change(s) (it is not necessarily the number of changes)¹
2. End-product is drastically different than what was contemplated in the contract ¹
3. Final cost relative to the original contract cost¹
4. Changes at issue were within the reasonable anticipation of the parties at the time of contracting¹
5. Individual and cumulative impact of changes ²
6. Effect of change on compensation or risk allocation ²
7. Disruption caused to the contractor's performance ²

¹ Stephen A. Hess, *Cardinal Change*, Construction Briefings No. 2005-9, Sept. 2005

² *Bruner & O'Connor* § 4:15

An Overview of Changes

WHAT IS A CARDINAL CHANGE?

- \$4MM worth of changes on \$7.2 MM project. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1021 (Nev. 2004).
- Elimination of an entire building on a project where the contracted scope of work included seven buildings. *Gen. Contracting & Const. Co. v. U.S.*, 84 Ct. Cl. 570 (Ct. Cl. 1937).

WHAT IS *NOT* A CARDINAL CHANGE?

- Jobsite became crowded with contractors (see e.g., *Dynalectric Co. v. Whittenberg Construction Co.*, 2010 U.S. Dist. LEXIS 110136 (W.D. Ky. 2010)).
- An increase in \$2,000,000 to an original contract worth \$14,240,000. *Paragon Energy Corp. v. U.S.*, 229 Ct. Cl. 524, 527–28 (Ct. Cl. 1981)).

An Overview of Changes

CARDINAL CHANGE

- A surety company is generally on the hook for changes within the “general scope” and will not be relieved from its obligations due to “[i]mmaterial changes in plan or specifications to which the surety fails to consent (internal citations omitted).” *United Bonding Ins. Co. v. W. S. Newell, Inc.*, 232 So. 2d 616, 625 (Ala. 1969).
- Changes outside the “general scope” need *not* be performed by the surety and will discharge its obligation under the bond (i.e., the surety will raise it as a defense), thereby preventing the owner from demanding performance pursuant to the bond upon a default. See e.g., Stephen A. Hess, *Cardinal Change*, Construction Briefings No. 2005-9, Sept. 2005.

An Overview of Changes

CARDINAL CHANGE

- Include language similar to the following in change orders:

“ . . . the Contractor stipulates that the work contemplated by this change order does not change, or otherwise go beyond, the general scope of the Project or otherwise cause the Project to materially differ from the Project scope bargained for”

- To avoid waiver, a contractor faced with a potential “cardinal” change must give the owner timely, written notice that it is reserving the right to pursue a “cardinal” change claim, among other possible claims. *Bruner & O'Connor* § 4:18.
- Require consent of surety for **all** changes, no matter how slight
- Be aware of the public bid laws when undertaking change orders
- Changes clause should cover changes within the “general scope,” not just “scope”

The Changes Clause

The Changes Clause

GENERALLY

- “A changes clause sets forth the manner in which claims must be presented, approved, and documented.” *Construction Disputes: Representing the Contractor*, § 5.02.
- Without a changes clause, the common law rule – changes require mutual agreement – will apply. See e.g., *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575, 577 (Mo. App. E. Dist. 2000) (Because the contractor did not include a changes clause in the subcontract, the Court held that changes required mutual agreement).

The Changes Clause

TYPES

- Consensus
- Federal
- AIA
- EJDJC
- AASHTO
- Custom

The Changes Clause

CONTENT

- | | |
|---|---|
| 1. Cost | 8. Writing requirement |
| 2. Timing | 9. Design professional and/or owner's right to issue unilateral directives (including "minor changes") |
| 3. Broadly worded to include "changes" and "extras" | 10. Required approval of the design professional(s) of record |
| 4. Notice | 11. Contractor agrees that all changes will be via "equitable adjustment" and waives traditional contract damages |
| 5. Waiver provisions | 12. The extent to which changes can be made; |
| 6. Authority to consummate change | 13. Procedure in the event the parties cannot agree. |
| 7. Post-performance audit rights | |

The Changes Clause

DON'T OVERLOOK THE CHANGES CLAUSE

Changes clauses should be carefully examined by the Contractor to determine its rights under the contract to pursue additional time and/or money, and how to best protect and preserve those rights. *See e.g., Holder Const. Group v. Georgia Tech Facilities, Inc.*, 640 S.E.2d 296, 299 (Ga. App. 2006) (Because Holder failed to follow the procedure mandated by the changes clause on 54 of 67 changes orders, Holder was not entitled to all requested relief for failing to adhere to the changes clause).

The Changes Clause

WAIVER OF THE CHANGES CLAUSE

“No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.” AIA Document A201-2007, Subparagraph 13.4.2.

But anti-waiver provisions are *NOT* bulletproof . . .

The Changes Clause

WAIVER OF THE CHANGES CLAUSE

- The changes clause requirements may be waived, expressly or impliedly, through the actions or inactions of the owner or its agent(s). *See e.g., RaCON, Inc. v. Tuscaloosa County*, 953 So. 2d 321, 338–39 (Ala. 2006), *as modified on denial of reh'g* (Sept. 15, 2006) (“a party who has included ... a provision [barring oral modifications] in a contract for that party's benefit can certainly waive that provision.”).
- Owner had actual knowledge and did not object. *See e.g., Aqua Pool Renovations, Inc. v. Paradise Manor Community Club, Inc.*, 880 So.2d 875 (La. App. 2004)(Because the owner’s representative was aware of the work, informed the board of directors of the additional work, and no objections were made, the Court found the contract to be orally modified to include the additional work).

The Changes Clause

WAIVER OF THE CHANGES CLAUSE

- Constant disregard of the writing requirement. *See e.g., Consol. Fed. Corp. v. Cain*, 394 S.E.2d 605, 606–07 (Ga. App. 1990) (“[W]here the parties by a course of conduct have departed from the terms of the contract and operated without prior written change orders, there may be a waiver, or oral variation of the provisions of the contract (internal quotations omitted).”).

The Changes Clause

WAIVER OF THE CHANGES CLAUSE

- Include an anti-waiver provision in the contract
- Instruct your agents on the proper channels of communication and approval
- Do not hold people out as having authority to bind
- Do not delay in acting when you have notice (of any kind) of a change
- Follow the terms of the changes clause (but don't forget other provisions)

The Changes Clause

WAIVER OF THE CHANGES CLAUSE

Include language in your change order similar to the following:

“Notwithstanding anything herein to the contrary, the Owner, however, specifically reserves the right to exercise any or all rights, claims, or remedies available under the Contract, as amended, without any waiver or forfeiture whatsoever. Furthermore, Owner’s consummation of this change order does not in any way constitute acceptance of the Work to Date.”

Making Changes to the Contracted Work

Making Changes to the Contracted Work

HOW ARE CHANGES MADE?

Formal

- Mutual Agreement
 - Written
 - Oral
- Unilateral Directive (the changes clause must provide for this right)

Constructive

- Owner conduct that does not result in a formal change, but causes the contractor to undertake obligations different from the original contract.

Making Changes to the Contracted Work

FORMAL CHANGES

Mutual Agreement

- Oral or written bilateral agreement that modifies the original agreement (and becomes a part thereof) by adjusting the scope and a corresponding adjustment in time and price.

Making Changes to the Contracted Work

FORMAL CHANGES

Unilateral Directive

- “Construction change directive” or “force account”
- Oral or written order from the owner directing the contractor to change its performance
- Minor changes or additional scope
- Applicable when the parties cannot come to a mutual agreement
- For unilateral directives (e.g., construction change directives), it is imperative that the contractor “protest the direction or interpretation of the owner, even if the owner ultimately directs the contract to proceed with the disputed interpretation or direction.” *Proving and Pricing Construction Claims* § 6.04.

Making Changes to the Contracted Work

FORMAL CHANGES

Should a contractor ignore a directive (generally not)?

1. Proposed change is clearly beyond the “general scope” of the contract
2. The changes clause requires “issuance of a written order and no such order was issued”
3. “[T]he order directs performance that is unsafe, “highly hazardous,” or “impossible”
4. “[T]he party giving the order already has materially breached the contract so as to justify termination or rescission”
5. The order involves differing site conditions causing a material increase in the contractor's costs for which the owner refuses to give an equitable adjustment

Contractors must not forget to reserve its right to file claims when faced with any of the above.

Bruner & O'Connor § 4:49

Making Changes to the Contracted Work

CONSTRUCTIVE CHANGE

- “A constructive change occurs where a contractor performs work beyond the contract requirements, without a formal order under the changes clause, either by an informal order of the Government or by fault of the Government.” *Miller Elevator Co., Inc. v. U.S.*, 30 Fed. Cl. 662, 678 (Fed. Cl. 1994), 36 F.3d 1111 (Fed. Cir. 1994). But “[t]here is no constructive change when the contract mandates performance even though a contractor may have based its bid on a different performance method.” *Proving and Pricing Construction Claims* § 6.04.
- “Constructive changes” do not necessarily “alter the character and quality of the work,” but instead “may affect the means and methods of the work with related cost [and/]or schedule impacts.” *Proving and Pricing Construction Claims* § 6.04

Making Changes to the Contracted Work

CONSTRUCTIVE CHANGE

1. Over-inspection (which gives rise to unreasonable demands)
2. Higher performance standards
3. Refuse to permit a performance method allowed under the contract
4. Failure to cooperate
5. Re-sequencing
6. Interference
7. Acceleration
8. Misrepresentation or failure to disclose information

9. Improper rejection of work
10. Refusal to grant a time extension where there has been an excusable delay (construction acceleration)
12. Failure to cooperate
13. Excessive testing requirements
14. Defective drawings or specifications
15. Cumulative impact of many change orders

Making Changes to the Contracted Work

CONSTRUCTIVE CHANGE – *METRIC CONST. CO., INC. V. US.*

“Metric bid for the work on San Nicolas Island and began its performance based upon the existing barge landing system at Daytona Beach,” and the government later installed a pontoon landing system that was not mentioned in the contract. The pontoon landing system wasn’t compatible with Metric’s barge. “The installation of the pontoon together with the government's insistence that Metric use the pontoon system rather than beach landings substantially hindered and restricted Metric's ability to land at San Nicolas Island and thus constituted a constructive change entitling Metric to an equitable adjustment.” *Metric Const. Co., Inc. v. U.S.*, 81 Fed. Cl. 804 (Fed. Cl. 2008).

Causes of Claims and Changes

Causes of Claims and Changes

GENERALLY

- Design defects
- Change(s) to scope of work (addition or deduction)
- Delays
- Disruption
- Acceleration
- Suspension of work
- Value engineering
- Differing site conditions
- Owner-related
- Breach of implied duty
- Ambiguity
- Weather

NOTE: Consult your contract because the risk of unexpected circumstances may, and often are, expressly or impliedly allocated to either party.

Causes of Claims and Changes

DEFENSES TO CLAIMS

1. Release
2. No damage for delay
3. Failure to Exhaust Administrative Remedies
4. Notice
5. Work is defective
6. Statute of repose

7. Authority
8. Causation
9. Assumed the risk
10. Writing
11. Statute of limitation
12. Other

Practice Pointers

Practice Pointers

BUILDING BLOCKS FOR PROVING CLAIMS FOR COST AND/OR TIME

1. Requests for information and submittal logs¹
2. Labor time cards and payroll records;¹
3. Foreman and superintendent's diaries and daily reports¹
4. Photographs and videotapes¹
5. Scheduling information including the baseline schedule, schedule updates, progress narratives, and "look-ahead" schedules¹
6. Agendas and minutes of job site meetings¹
7. Notes of conversations¹
8. Transmittals and correspondence in the forms of letters, facsimiles, and e-mail¹
9. Job cost accounting records and reports¹

10. The change order and claim log¹
11. Budget and cost estimates²
12. Design professional field reports²
13. Testing and inspection reports²
14. Delivery receipts²
15. Job-cost reports²
16. Equipment utilization records²
17. Weather data²

¹A Bruner & O'Connor § 4:54 (June 2016 update).

²Construction Scheduling Preparation Liability & Claims § 6.01

Practice Pointers

FROM THE OWNER'S PERSPECTIVE

1. Clearly defined scope of work, think through the project
2. Have a changes clause and follow it
3. Keep good records
4. Contractor due diligence
5. Place notice requirements in contract that bars claims after X days
6. Obtain partial lien releases with each pay application

7. Clearly set forth who has authority to bind
8. Give prospective bidders adequate time to prepare bids
9. Consider what could happen on the front-end (i.e., force majeure)
10. Full disclosure
11. Have document retention policies

Practice Pointers

FROM THE OWNER'S PERSPECTIVE: CHANGE CAN BE OPPORTUNITY

- “Change order, full settlement and release”
- Change orders should have a provision whereby the contractor waives and releases all claims for price and schedule impacts in any way related, directly or indirect, to the change contemplated by the change order.

Practice Pointers

FROM THE OWNER'S PERSPECTIVE: CHANGE CAN BE OPPORTUNITY

“... the compensation agreed to herein is a fair and equitable adjustment for the changes contemplated hereby and fully compensates Contractor for all additional work, including all that work reasonably inferable from the scope hereof and those items customarily or incidentally installed as part of same, and time to date; (7) the Contractor stipulates that the work contemplated by this change order does not change, or otherwise go beyond, the general scope of the Project or otherwise cause the Project to materially differ from the Project scope bargained for Furthermore, the Contractor irrevocably and unconditionally waives, releases and forever discharges the Owner, including its agents, officers, and employees, for claims of any kind whatsoever through the Date of this Change Order, including, without limitation, cumulative impact claims, whether monetary or otherwise, and Contractor's acceptance hereof forever terminates its right to file any claim(s) or lien(s) arising out of or otherwise related to the performance to Date. Notwithstanding anything herein to the contrary, the Owner, however, specifically reserves the right to exercise any or all rights, claims, or remedies available under the Contract, as amended, without any waiver or forfeiture whatsoever. Furthermore, Owner's consummation of this change order does not in any way constitute acceptance of the Work to Date.”

Practice Pointers

FROM THE CONTRACTOR'S PERSPECTIVE

- | | |
|---|---|
| <ol style="list-style-type: none">1. Read the lien releases, etc. prior to signing2. Never sign “unconditional lien release” prior to payment3. Reservation of rights4. Know your contract5. Owner due diligence6. Design team due diligence | <ol style="list-style-type: none">7. Don't rush the bid8. Follow the plans and specifications9. Instruct your personnel on record-keeping10. If performance criteria is specified, be sure it is achievable11. Detailed site investigation procedures12. Document retention guidelines |
|---|---|

QUESTIONS?

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