

BEST PRACTICES

Change Orders

things to watch for in negotiations

By Aman Kahlon



It is the rare construction project that is completed without any change in the work. In most sophisticated construction projects, the contractual mechanism for managing these changes involves the issuance of a change order. However, managing change orders is not something project teams are always well-trained on, which can cause issues for small and big contractors alike. Let's walk through some of the items a contractor should keep in mind when negotiating a change order with an owner.

1 MAKE SURE YOUR PROJECT MANAGER HAS READ AND IS FAMILIAR WITH THE CONTRACT

Your project manager or whoever will be responsible for negotiating a change order should understand the change order provision in your contract and any related terms and conditions from the contract (e.g., the differing site

conditions clause, the force majeure clause, etc.). These provisions will describe the different occurrences that entitle you to a change order and the various conditions you must comply with to receive a change order.

A contractor who does not understand these terms may inadvertently waive certain rights or remedies. For example, most change order clauses require some sort of notice prior to performing the change work. In some circumstances, ignorance of the notice requirements may forfeit a right to a change order.

You may also leave money on the table if you do not read your change order clause closely. You need to, for instance, understand what markup you're entitled to and if there are any contractual rates applicable to the change work. You also need to think carefully about what the downstream impacts to any subcontractors or suppliers will be. Do your subcontracts have change

order requirements that differ from the general contract? Will those differences impact your costs? Does your change order pricing fully account for increased insurance, bond, Subguard, subcontractor overhead, etc. costs?

2 READ THE FINAL CHANGE ORDER CAREFULLY, ESPECIALLY ANY CLOSING OR RELEASE LANGUAGE

On big or contentious change orders, the price negotiation may be all-consuming and exhausting, which may make you anxious to sign once you have settled on a price. But, before you execute the final change order, you should review it carefully (with counsel if necessary). You want to make sure that the final change order language captures the actual scope of the changed work. If there are changes to the contract or specifications arising out of a change, you should make sure that those are incorporated and that any references to those changes



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elsewhere in the contract documents are appropriately revised to be consistent with the new language. You also want to be mindful of how the changed work is described. If it is described in vague or broad terms, you may later find an owner expecting you to perform work that you did not originally contemplate in the change.

Similarly, you should pay attention to the closing or release language on the change order. Owners may require more

expansive releases that could cut off your right to recover on future changes to the work. If you expect to encounter additional changes that are similar to the change order work but are not captured in your pricing, you should try and narrow or modify the release to account for anticipated future changes, where possible, which may better preserve your rights relative to future scope disputes.

CLOSING THOUGHT

Scope changes can be difficult to navigate. Because "time is of the essence" on most construction projects, you may find yourself under a lot of pressure to negotiate a change quickly so as not to delay the project and increase costs for all parties involved. That is why it's important to spend time drafting a contract that defines a reasonable process for evaluating and granting change orders. Then, when problems arise that require a change order, you have a strong framework for negotiations.

Adhering to your contractual guidelines will make the change order process run smoothly. However, to avoid a disadvantageous result, you also need to think comprehensively about the project and how a particular change will affect follow-on work and work by your subcontractors and suppliers. Paying attention to your contract and thinking holistically about your project as you enter change order discussions with an owner should help you achieve a successful outcome. ■

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