

CONSTRUCTION CONTRACT CHANGE MANAGEMENT **Controlling Project Scope Creep**

Two characteristics of the construction business are prevalent – no project finishes without change to the envisioned outcome, and all projects must endure owner/contractor disputes that may lead to claims for increased costs and time extension. Such is acknowledged as the nature of construction. This article recognizes the conditions will continue indefinitely and identifies some contributing factors with a view to minimizing their impact and avoiding costly claim development or litigation.

Simultaneous administration of multiple contracts and subcontracts for large-scale construction projects is complex. The following thoughts and comments on several key topics may help with managing variations, lower the risk of mismanaged scope change, and ease project closure.



Change Recognition. Timely recognition of changed conditions is essential. When addressing claims and disputes, construction industry literature is replete with discussions of common sources of contract change or variance arising after work has started. Examples include design errors or omissions, specification revisions, unforeseen site conditions, owner caused delay, work suspension, schedule acceleration, regulatory requirements, forces of nature, and opposing contract interpretations. Without early recognition, which is a major tactic that requires a change conscious attitude among involved parties, necessary attention to the impact of a change on project time, cost and quality can be diminished. Once a potential change to a contract is identified the contractual process of notification, approval or denial is best initiated immediately.

Change Management Planning. A change management plan is key to achieving effective contract change control. Practical knowledge of contract entitlements among project stakeholders is upgraded when senior management for each party takes steps during project initiation to ensure a high priority plan is created and maintained. In addition to defining responsibilities, a project change management plan will address approval levels for authorizing variations to the scope of work, documentation obligations, and progress tracking requirements. The process needs to be compliant with contract provisions. Early plan implementation and participant indoctrination is essential, and periodic updates are necessary. A good plan will involve project performance measurements to determine the cause and magnitude of a variation relative to a scope baseline, and the corrective action required. An important component of an effective change management plan is a requirement to ensure approved changes are thoroughly incorporated across all other project management plans.

Project team responsibilities require clear definition in a plan. One key to success of a change management plan is early confirmation of the level of experience or training in contract administration of staff responsible for managing and implementing the program. Project managers, contract administrators, project engineers, construction managers and superintendents having full understanding

of the project and empowerment to solve problems are in the greatest position to recognize changed conditions during the work. Depending on project role, responsible party knowledge can range from a basic familiarity with the contract's documents through more detailed knowledge of its legal concepts, rights and obligations, to a temporal understanding of construction law. Degrees of familiarity can vary by title or function and performance monitoring should be included among the project's quality control attributes to be monitored.

Scope Creep. Acceptance of unnecessary change adds to scope creep. Diligence in potential change detection by senior members of a change conscious project team is required for mitigation of risks leading to disputes or claims. Frequently, design leads or mid-level site supervisors lack familiarity with commercial portions of a contract key to their function. Contract administration duty may be split among available but inexperienced project staff or managed as only a small portion of buyer or field engineer duty. Often members of a project team lack familiarity with or even an interest in the commercial aspects of contracts. Lack of awareness of key provisions by design, construction or owner personnel combined with personal preference or a greater technical than commercial mindset can lead to an undisciplined change control process and even gold-plating, enhancing the risk of scope creep. In short, allocation of contract change management to the inexperienced or untrained should be avoided.

Change Consciousness. A change conscious attitude among stakeholders is important. Prompt identification and notification of a potential design or construction change is a common but too often neglected construction contract provision. Owner, contractor or subcontractor intransigence in change request notification can result in recycle of work and delay. Lack of awareness or waiting too long can impact a contractor's right to negotiate a remedy, reach resolution, or even file a claim. Unfortunately, on larger projects notification can be overlooked or delayed as work progresses. It's not uncommon for a change to be incorporated in the work before formal recognition. Integration of nonessential work scope outside the minimum required to meet an approved specification as a result of the personal preferences or partialities of designer or owner team members is a frequent example. Other examples include informal directives by owner representatives to designers or site labor for 'extras' or modifications to means and methods, and pre-startup operator alteration of installed equipment. Of note, changes arising out of attempts to please a client in the hope of future contracts are usually a mistake.

Owner/Contractor Responsibilities. Initiating a contract change introduces added responsibility to both parties. By originating a change order, owners implement a right to direct changes in the work within the scope of a contract and assume an obligation to ensure equitable adjustment of price and time is realized. Contractors detecting job conditions needing a change to the contract are commonly required to advise the owner in writing, directly or within a specified time period, stating the impact on price and time. Either party's failure to recognize and provide notice of a changed condition in a timely manner can lead to recycled design or construction work, schedule delay, unrecovered cost, unnecessary disputes or unsettled claims and even litigation.

Relative to the foregoing, three contractual issues are important. It's wise for both parties to ensure change management is conducted by representatives that understand the concepts of constructive change to a contract, constructive acceleration, and cardinal change. Each can be difficult to recognize early, and when identified after out-of-scope work has commenced a settlement process can easily rise to a dispute or claim. Construction publications define a constructive change as the result of owner action or inaction that can be interpreted as a change to a contract although no proper, written change request was issued. It occurs when work is performed beyond contract requirements, without a formal

order under the changes clause. Under certain circumstances a constructive change can be deemed a valid oral contract, even after work is underway or completed.

Constructive acceleration, a frequent source of construction disputes, may occur when an owner directs acceleration of performance to improve the current rate of progress but refuses to grant an extension of time, and insists on maintaining completion by a contracted date. Simply put, construction acceleration is when excusable delays occur that entitle the contractor to some extensions; the owner was notified and a time extension was requested; and the owner failed or refused to grant the time extension and required completion by the original completion date. Here relief is possible only if the contractor can demonstrate constructive acceleration notice is given, a delay is excusable, an extension is requested and denied, and added costs to accelerate are expended.

A cardinal change is a change that due to the type of work or the extent of the work is beyond the general scope of the contract and beyond the reasonable contemplation of the owner and contractor at the time of contract formation. It is a change made by an owner that is so extensive or of such magnitude as to be outside the scope of the original contract. Cardinal changes may arise from changes in quantity or from changes in the means and methods of performing work.

The relevance of the three topics should receive early consideration when variations are under review as they will certainly be addressed should a dispute move into claim status or litigation.

Project and Contract Closure Considerations. Simultaneous resolution, documentation and contract revision processes ease project and contract closure. Because of the impact incorporated contract revisions can have on the accuracy of project cost and schedule processes, identifying, negotiating and resolving contract changes and updating of contracts is best done on an ongoing basis. Delayed integration of approved change orders into contracts can lead to false progress reports and an overly complex project completion. Timely updates and swift contemporary administration incorporating approved changes to pricing and time, deliverables, quantities, or work performance can reduce inaccuracies in reports and closure delay due to unresolved disputes. Documentation to be preserved in support of both contract and project closure should include both approved and unapproved change requests, negotiation correspondence, details of modifications, work performance reports, as-built information, inspection results and payment records.

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