

## SECTION I: CHANGES IN THE WORK<sup>1</sup>

Construction is not like assembly line production where the same item is produced over and over again. Rather, almost every construction project contains a unique design of some complexity or a standardized design applied to a different location and under unique conditions. In all likelihood, the parties to the contract have not built precisely the same building before so they do not have experience about how exactly it should be built or what project specific problems will be encountered.

Moreover, few, if any, construction projects are completed without some deviation from the original plans and specifications.<sup>2</sup> Such deviations, to some degree, are expected. Consequently, the parties want to reserve the right to make adjustments as construction progresses and unexpected issues arise on the project.

A contract change happens when an event or condition modifies the work as defined in the contract documents. Changes may include (i) additions to or deletions from the work to be completed; (ii) changes in the materials specified; (iii) corrections in the specifications or drawings; (iv) acts or omissions of other contractors or trades; (v) departures from the contract schedule; (vi) changes in the sequence in which work activities are to be performed; and (vii) changes in performance resulting from construction conditions. Changes may result in either additional costs, credits, extended time for performance or some combination of these.

The impact of changes in the scope of work -- both time and money -- is probably the single most disputed issue in construction. Therefore, in order to keep the project moving toward completion, the contractual provisions governing changes must be both fair and effective in encouraging the timely resolution of cost and time issues.

The “changes” clause is a necessary provision in every construction contract, and most construction contracts have a changes clause permitting the parties to make changes in the scope or character of the work. Typically, construction contracts contain clauses which allow for such changes either with or without the agreement of the parties at the time the change is made.

The traditional changes clause requires mutual agreement of the parties on the scope of the modification as well as the effect the modification will have on the price for the work and the time in which it will be performed. This method results in what is generally referred to as a “change order.” In theory, the change order should be a written document issued prior to commencement of the work. However, in reality, this rarely happens.

The second type of changes clause applies when the parties cannot agree on some portion of the modification, either as to the need for a modification, the scope of the modification, or the price or time impact of the modification. Under this scenario, the changes clause permits one

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<sup>2</sup> A Silberman, Beyond Changes: Abandonment and Cardinal Change, 22 Construction Lawyer 9 (Fall 2002)

party, typically the owner or its design professional, to direct that the work be performed notwithstanding the lack of agreement between the parties as to the impact of the modification.

The manner in which the contract addresses the scenario where the parties are not in agreement and the name of that process vary from contract to contract. However, change clauses typically will provide some mechanism for one party to require that the added or disputed work be performed, as well as provision for an adjustment at a later point in time to resolve the attendant price and time issues. As might be expected, this type of change is the subject of much litigation. The owner or contractor has secured performance of the change with no agreement as to price or time. This leaves the contractor or subcontractor to negotiate after the fact a fair price or time extension.

## SECTION II: CONTRACT PROVISIONS

### A. American Institute of Architects

The AIA forms articulate elaborate procedures for change orders. The AIA A201 includes change clauses allowing for three types of changes: change orders, construction change directives, and orders for minor changes in the work. These same procedures are incorporated into the AIA A401 by reference to the AIA A201.

AIA A201 provides:

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work...

AIA A201 describes change orders as follows:

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .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.

To recover on a change order pursuant to this contractual provision, all parties must sign and agree to each of the essential elements of the change. Until all required parties sign the change order, a contractor or subcontractor may perform the changed work but is at risk that the party to be charged with responsibility for the changed work will not agree to the terms for its performance.

The AIA provides a mechanism for the owner to order implementation of a change when the owner and contractor cannot agree on all of the terms of a change order. Partial payment for such work is also contemplated as set forth below:

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

.1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;

.2 unit prices stated in the Contract Documents or subsequently agreed upon;

.3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage of fee; or

.4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

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7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

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7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

In the absence of an impact to the price or contract time, the AIA A201 empowers the design professional to order minor changes in the work.

7.4.1 The Architect will have 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 intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

The contractor may also initiate the change order process by making a claim for an increase in the contract sum or extension of the contract time. Paragraph 4.3.2 of the AIA A201 provides:

Claims by either party must be initiated within 21 days after the occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

AIA A401 provides as follows:

5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work which would be inconsistent with the changes made by the Modifications to the Prime Contract.

5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

#### B. Associated General Contractors

As with the AIA family of documents, the AGC documents contain provisions for agreed modifications to the scope of the work and for directed modifications to the scope of the work (sometimes called “force account” work) where there is no agreement as to the entitlement to an adjustment in time or money, or the quantum of the adjustment. Unlike the AIA documents, the AGC documents do not contain provisions for directed changes where the change does not result in an adjustment in the contract price or time.

AGC 200, recognizes that either the owner or contractor may initiate a change:

8.1.1 The Contractor may request and/or the Owner may order changes in the Work or the timing or sequencing of the Work that impacts the Contract Price or the Contract Time. All such changes in the Work that affect Contract Time or Contract Price shall be formalized in a Change Order . . .

AGC 200 contemplates that the owner and contractor (but not the design professional) shall negotiate and execute change orders.

8.1.2 The Owner and the Contractor shall negotiate in good faith an appropriate adjustment to the Contract Price and/or the Contract Time and shall conclude these negotiations as expeditiously as possible. Acceptance of the Change Order and any adjustment in the Contract Price and/or Contract Time shall not be unreasonably withheld.

Like the AIA documents, the AGC 200 contains provisions for changed work to be performed even where the parties have not yet agreed on the cost and time impacts. Again, the design professional is not involved in implementation of these provisions.

8.2.1 The Owner may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the Contractor on the adjustment, if any, in the Contract Price and/or the Contract Time.

8.2.2 The Owner and Contractor shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price and/or Contract Time arising out of Interim Directed Change. As the Changed Work is performed, the Contractor shall submit its costs for such work with its application for payment beginning with the next application for payment within thirty (30) days of the issuance of the Interim Directed Change. If there is a dispute as to the cost to the Owner, the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work. In such event, the parties reserve their rights as to the disputed amount, subject to the requirements of Article 12.

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8.3.1 An increase or decrease in the Contract Price and/or the Contract Time resulting from a change in the Work shall be determined by one or more of the following methods:

- .1 unit prices set forth in this Agreement or as subsequently agreed;
- .2 a mutually accepted, itemized lump sum;
- .3 costs calculated on a basis agreed upon by the Owner and Contractor plus a Fee (either a lump sum or a Fee based on a percentage of cost) to which they agree; or
- .4 If an increase or decrease cannot be agreed to as set forth in Clauses .1 through .3 above, and the Owner issues an Interim Directed Change, the cost of the change in the Work shall be determined by the reasonable actual expense and savings of the performance of the Work resulting from the change. If there is a net increase in the Contract Price, the Contractor's Fee shall be adjusted accordingly. In case of a net decrease in the Contract Price, the Contractor's Fee shall not be adjusted

unless ten percent (10%) or more of the Project is deleted. The Contractor shall maintain a documented, itemized accounting evidencing the expenses and savings.

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8.3.3 If the Owner and the Contractor disagree as to whether work required by the Owner is within the scope of the Work, the Contractor shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations. If the Owner issues a written order for the Contractor to proceed, the Contractor shall perform the disputed work and the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work. In such event, both parties reserve their rights as to whether the work was within the scope of the Work, subject to the requirements of Article 12. The Owner's payment does not prejudice its right to be reimbursed should it be determined that the disputed work was within the scope of Work. The Contractor's receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work should it be determined that the disputed work is not within the scope of the Work.

One of the relatively new concepts incorporated into the AGC contract is the right to obtain payment for a percentage of the estimated costs of a change order or change directive, even where the parties are unable to agree on the ultimate costs of the modification. One way to avoid bearing the full cost of the disputed change order is to modify the changes clause to specify payment of a portion of the estimated costs prior to final negotiations on entitlement and quantum.

While the AGC 200 includes this right to payment with respect to changes issued by the Owner, the AGC 650 and 655 do not provide the same right with respect to subcontractors. Accordingly a proper subcontract modification should be added.

AGC 650, like its AIA counterpart, passes through to the contractor – subcontractor relationship the ability to make changes in the work.

7.1 When the Contractor orders in writing, the Subcontractor, without nullifying this Agreement, shall make any and all changes in the Subcontract Work which are within the general scope of this Agreement. Any adjustments in the Subcontract Amount or Subcontract Time shall be authorized by a Subcontract Change Order. No adjustment shall be made for any changes performed by the Subcontractor that have not been ordered by the Contractor . . .

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7.2 To the extent that the Subcontract Documents provide for Construction Change Directives in the absence of agreement on the terms of a Subcontract Change Order, the Subcontractor shall promptly comply with the Construction Change Directive and be entitled to apply for interim payment if the Subcontract Documents so provide.

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7.4 If a Subcontract Change Order requires an adjustment in the Subcontract Amount, the adjustment shall be established by one of the following methods:

- .1 mutual acceptance of an itemized lump sum;
- .2 unit prices as indicated in the Subcontract Documents or as subsequently agreed to by the parties; or
- .3 costs determined in a manner acceptable to the parties and a mutually acceptable fixed or percentage fee; or
- .4 another method provided in the Subcontract Documents

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7.5 If the Subcontractor does not respond promptly or disputes the method of adjustment, the method and the adjustment shall be determined by the Contractor on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in the case of an increase in the Subcontract Amount, an allowance for overhead and profit of the percentage provided in Paragraph 7.6. The Subcontractor may contest the reasonableness of any adjustment determined by the Contractor. The Subcontractor shall maintain for the Contractor's review and approval an appropriately itemized and substantiated accounting of the following items attributable to the Subcontract Change Order:

- .1 labor costs, including Social Security, health, welfare, retirement and other fringe benefits as normally required, and state workers' compensation insurance;
- .2 costs of materials, supplies and equipment, whether incorporated in the Subcontract Work or consumed, including transportation costs;
- .3 costs of renting machinery and equipment other than hand tools;
- .4 costs of bond and insurance premiums, permit fees and taxes attributable to the change; and
- .5 costs of additional supervision and field office personnel services necessitated by the change.



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7.7 The Subcontractor shall not perform changes in the Subcontract Work until a Subcontract Change Order has been executed or written instructions have been issued in accordance with Paragraphs 7.2 and 7.9

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7.9 The Contractor may direct the Subcontractor to perform incidental changes in the Subcontract Work which do not involve adjustments in the Subcontract Amount or Subcontract Time. Incidental changes shall be consistent with the scope and intent of the Subcontract Documents. The Contractor shall initiate an incidental change in the Subcontract Work by issuing a written order to the Subcontractor. Such written notice shall be carried out promptly and is binding on the parties.

C. Engineers Joint Contract Documents Committee

The EJCDC C-700 contains extensive provisions on initiating, performing and pricing changed work. Like the AIA document, the right to order changes in the work is within the owner's purview. EJCDC C-700 provides in part:

10.01 Authorized Changes in the Work

A. Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work by a Change Order, or a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).

B. If Owner and Contractor are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Change Directive, a Claim may be made therefor as provided in Paragraph 10.05.

EJCDC C-700 spells out what a change order is and who is involved in formulating the change order. Not surprisingly, the design professional has a prescribed role in "recommending" a change order; this role may be slightly less substantial than the design professional's role under the AIA documents where the design professional's signature is required on the change order.

10.03 Execution of Change Orders

A. Owner and Contractor shall execute appropriate Change Orders recommended by Engineer covering:

1. changes in the Work which are: (i) ordered by Owner pursuant to Paragraph 10.01.A, (ii) required because of acceptance of defective Work under

Paragraph 13.08.A or Owner's correction of defective Work under Paragraph 13.09. or (iii) agreed to by the parties:

2. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed in accordance with a Work Change Directive; and

3. changes in the Contract Price or Contract Times which embody the substance of any written decision rendered by Engineer pursuant to Paragraph 10.05: provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, Contractor shall carry on the Work and adhere to the Progress Schedule as provided in Paragraph 6.18.A.

The "Work Change Directive" is the mechanism that allows the owner to direct the contractor to perform changed work in the absence of agreement on the impact of the change on price and schedule. The EJCDC describes the Work Change Directive as follows:

1.01.A.52 Work Change Directive -- A written statement to Contractor issued on or after the Effective Date of the Agreement and signed by Owner and recommended by Engineer ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

The design professional is permitted to order minor changes in the work that do not affect the contract time or price.

#### 9.04 Authorized Variations in Work

A. Engineer may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. These may be accomplished by a Field Order and will be binding on Owner and also on Contractor, who shall perform the Work involved promptly. If Owner or Contractor believes that a Field Order justifies an adjustment in the Contract Price or Contract Times, or both, and the parties are unable to agree on entitlement

to or on the amount or extent, if any, of any such adjustment, a Claim may be made therefor as provided in Paragraph 10.05.

The EJCDC document also contains more extensive provisions for pricing of change orders (particularly contractor mark-ups) than the AIA and AGC documents which leave it up to the parties to reach agreement. For example, in the absence of applicable unit prices or an agreed lump sum fee for the contractor, Paragraph 12.01.C.2 the EJCDC document prescribes the following percentage mark-ups for changed work:

1. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:

a. for costs incurred under Paragraphs 11.01.A.1 and 11.01.A.2. the Contractor's fee shall be 15 percent;

b. for costs incurred under Paragraph 11.01.A.3, the Contractor's fee shall be five percent;

c. where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon. the intent of Paragraph 12.01.C.2.a is that the Subcontractor who actually performs the Work, at whatever tier, will be paid a fee of 15 percent of the costs incurred by such Subcontractor under Paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and Contractor will each be paid a fee of five percent of the amount paid to the next lower tier Subcontractor;

d. no fee shall be payable on the basis of costs itemized under Paragraphs 11.01.A.4. 11.01.A.5. and 11.01.B;

e. the amount of credit to be allowed by Contractor to Owner for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in Contractor's fee by an amount equal to five percent of such net decrease; and

f. when both additions and credits are involved in any one change, the adjustment in Contractor's fee shall be computed on the basis of the net change in accordance with Paragraphs 12.01.C.2.a through 12.01.C.2.e, inclusive.

### SECTION III: ALTERNATIVE CONTRACT PROVISIONS

A. Modify the changes clause to allow for an adjustment in the contract sum or contract time where a change occurs, but no change order or directive is issued:

Notwithstanding any provision to the contrary, Contractor<sup>3</sup> shall be entitled to an equitable adjustment, in both time and price, should the Owner fail to provide a Change Order or otherwise direct a change where it is determined that the Work performed was not within the scope of Work of the Contract Documents or differed materially from the character of the Work expected by the parties.

The pace of construction on a project often outstrips the parties' ability to comply with notice and change order requirements. It may be useful to include this type of clause to permit later recovery of costs in order to move the project forward. Many projects experience a large number of change orders which, if passed through the change order process as required by the contract documents, would result in significant delay to the project. In order to avoid delays on the project it is in all parties' interest to allow for a streamlining of the change order process.

The downside to this type of clause is that contractor may ambush the owner at the end of the project with substantial and numerous requests for equitable adjustments. This type of clause therefore undermines the most important functions of a notice provision which is to provide the owner with an ability to evaluate the claimed change and minimize the impact before any or at least significant costs are incurred.

The contractor also has a significant interest in addressing how and by whom the right to added time or money will be "determined." Also, the contractor needs some mechanism to get paid, on an interim basis, for extra or additional work. The contractor does not want to finance the work until the end of the job and then commence negotiations seeking the recovery of its added costs.

B. Insert a provision that states that payment to the contractor is not a condition precedent to payment of the subcontractor for change orders.

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<sup>3</sup> These proposed modified clauses may be used in contracts between the owner and contractor as well as between the contractor and subcontractor by simply changing the identity of the parties.

Contractor's receipt of compensation from the Owner for the changed work shall not be a condition precedent to Subcontractor's right to be paid for the performance of changed work at the direction of the Contractor.

Some subcontracts contain clauses such as "Subcontract revisions will be made only to the extent that the Contractor is entitled to such compensation from (or must grant such compensation to) the Owner resulting from Owner or Architect directed changes." In order to avoid the pitfall of the contractor directing the subcontractor to perform extra or additional work which is not a change to the prime contract and for which the contractor is not entitled to additional compensation from the owner, subcontractors will frequently seek to add a changes clause to the subcontract to allow compensation for directed work, even where no change occurs in the prime contract.

From the contractor's standpoint, this type of provision creates a problem in that the contractor is obligated to pay for the performance of the change without first resolving the issue of the owner's obligation for payment under the prime contract. In addition, both the contractor and the subcontractor still need to know when the scope issue will be resolved, by whom and how long it will take for the time and money issues to be concluded.

C. Modify the changes clause to prevent the use of the termination for convenience clause to make deductive changes:

Any reduction in the scope of Work shall not be valid unless effectuated by Change Order or Construction Change Directive. Unless a termination is for all Work to be performed by Contractor<sup>4</sup>, the termination for convenience clause shall not be used to reduce the scope of Work.

The purpose of the above clause is to require that deductive changes in the scope of the work be handled according to the changes clause, just like an additive modification. This includes notice and an opportunity to negotiate the cost of the deductive change order, and perhaps most importantly, pricing of the deductive change within a reasonable time.

From an owner's standpoint, such a clause may prove to be too limiting. The owner could be held hostage in a negotiation with the contractor who insists on giving insufficient credit for a substantial deduction in the work thus protecting or perhaps increasing its profit margin.

D. Modify the changes clause to make the negotiation of change order pricing a condition precedent to the obligation to perform the changed work.

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<sup>4</sup> Can also be modified for use in the subcontract agreement.

Contractor<sup>5</sup> shall not be required to perform changes or extra work without the written agreement of the Owner and Contractor on the price and time allowed.

OR

Contractor shall not be required to perform extra work prior to receipt of a duly authorized change order. The ordering of extra work from Contractor by any person acting on behalf of the Owner shall constitute an agreement to pay for said work, whether or not confirmed by change order.

To avoid the pitfalls of being required to perform work without an agreement on pricing or time, this provision makes agreement on both a condition precedent to the performance of the work. Most owners will not agree to this provision since it provides the contractor the leverage to bring the project to a grinding halt while negotiations over disputed changes occur. Owners, motivated by schedule as well as by price, will likely oppose such a clause in its contract.

E. Modify the time frame for a contractor to provide notice of a claim:

If Contractor seeks an increase in the Contract Sum and/or an extension in the Contract Time, it shall give Owner written notice thereof within [\_\_\_\_\_] days after Contractor's actual knowledge of the occurrence of the event alleged to give rise to such claim ("Initial Claim Notice"). The support for the monetary and time impact of the claim itself shall be submitted no later than [\_\_\_\_\_] days after Contractor's Initial Claim Notice, or such later time as mutually agreed in writing by Owner and Contractor.

From the owner's standpoint, this clause should include short time frames for providing notice of claims for additional time or money. The advantage of shorter time frames for notice is that it prevents a contractor from sitting back while claims are accumulating and then confronting the owner with a huge claim at the end of the project. This clause also acts as an early warning system for the owner. The sooner that the owner gets notice of the claim the sooner the owner can investigate the facts and develop a plan to either avoid or mitigate the impact of the claim.

On the other hand, shorter time frames for notice in this clause may cause the contractor to inundate the owner with claim notices, knowing that it must comply with a tight notice provision. In addition, the true cost of a claim may be very difficult to quantify within the limited period provided. The contractor's view is if the owner caused the cost to be incurred or is responsible for it being incurred, the owner should be required to pay. A tight notice provision may operate unfairly to deprive the contractor of compensation it is rightfully owed.

F. Insert a clause that defines the trigger point for increase or decrease in the contractor's profit and overhead for changed work based on percentage of contract sum or absolute dollar amounts:

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<sup>5</sup> Can also be modified for use in the subcontract agreement.

Contractor agrees that for additive Change Orders no profit and overhead shall be charged unless the aggregate amount of direct costs of Change Orders exceeds [%/dollar amount] of the initial Contract Sum. Owner agrees that for deductive Change Orders no deduction shall be made for Contractor's profit and overhead on the deleted Work unless the aggregate amount of direct costs of Change Orders exceeds [%/dollar amount] of the initial Contract Sum.

This provision recognizes that changes, whether additive or deductive, do not necessarily impact profit and overhead. Furthermore, it prevents the owner and contractor from becoming bogged down in disputes over the value of smaller change orders. Not every additive change order, especially if the dollar value is minimal, will impact the contractor's overhead or justify additional profit. On the other hand, some deductive change orders may actually require more effort of the contractor, and unless very extensive, the deductive change orders is unlikely to reduce the contractor's overhead.

G. Insert a clause that addresses how overhead costs (i.e., field staff and overhead) are calculated on changes:

No increase in the general conditions costs shall be allowed for changed Work unless (a) such change extends the Contract Time; or (b) Contractor demonstrates to the reasonable satisfaction of the Owner an increase in actual general conditions costs incurred directly and solely as a result of the changed Work.

Change orders will typically cost an owner more than base contract work. However, the contractor should be required to show an actual impact in its general conditions costs before recovering such costs. It should not be assumed that every change impacts general conditions costs.

H. Limit payment on construction change directives (or similar directive) so that the Contractor is incentivized to negotiate the final terms of a change order:

Owner shall have no obligation to pay for Work performed pursuant to a Construction Change Directive unless and until the price and time impact of such Work have been finalized in a Change Order.

OR

Owner shall have no obligation to pay for Work performed pursuant to a Construction Change Directive to the extent such Work is performed more than \_\_\_ days after issuance of a Construction Change Directive unless a Change Order has been signed by the parties with respect to such Work.

Construction change directives are subject to misuse. They are used when the owner and contractor cannot agree on the price and time impact of a change. When issued, the construction change directive may provide that the owner shall pay on a time and material basis until a change order is negotiated. The problem is that the immediate urgency passes, work is being done in the field and the contractor is getting paid. The incentive to meet and confer on the final terms of a

change order is gone. By prohibiting or limiting the payment on construction change directives, the parties will have a substantial incentive to work out a change order as quickly as possible.

On the other hand, the contractor has the right to get paid for extra work performed. The owner should not be unjustly enriched just because agreement on price cannot be obtained within some defined time period. The contractor's view is if the owner wants the right to require, with advance agreement on time and price, the performance of extra work, then the owner needs to remain obligated to pay. This proposed change, from the contractor's perspective, puts too much leverage in the owner's hands.

I. Modify the changes clause to preclude recovery of the indirect costs of multiple changes:

Contractor waives any and all rights to claim additional time or money under the for Work to be performed under this Change Order. This Change Order constitutes compensation in full to the Contractor for all costs and markups directly or indirectly attributable to the changes ordered herein, for all delays related thereto, and for performance of the change within the time stated.

Most change orders provide that the execution of a change order and agreement on pricing of the change order constitutes a waiver of any additional costs incurred in performing the modified work<sup>6</sup>. However, often the cost of a particular change in the scope of the work cannot be determined until after the effect of the change has been included with the effect of other changes to the project. This is what is called the "ripple effect" or impact cost of the issuance of multiple change orders.<sup>7</sup> This modification attempts to bar the assertion of indirect impact claims and precludes the contractor from later seeking the recovery of indirect costs for multiple changes.

#### RELATED TOPICS:

Differing Site Conditions  
Termination  
Compensable and Excusable Delay  
No Damages for Delay  
Pay-if -Paid  
Flow-Down  
Hazardous Materials

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<sup>6</sup> *United States v. Rice*, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53 (1942).

<sup>7</sup> *Appeal of Pittman Construction Co.*, G.S.B.C.A. 4897, 81-1 B.C.A. (CCH) ¶14,847 (1980).