

Change Orders – Follow the Contract and Think Like a Lawyer

Presented by:
Kate Pettit, Esquire
Offit Kurman, P.A.
484-531-1706
kpettit@offitkurman.com

Session Objectives

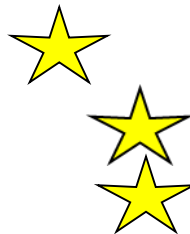
- Contract Drafting
- Common Scenarios/ Practical Realities
- Considerations in Preparing Change Orders
- Case Studies

What are change orders?

- A change order is any change to the original contract regarding the scope of work, price or schedule agreed upon between any two parties in a construction project.
 - Includes changes in labor, materials and time
 - A change order is not a separate contract.
- Change orders are very common in a construction project since unpredicted events happen all the time, causing a need to change the original agreement.

Common Reasons for Change Orders

- Design changes are made after the project has started
- Plan modifications or deletions are made
- Extra work is required above the stated scope
- New instructions are provided by the owner, an architect, or the site superintendent
- Drawings need more detail
- Materials or workers are delayed
- Job site conditions are not as expected
- Conditions affect safety
- Poorly defined scope of work
- Unrealistic timelines are in place
- Unrealistic budgets are in place



Start with the Contract

- No perfect contract
- Scope of work
 - Must be clear
 - Identify potential differences in interpretation
 - Define what is included in the scope of work
 - Define what is not included in the scope of work (exclusions)



Change in Work Clauses

- Specify procedure for change orders
- Signed written change order is necessary
 - Contractor is not required to do work outside the original scope of work without a signed change order
- AIA-A201 2017 - Article 7
- AGC ConsensusDocs 200 – Article 8

Sample Changes in Work Clauses

- Contractor may at any time, make changes in the work herein contracted for and the Subcontractor shall proceed with the work as directed.
- If said changes cause an increase or decrease in the cost of performance or in the time required for performance, an equitable adjustment shall be made and this Subcontract shall be modified accordingly.

Sample Changes in Work Clauses – Specify Written C.O.

- ~~• Contractor may at any time, make changes in the work herein contracted for and the Subcontractor shall proceed with the work as directed.~~
- Changes in the scope of work may only be performed upon execution of a written change order signed by both Contractor and Subcontractor.

Sample Changes in Work Clauses – Be Specific

- ~~• If said changes cause an increase or decrease in the cost of performance or in the time required for performance, an equitable adjustment shall be made and this Subcontract shall be modified accordingly.~~
- A change order shall be based on an agreement between the Contractor and Subcontractor for a change in scope of the work, as well as a related and appropriate adjustment in the price and schedule. All other provisions of this contract shall apply to change order work.

Sample Changes in Work Clauses - Clarify Responsibilities

- Contractor shall not be required to pay for changes in the scope of work performed by Subcontractor if said work is performed prior to the execution of a written change order by both Contractor and Subcontractor.
- Subcontractor shall not be required to perform work which would result in a change in scope absent a properly prepared change order executed by both Contractor and Subcontractor.

Sample Changes in Work Clauses – Specify Who Has Authority

- Such changes in the work shall be authorized by written change order signed by _____.



Sample Changes in Work Clauses – Specify Overhead and Profit

- Subcontractor shall each be entitled to 10% overhead and 5% profit on all change orders.

Sample Changes in Work Clause

Changes in the scope of work may only be performed upon execution of a written change order signed by both Contractor and Subcontractor.

← Written, executed C.O.

A change order shall be based on an agreement between the Contractor and Subcontractor for a change in scope of the work, as well as a related and appropriate adjustment in the price and schedule. All other provisions of this contract shall apply to change order work.

← Define requirements

Contractor shall not be required to pay for changes in the scope of work performed by Subcontractor if said work is performed prior to the execution of a written change order by both Contractor and Subcontractor. Subcontractor shall not be required to perform work which would result in a change in scope absent a properly prepared change order executed by both Contractor and Subcontractor.

← Define responsibilities

Such changes in the work shall be authorized by written change order signed by _____.

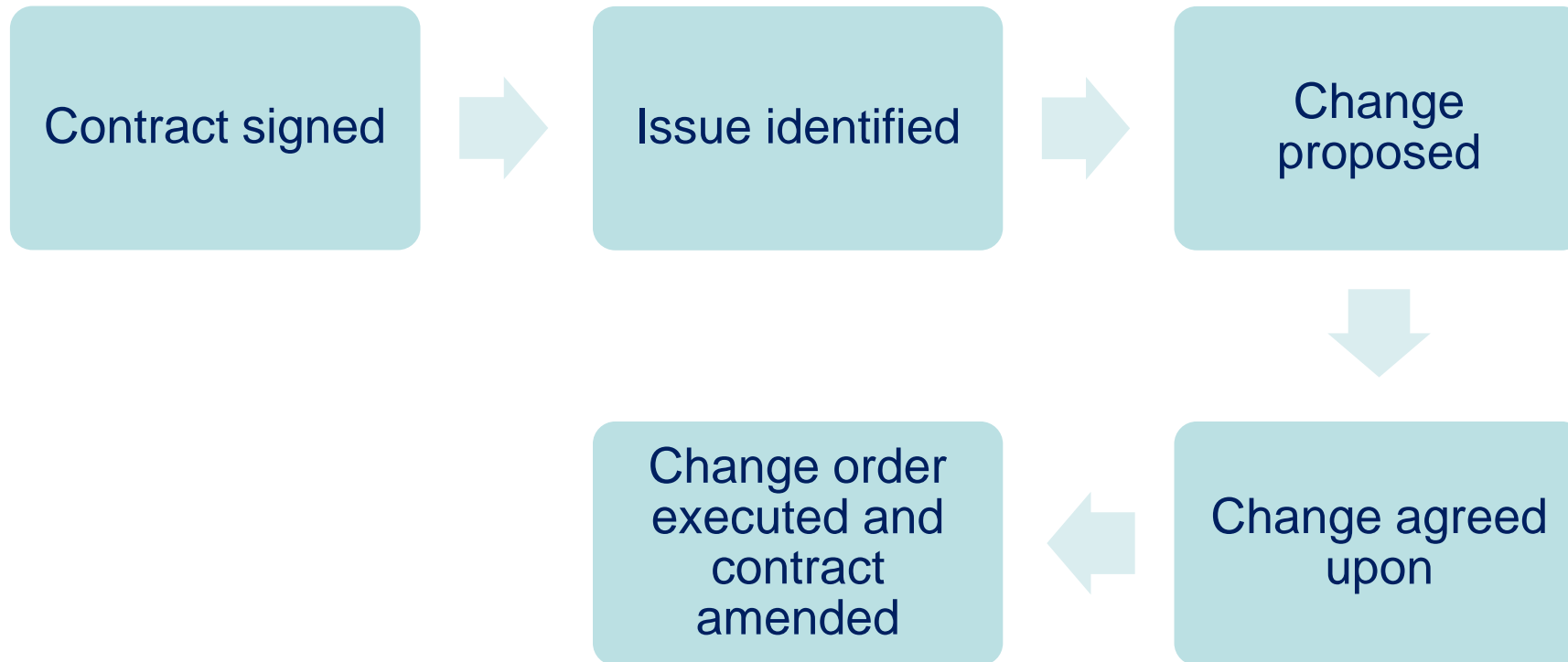
← Specify authority

Subcontractor shall each be entitled to 10% overhead and 5% profit on all change orders.

← Specify overhead and profit



Change Order Process



Perfect Scenario

- Obtain approval in writing before doing work
- Prepare change order that includes:
 - A thorough description of the change – how is it different from the original scope of work
 - Identify deletions from scope
 - Identify price change
 - Reason for the change
 - Projected impact on project completion date
- Have change order executed by both parties

Practical Realities

- Common scenarios in the field
- No time for formal change order
- Send email confirming scope, schedule and price
 - Have owner/contractor confirm their understanding
- Know the risk



Verbal Change Orders

- Three issues:
 1. Was the verbal change actually directed?
 2. Did the person who verbally directed the change have authority to do so?
 3. Was there an agreement on scope, budget and timeline?

Custom Contracts and Form Change Orders

- Custom contracts can identify potential issues
- Form change orders can be made available to field personnel
 - Why?
 - Less confusion
 - Better paperwork in the file
 - Can customize the change order in the field
 - Can tie back to the original scope of work
- Training for field personnel on how to handle change orders

What if owner and contractor disagree on pricing?

- Can stand firm on the contract language that contractor does not need to perform work without a signed change order
- Can also ask the architect to weigh in on what is fair

Common Issues in Dispute

1. Whether work was in original scope of work
2. Impact on budget
3. Impact on timeline
4. Authority

Deductive Change Orders

- Change Order or Partial Termination?
 - Is deletion major or minor?
 - Will other work be substituted for the deleted work?

Pricing a Deductive Change Order

- Two methods:
 1. Deleted work is in a line item (easy)
 2. Deleted work is an inseverable and integral part of the overall project (hard)
 - Price for the deletion is the actual cost saved by the contractor

Negotiating a Change Order

- What is the goal?
 - This may depend on whether the contract is in progress or not
- Get the facts
 - What's extra?
- Define any disagreements
 - Is there a dispute as to fault, cost, timing, etc.
- Bargain a solution
 - Can there be an agreement on cost, time, etc.
 - If not, can the parties agree on a mechanism for resolving disagreements
- Document the agreement

Construction Change Directives

- Allows an owner to unilaterally change the work without agreement
- Owner issues CCD, and contractor must complete the work
- Additional compensation and completion time would generally be decided by architect instead of agreement of the parties
- Contractor **MUST** complete the work

Cardinal Change Doctrine

- Protects contractors from overreach in change orders
- Some changes are so fundamental that they alter the original obligation undertaken by contractor that it would be a breach of the contract by the owner to insist that the contractor perform the work

Considerations in Litigation

- To determine whether a “change” is really a change, look at:
 - Pre-bid documents, responses to RFIs, field work orders, and the parties’ course of dealing
- If there is no written change order, consider whether the parties may have waived the requirement through their words or actions
- Change to one contract doesn’t necessarily change another

Case Study

Oral Change Orders

- *Son-Shine Grading, Inc. v. ADC Const. Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984)
- Verbal agreement between superintendents for contractor and subcontractor found to be sufficient to amend subcontract despite clause prohibiting verbal amendments
- Contract provision can be waived by the parties' actions

Case Study

Oral Change Orders

- *Charles T. Driscoll Masonry Restoration Co., Inc. v. Cty. of Ulster*, 40 A.D.3d 1289, 1291–92, 836 N.Y.S.2d 362, 365–66 (2007)
- Contractor obtaining written change orders during the time in dispute showed the parties did not waive formal requirements of changes clause

Case Study

Who has authority to direct changed work?

- *First Gen. Constr. Corp. v. Kasco Constr. Co.*, 2011 U.S. Dist. LEXIS 55349 (E.D. Pa. 2011)
- Contract specified that only the project manager was authorized to direct change order work
- Superintendent orally directed change order work
- The Court held that verbal directives by an unauthorized person are insufficient to support a claim for change order work

Session Summary

- Contract Drafting
- Common Scenarios/ Practical Realities
- Considerations in Preparing Change Orders
- Case Studies

THANK YOU

For Further Inquiries:

Kate Pettit, Esquire

Offit Kurman, P.A.

484-531-1706

kpettit@offitkurman.com