

## Legal Information on Change Orders

***Why should we be so concerned about change orders?*** There is nothing that engenders one's ire faster or brings you to the verge of a violent dispute, as our friend: the change order. Or, as one judge stated, construction is nothing more than "organized chaos", and actually "analogous to ever changing commands on the battlefield". Fact is, when you're facing a judge, mediator, or arbitrator, there is hardly any construction dispute that does not include within its nasty ambit that loved or dreaded concept of an extra. So let's try to get you out of that unpleasant arena. For a moment we are going to be your Mother and give you a few well intended nags.

***What are the basic kinds of change orders?*** Generally speaking, there are three instances in which change orders are issued: 1) owner-directed design changes, where the owner or representative decides to make the change, 2) deletions, and 3) the contractor decides there is a need to do the extra work, which the courts call a "constructive change".

***How do change orders work?*** The idea that in the middle of a job a contract can be changed without re-signing a totally new contract is foreign to the law. Imagine entering into a contract to purchase a two bedroom home and right before close of escrow, the buyer orders the seller to construct a third bedroom. We would think the person had gone mad. Construction projects are an exception. This is because the courts recognize that changes occur frequently and there has to be a way to handle them. So, the idea is contractors can be directed to do additional work, even if it is disputed. In general, a contractor is usually not allowed to stop work or walk-off the project. Instead, the contractor will continue doing the work, will not waive its rights to receive additional compensation, and any disputes will be resolved at a later date. The courts then come in and may help a contractor receive additional compensation if it is later found the owner should have paid the contractor, viewed retrospectively. This all sounds great, but as you read in more detail under this article, there are lots of complications with this simple idea.

***When does a change become an extra?*** You know the answer to this one: every time there is a substantial (definition: something that is not minor) change in the general scope of the work that affects money or time. In other words, an extra is an addition to the contract involving work that had not been included in the original agreement.

Unfortunately for us, the decision as to what is an extra is a "factual issue" to be determined by the courts on a case-by-case basis. This is another way of saying it can go either way depending upon who you have as a judge. To be technical, you get extra compensation only if you prove the following: 1) the additional work is outside the general scope of the original contract, 2) it is not rendered necessary by the fault of the contractor, 3) the contractor gives some kind of notice that it considers the work to be extra so that no one can assume it is done as a freebie or voluntarily, and 4) contractor incurs extra cost.

So, to use an exceedingly simple example, if the contract was for building a house and an adjoining well to a specific depth, a later direction to dig the well 5 ft. deeper would be an extra. The rule is easy to state but the real difficulty is applying it to the facts, since it is not uncommon for an owner to claim it is within the contract. In general terms, change order disputes may result from the following circumstances: the owner decides to make a change, circumstances beyond the control of the parties, unforeseen site or weather conditions, differences in material quantities estimated and actually furnished, design deficiencies, unavailability of products, or the unavailability of suitable materials.

But there is some good news: when you have a specific job description, working drawings, or specifications, it is relatively easy to determine. Again with the lecture: this is also a good reason to have detailed and specific job descriptions in your contracts. Who wants to get stuck with doing the work without extra compensation because the owner claims your job description is vague?

Remember that change orders can only be made to the work, not the terms of the contract. For example, the owner could not unilaterally decide in the middle the project to pay you under a different payment schedule. But it could require you to do additional work.

**T and M and Cost-Plus contracts:** Change orders only apply to fixed sum or lump sum contracts. Cost-plus and T and M (Time and Materials) contracts, unless they have a guaranteed maximum, by definition cannot have a change order. The final price is whatever it takes to finish the job. You know this as a contractor, but most owners do not. With the first changes requested by the owner, tell them there will not be any change orders because of the nature of the contract. At the same time, tell them the more they change, the more it will cost, so they are not surprised at the end.

**Allowances and change orders.** Assume you have a \$10,000.00 allowance for finished plumbing fixtures, most of which have already been picked out by the owner. The owner then goes to a supply house and orders expensive fixtures. Should you use a change order? Yes. The owner needs to know right away they may be going over the allowance, since in a way, it is a ceiling or a fixed price for that segment.

***If the change order is not in writing, do I lose my right to extra compensation?*** Many contracts allow a change order only if 1) written notice is given within a certain period of time before performing the extra work and/or 2) it is in writing and signed by the owner or representative (architect, engineer, etc.). Some contract provisions are even tougher and say that the written change order is a condition precedent to extra compensation and that without it, the contractor under no circumstances shall be entitled to further monies (example: "Such a written and signed change order is an express condition precedent to the right of the contractor to receive additional compensation"). So, what if you are told to do the work, dutifully comply, but because of the urgency of the job or because the owner never gets around to it, you never receive a written change order? Or, even worse, after you do the work, the owner changes his or her mind and will not pay you extra?

In NationalLienLaw's opinion, there is nothing more heavy-handed or draconian than the owner directing you to do work and then after you're done, throwing in your face that you did not sign a change order that had been sitting on their desk unsigned. But does this mean that courts and arbitrators agree with us? In many cases they do, but in others, contractors lose on this issue day after day. We're not trying to give you double talk, but simply telling you this is fraught with uncertainty and you should be very careful, including seeking competent legal advice.

Before getting into the details, as a generalization, you'll be happy to know that most courts will come to your aid and allow it out of fairness. The courts really let their creative juices flow on this issue, coming up with almost unlimited theories that will help your cause. The reasoning is that you were told to do it and the owner benefited by it. It comes from an old, common law rule that if a condition to a contract (the requirement of a written change order) is within the control of one party who decides it is not necessary, that party cannot turn around and later say the other person has not complied with it. This is sometimes expressed in the form of the rule of estoppel and waiver. In other words, someone relies to their detriment on a representation by another which cannot be retracted after you have changed your position.

With this in mind, let us now be more specific. There are three types of construction clauses in this area: 1) requiring notification within a certain period of time after you learn of the facts which give rise to the change, 2) requiring the owner or representative sign a written change order before the work is done, and 3) requiring submission of a claim before the work is started with an itemization of the extra costs. Some contracts have one, both, or neither of these provisions. As to 1) above, a typical contract provision might state:

“Subcontractor shall give written notice of its intent to perform extra work or request additional compensation, no later than 21 days after occurrence of the event giving rise to such claim or extra work. Under no circumstances, shall additional compensation or damages be allowed if the notice is given after starting the extra.”

This is the easiest for you to perform. All you need to do is give written notice that you are planning to do the work and will later claim extra compensation. Because it is relatively easy and does not require written agreement from the owner or representative, the courts tend to be a little stricter with you. In other words, the court will find against you if no notice at all was given. If your contract requires such notification, use the form titled: “Change Order Confirmation” (C/O-2), or if you are in the field at the time, use either “Field Change Order” (C/O-3 full size) or “Field Change Order” (C/O-4 one-half size). It is recommended you use this notice even if it is not required under the contract.

But what if a contract requires 21 days notice, for example, but the notice is given too late or after you have already started the work? What do the courts say? They go two ways. The first way, as seen by the decisions in New York (as well as Wyoming, Florida, Massachusetts, Georgia and Missouri, as examples only) are strict and if you do not give it on time, there is no exception and you are out of luck.

On the other hand, U.S. government cases as well as Alaska, Louisiana, Washington, and Ohio, to name a few, are more liberal and will allow the untimely notice as long as it does not prejudice or interfere with the owner.

As to 2) above, a typical contract provision might state:

“Subcontractor shall make no changes in the work required to be performed under this contract, nor shall subcontractor perform any extra work without the prior written consent of the owner or representative, as seen by an executed written change order signed before the extra work commences which describes the work, the additional compensation, and the extended time, if any.”

Fortunately, the AIA is wise to this problem and its contracts do not require a prior written and signed change order before proceeding. They take a more practical approach and are more concerned with keeping the work flowing and resolving disputes later. However, they do require that 21 days notice be given after first learning of the condition which can give rise to the claim (AIA Document--1997, General Conditions to the Contract, 4.3.2).

You will be happy to know that since the mid-20th century, most (but not all) states do not require a signed change order as long as: 1) there is clear evidence the owner or general contractor (if you are a sub) verbally authorized and directed the work, 2) the work actually is an extra, and 3) the contractor or subcontractor relied upon that direction and actually did the work. And better yet, it is the humble opinion of NationalLienLaw that if you send the owner or general contractor a change order and it is never signed, in most cases you will have an even better chance of prevailing as long as it is delivered prior to starting the work.

The courts are more likely to come to your aid if there is some fault on the owner such as: past conduct in which the parties do everything verbally; extras caused by design errors or ambiguous drawings; the architect is authorized to waive the written requirement (most contracts do not allow this); the owner later acknowledges the extra in writing; the owner threatens you with economic duress; changed conditions unforeseen at the time of the contract; emergency situations, or new regulations or codes are enacted after the contract.

However, in states which strictly require an extra to be signed and in writing, there is a quid pro quo for the person doing the work. In a strange way, the states have a rule which is very easy to stomach, namely, if someone tells you to do extra work which you do not want to do, and a written change order is required but not forthcoming, you have the absolute right to refuse to do the work.

So what do you do if your change order is not signed? Most courts frown on your abandoning the project at that point and look much more favorably if you complete the project and make your claim later. If you have been told to do the work, it is agreed to be an extra, but there is no agreement yet as to the pricing and terms, use the form

titled: "Change Order Confirmation" (C/O-2), or if you are in the field, "Field Change Order" (C/O-3 full size) or "Field Change Order" (C/O-4 one-half size).

As difficult as the signed change order requirement is, it pales in comparison to clauses which also require you to submit a detailed "claim" before starting the extra work. No, we are not crazy and some contracts actually say that. An example would be:

"The contractor shall give both the owner and the engineer 1) notice within fifteen days of the occurrence of the event giving rise to any claim for extras or damages and 2) written notice of the amount of the claim with all supporting data within 45 days of such occurrence, unless the engineer allows an additional period of time to ascertain accurate cost data."

Amazingly, there are courts which enforce this stiff provision, so be careful. For this reason, we have included such a notification as the second page (it is called "Notice of Claim") of the form titled: "Notice of Extra Work Performed Under Protest" (C/O-5), and it is built into the form titled: "Additional Work Protest" (C/O-6). If you have agreement on all terms and both parties have signed the change order, you need not serve this notification of your claim.

The courts have been concerned about this apparent unfairness by sometimes finding that the contractor is relieved of this substantiation requirement if the full extent of the claim could not be known until later. In other words, you don't know how much extra it will cost you until the dust settles later on. See *E. C. Ernst, Inc. v. General Motors Corp.* 482 F. 2<sup>nd</sup> 1047 (5<sup>th</sup> Cir. 1973). The Associated General Contractors (AGC) was apparently so concerned about this onerous requirement that they made a change to their standard form contract in section 4.3.2 which says in essence that the detailed claim only needs to be "initiated" rather than "made" within the 21 days after occurrence of the event. In other words, you may not know the exact extent or amount of the claim and so in the beginning you outline what you know and augmented later when you have more information.

***Is it to my benefit to have a contract provision requiring signed change orders?*** I know what you're thinking. You have all heard stories about how contractors bid low and then make money on the other end with change orders. This especially applies to public works projects. But it never really works that way. Wouldn't you rather move-in quick, finish the job, get your profit and overhead, and go on to the next project just as quick as possible? Think of the extra time in special ordering, moving your crew around, and ultimately having to dispute matters with the owner. Frankly, they can be more of a hassle than that they are worth. With this in mind, it probably is a good idea to require a signed change order in your contract. Naturally, that will prevent some owners from signing such a change order, but when they do, it sure is great in preventing disputes.

On the other hand, there is a back-up position. If you are told to do the extra but the

owner or general does not sign the change order, you are not completely out in the dark because the forms in this Kit will hopefully allow extra compensation. One of the change order forms allows for extra compensation, even if there is no agreement as to price, if you were actually directed to do the work by the owner. See “Change Order Confirmation” (C/O-2), or if you are in the field, “Field Change Order” (C/O-3 full size) or “Field Change Order” (C/O-4 one-half size).

There is another cool thing about having a contract which requires signed change orders. If you don't want to do the change order or are fearful that you might not be paid later on, it's always nice to have an excuse and for not doing the extra work. What can be more natural than pointing to the contract requirement of a written change order and telling the owner or general that you cannot do the work unless the signed change order is received? That may stop them right in their tracks. Since they signed the contract with this provision, it's hard for them to complain. Although there will be all kinds of threats, including delay of the job, impeding the other trades, etc., but if it is a contract requirement, you might decide to stand tough. There's also something very suspicious about someone saying “trust me, we don't need it signed”, when it only takes a few moments to do so. Many times this can be a prescription for fraud. The bottom line: the more often it is signed the better chance you have of being paid. But, as you know from reading other sections of this article, refusing to do a change order only applies if there is not a contract provision which allows the owner to order changes.

If the insistence on a written change order damages the relationship, maybe there is something wrong with the relationship in the first place. And it is absolutely untrue that change orders are too hard to prepare in the field or under urgent circumstances. Write it out on a scrap of paper, for goodness sakes, or better yet, use the sample field change order form included with this Kit. See “Field Change Order” (C/O-3 full size) or “Field Change Order” (C/O-4 one-half size). Literally, lawsuits have been won with written statements made on a cocktail napkins!

It is recommended you go over a written change order provision with the owner (especially residential owners) in the beginning when you're negotiating the contract. Tell them you're perfectly happy to build their project exactly as depicted in the plans, but if there are any changes, you're going to have to charge extra. Warn them in a friendly way that projects become more expensive mostly because of change orders. Then, when they hit you with the first change order, remind them of the previous conversation and say you will be happy to do so but it is going to cost them more money. They will appreciate this candor and there will be more changes they will actually sign and therefore pay. The standard form home improvement contracts on this web site are worded so that the change order should be in writing, but if a contractor is directed to do the work and does so, the written agreement is waived.

***Can I Refuse to Do an Extra if the Change Order is Not Signed First?*** No, if you have a contract provision which allows the owner to order you to do additional work. Yes, probably if your contract is silent as to changes and change orders. Let's break this down.

If you are working on a larger job which has a detailed written contract, there are very few cases in which there will not be a clause relating to changes. And if there is such a clause, it almost always allows the owner to direct further work. It might say: "The owner may, at any time and under its ultimate discretion, order the contractor to perform additional work within the general scope of the contract." If that is the case, the courts are almost universal in stating that if you're told to do the additional work, you must do so even if there is no written change order. The theory is that stopping the work will interfere with the project and it can be resolved later with an equitable adjustment (a fancy phrase for a change order given by the courts at a later date). In the U.S. government contracts, it might state:

"The contractor shall proceed diligently with performance of his contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the contracting officer (F.A.R. Section 52.233-1(i), 48 C.F.R. Section 52.233-1(i))"

The AIA contract states:

"Pending final resolution of a Claim, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents (AIA Document A201-1997, 4.3.3)"

If you refuse to do the extra work, you are putting yourself in jeopardy of being sued for material breach of contract and possible termination for default. Although you should not get too excited, there are some very limited exceptions: 1) the owner goes "overboard" and you are told to do an extra that is completely outside the general scope of the contract, 2) the contract has an absolute condition that you are not to precede unless the change order is signed and it is never signed (and even in this case some states still require you to perform), 3) you were asked to do hazardous, illegal, or impossible to perform work, 4) the change order involves some unforeseen site conditions which, if performed, would cause you an unreasonable amount of money. An example of 4) is a case in which the government was required to provide adequate sewer conditions but into the job, it was discovered the system had broken down and the government then ordered the contractor, totally outside his contract, to repair the sewer system at a great cost—which the contractor rightfully refused.

But what about those of us who have smaller projects, including residential construction, and may only be operating under a verbal contract or a one page proposal which does not have any language allowing the owner to order changes? The problem is that there is very little reported cases from the courts in this situation for the simple reason that on such smaller projects, there is rarely complicated litigation, especially decisions rendered by an appellate court. Most the cases discuss what happens when there is a detailed "changes clause" provision. Without such a clause, this brings us into the basic law of contracts which says that one party may not change the terms at will and a contract can be modified only if a new contract is signed by both parties. In the opinion of NationalLienLaw, you cannot be forced to do the extra and could refuse.

I know what you're thinking--that is a great theory but it does not work in the practical world. Refusing to do a change order unless it is in writing can cause ill will and damage working relations. Human nature is such that we rarely wish to offend or launch into combat with anyone. So, when the subject of a change order comes up with its potential of offending someone because it may mean they have to pay a more money, we tend to avoid the subject. In actuality, we only create more problems this way because it will fester and become a larger problem at the end of the job.

For this reason, if there is no contract provision allowing the owner to order additional work, do not be fearful of refusing to do additional work unless it is in a signed change order. Stand your ground in a professional manner. Contrary to popular belief, few people are offended if you hold-off doing the work until it is put in writing. If someone does have a relatively violent reaction—something is going on that should give you concern.

The best time to insist on a change order is right at the beginning when it is first discussed. Your chances are 300% better to get it signed when “the anxieties are high”, namely the beginning point when the person really wants it done. Good luck later when you are on each other's nerves.

But, what if it is an urgent situation and no one has the paperwork on them at the time? It might be OK to do the work, but make certain you confirm in writing who told you to do it and when. For such a form, see “Change Order Confirmation” (C/O-2). The standard form home improvement contracts on this web site also have a protective clause in this regard.

***Is there any limit to what we have to do—are there any circumstances in which we can refuse to do major changes?*** Yes, there are limits, but unfortunately they are quite rare. You can only be directed to make changes which are within the general scope of the contract. That general scope is very broad. But, if you were asked to do something which is completely beyond the bounds of the contract, you can refuse and claim breach of contract, together with damages. The only way to understand this is to look at some examples.

In the following cases, the change was considered to be so far out of the contract that the contractor could refuse to do it: *Peter Kiewit Sons v. Summit Const. Co.* 422 F. 2<sup>nd</sup> 242 (8<sup>th</sup> Cir. 1969), finding that a change order requiring backfill to be placed at the same time as the work being done by other subs in the same work area, increasing the cost of the backfill work by 200%; *Employer's Insurance of Wausau v. Construction Management Engineers of Florida*, 377 S.E. 2<sup>nd</sup> 119 (1989), where changes to the contract meant the value increased from 2.3 million to 6.2 million; *Edward R. Marden Corp. v. U.S.*, 194 Ct. Cl. 799, 422 F. 2<sup>nd</sup> 364 (1971), where a hangar being built collapsed because the specifications were defective in failing to state that tie rods had to be installed before the arches were released from the buttresses. The contractor was ordered to reconstruct the entire hangar and incurred increase costs of 3.7 million, almost double the contract price. When it gets this far afield, the courts call it an impermissible “cardinal change”.

If it is considered a “cardinal change”, you are entitled to abandon the contract without being sued, refused the change order, and bring a lawsuit to recover labor and material furnished to date, and even lost profits. You would not be reduced to the limited remedies under the change order provisions, which usually only allow the cost of additional labor and materials plus 10% profit and overhead.

But don't be too confident. In most cases, courts find there has not been a “cardinal change”. Here are some examples: *Wunderlich Contracting Co. v. U.S.*, 351 F. 2<sup>nd</sup> 956 (1965), holding that extensive changes adding 50% to the performance time were still within the contract general scope; *J.D. Hedin Const. Co. v. U.S.* 347 F. 2<sup>nd</sup> 235 (1965), finding that six changes after completion of most of the work, which added 102 days to performance time were still within the general scope of the contract.

But what about directing us to do numerous small changes, no one of which would be considered major? We have all been in this position. Some city inspectors or project managers become so obsessive we suspect they're on steroids. They find fault and make changes on almost everything. This is referred to as: “Death by a thousand cuts”. Whether this would be considered a cardinal change is also a gray area. Again, it is hard for the contractor to prove.

For example, in *Pittman Construction Co. v. U.S.*, 2 Cl. Ct. 211 (1983), there were 206 change orders, but they only added to 12% of the added cost and 10% of the completion date. This was not considered a cardinal change.

***Does it make any difference if our contract and specs are very detailed as to what does or does not have to be done?*** It certainly does. The more detailed the contract or specifications, the less chance of having a change order dispute. For example, in the case of *F.E. Marsh and Co v. Light and Power Co. of St. Ansgar*, 195 N.E. 754 (Iowa 1923), the contractor agreed to construct a dam and power plant under a performance specification that simply required the foundation of the dam to be placed on “bedrock”, without any specification as to exactly how deep. When the elevation of the bedrock was found to be two feet deeper than expected, the contractor was required to do substantial work and insisted on a change order which was not granted. The court ruled against the contractor. Notice how this differs from the case of *Howard v. Harvard Congregational Society*, 112 N.E. 233 (Mass. 1916). In that case, the contractor was required by detailed specifications to “remove fill, earth and stones to the specified depth of . . .”. In the process of excavating, the contractor encountered a ledge of solid rock, informed the architect there would have to be an extra, and later sued the owner for the additional costs. It was successful because of the detailed specifications.

***Is there a compromise position between being a jerk and too much of a nice guy?*** There sure is. The two possibilities are 1) never doing any additional work for free, playing things strictly by the numbers, and always insisting on getting even the smallest extra in writing and 2) constantly doing things free because you are the ultimate “pleaser”. In other words, on any project there are a small number of items outside the scope of the contract that the owner would like performed. Since they are

outside the strict scope of the contract, you have the right to charge extra. However, a lot of people throw them in as customer service.

We have a better idea, with the phrase: "*Tough on the signing and liberal on the terms*". This means always insist on them being put in writing, but be real liberal (low price if they are minor) about how much. That way everybody is happy. Besides, what would you rather have: getting paid 70% of your normal fee without delay or dispute or paying double that in attorney's collection fees if you charge full price and are not paid at all?

And don't even think about giving it away for free. In the process of building good relations with your owner or general contractor, you decide to give them a few change order freebies in the beginning of the job. Big mistake. A business person that does not charge for services always loses respect. You have demeaned your worth and they think less of you.

And, you have to train the owner early or they will constantly take advantage of you. If you give them freebies early on in the contract, they will "nitpick" you to death. But, if they know they have to pay extra and put it in writing, there are not nearly as many requests. After all, these picky little changes do nothing but slow down the project.

***Unforeseen site conditions.*** Talk about a gray area. The contractor sometimes requires extra labor and materials and the owner states that a pre-contract site inspection would have discovered such conditions. The only solution is to have a contract provision which states that a change order is allowed for conditions that are discovered later but were not apparent from an initial physical inspection. The standard form home improvement contracts on this web site have such a provision.

***Building Code Compliance.*** Can you get a change order if you discover later the building code requires extra work? Good luck. Many courts take the position that an experienced contractor is supposed to know the "ins and outs" of the code, and should have factored in those requirements in the initial contract.

But you have a much better chance if there are changes to the regulations or building code after entering into the contract. Here is an example. Three months after awarding the contract, OSHA regulations changed to require the contractor to excavate its ditches with flatter slopes than specified under the prior regulation and the government referred to a clause which made the contractor liable for code compliance, refusing a change order. The court upheld the claim of the contractor. See, *Hills Materials Co. v Rice*, 982 F. 2<sup>nd</sup> 514 (1992).

***Building inspector changes.*** Most owners argue that a change caused by the building inspector is on the contractor's nickel. The assumption is that the inspector is merely pointing out the requirements of the code that the contractor should have known. But we all know it does not work that way in practice. Arbitrary and sometimes nonsensical directions are made by the inspector. And, he may be interpreting the building code requirements that are vague and subject to interpretation. Again, good

luck. Most courts and arbitrator's will assume the contractor should have known and deny the extra. There is a contract provision in the standard home improvement contract on this web site which may help the situation out a bit, but there is no guarantee.

***Architects and engineers--their interpretation.*** In principle it is a simple matter when the owner directs the architect or engineer to make changes which then filters down to the contractor to perform. But it almost never works that way. Many times the architect construes his or her own plans in such a way that the changes are considered within the scope and not subject to a change order. If you have an AIA contract you're dead because the architect is the final arbiter and decides the interpretation of its own plans. If you do not have an AIA contract, that decision is not necessarily binding as seen by the clause in this web site's standard home improvement contract. Except for AIA contracts, a court or arbitrator will probably ignore what the owner intended or hope for--it is either on the drawings or not. If they cannot point to it, they lose. This greatly helps the contractor in a dispute.

Design professionals, we love them, and although the vast majority are very easy to work with, boy, when they go bad, they can really cause a problem with the project. Fortunately, almost all states have the requirements that the owner and its representative must act in good faith and do nothing to delay, hinder, or interfere with the performance of the contractor and the various specialty trades. Breach of this duty equates to compensable delay and disruption damages, if any of the following occurs:

- 1) Inefficiently managing the contract, including the payment process, change order process, work coordination, and scheduling.
- 2) Not providing the contractor with timely access to the project.
- 3) Not completing preceding work necessary to allow the contractor to do their work.
- 4) Not exercising inspection and rejection rights in a timely and reasonable fashion.
- 5) Not correcting design errors promptly.
- 6) Not properly scheduling and coordinating the work of others.
- 7) Not providing timely information.
- 8) Not properly responding to change order requests.
- 9) Not giving required direction in a timely fashion.

This all sounds great, but Holy Mackerel, you'd almost have to have a fulltime person just to monitor these deficiencies. But you'd be surprised how easy it is to document such problems. A simple transmittal memo (it doesn't have to be a formal letter) does volumes and is worth its weight in gold in court. Even well maintained daily logs can do the trick. Simply inform your personnel that even spending fifteen minutes more per day on such dreaded paperwork will vastly improve your chances in front of a court or arbitrator.

**The owner's superior knowledge.** No, we're not comparing SAT scores. We're talking about the things the owner knows that you are in the dark about because there has not been adequate disclosure. How about this one: a contractor was to furnish elevator maintenance for a three year term on a government building. Prior to awarding the contract, the government did not tell the contractor it shortly intended to enter into a \$42 million contract for substantial renovation of this 50 year old office building. After the contract for the renovation was awarded, the government ingenuously turned to the contractor and told them it would be "business as usual" at the same price. But, under the renovation contract, it required the use of building elevators which really increased the contractor's elevator maintenance. The contractor won because the government did not disclose its superior knowledge. Hah. So there.

**Accelerating the critical path.** It is hard enough to get the work done in the first place, let alone within the almost insane time limits laid on the shoulders of most contractors. But under certain circumstances, contractors can receive impact damages if they are forced to accelerate unreasonably, thereby encouraging additional costs including unnecessary overtime and additional equipment costs. The courts call this "constructive acceleration". To prevail and get additional compensation, you have to prove: 1) the owner or some other contractor caused delay to the critical path, 2) you requested a time extension, 3) that extension was wrongfully rejected, 4) nevertheless, you were told to finish the contract within the original completion date, 5) you protested, hopefully in writing, and 6) you had to accelerate your performance and were damaged thereby.

But watch out, you may not get damages even if all of these are present. The courts may defeat your recovery if there is a "No-damage-for-delay" clause in your contract and you already know it is a fast track job. Here again, it shows just how important contract provisions are to your job. Always look at your proposed contract before signing, and do not be afraid to suggest changes. This is not like buying a Xerox machine where you take it or leave it as far as the contract provisions. Most owners and general contractors will bend somewhat.

**Increases in the cost of labor and material after the contract is signed.** Nice try. Unfortunately, this is your risk and there cannot be a change order unless there is a material substitution or, possibly, an increase in cost due to a special order.

**Drawings that do not work.** If you follow the drawings and things do not work or fit in place, you win extra compensation to make the modifications. You're entitled to rely upon the adequacy of the plans. For example, if you follow to the letter the fabrication dimensions of an interior metal stairway and it does not fit, you get an extra. The same would apply if you religiously constructed the slope of the roof, per the plans, but it nevertheless causes ponding.

The reason is that the owner or the government has an implied warranty to deliver adequate plans and specifications. If the defect in those specifications is latent, meaning that it could not be discovered upon reasonable inspection at the time of entering into the contract, the contractor gets extra compensation to perform. Here are some examples:

1) A contract to install plumbing and HVAC systems called for ductwork to be installed and allow the use of flexible duct work in certain areas. The installation specification required rigid insulation. Rigid insulation is normally used with sheet metal duct but not with flexible duct work. During the project the government required installation of flexible duct work with other non rigid materials. The contractor later won its court battle for additional compensation (*Metric Constructors, Inc. v. U.S.* 44 Fed. Cl. 513 (1999)).

2) In a contract for construction of river control structures, the site had to be de-watered and the government's bid documents included data obtained from a pump test which allowed estimating the number of de-watering wells to draw down the ground water. After the contractor used that data and constructed the wells, the government decided it was not drawing enough water and insisted on the installation of twenty additional wells, which were installed over protest. The contractor later won because it had the right to rely upon the government's testing which was deficient (*Al Johnson Const. Co. v. U.S.*, 20 Cl. Ct. 184 (1990)).

3) In a contract for the construction of a science building, the contract required installation of a science laboratory and fume hoods to vent chemical fumes from the laboratory. The hoods were to be furnished by the owner to the plumbing subcontractor. But the specifications omitted any requirement for installation of piping from the hoods to the building exterior. The specifications simply referred the contractor to the drawings, which in turn did not provide much detail to illustrate what piping was necessary. The contractor took the position that the piping was not required but the government nevertheless insisted it be done and the contractor later won its suit for extra costs (*Julian Speer Co. v. Ohio State Univ.*, 680 N.E. 2<sup>nd</sup> 254 (Ct. Cl. 1997)).

**The "changeaholic" owner.** What if you have a \$300,000 contract that turns into a \$500,000 one because of constant change orders? Unless the owner is independently wealthy and one-of-a-kind, you're setting yourself up for problems. Constructing a building is not like writing a novel on a word processor where you can have multiple drafts by changing, cutting and pasting, and a editing. Unless you feel unusually lucky, you have to sit the owner down in the beginning and try to nip this in the bud. Whatever you do, see this one coming and insist upon written change orders along the way or you will be burned seriously when it comes time for the last progress draw or retention and they run out of money.

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**Hyper-technical inspections.** You know this drill: too many inspections, too critical, and insistence upon unspecified measurement tests that were never in the contract in the first place. Here, you have a halfway decent chance getting upon extra costs. Here is an example we love because you can see the sadistic glint in the eye of the inspector. This is the Texas case known as *State v. Buckner Const. Co.*, 704 S.W. 2<sup>nd</sup> 837 (Texas, 1985), which was for a contract in the painting of structural steel supports on highway bridges. The only thing the specifications required was that loose paint be removed by sandblasting. The owner's field inspector insisted upon complete removal of all paint, to bare steel, but kept the contractor guessing with non-specified tests that were never laid-out in the contract. One of the non-specified tests involved placing duct tape to the bridge steel (and probably keeping it there long enough so it had a good bond!), and then apparently in dramatic style, ripping it off and showing the contractor that if there were any flecks of paint on the underside of the tape, he had to re-sandblast. The court said this hyper-technical inspection by a hyperactive inspector (sorry, we couldn't resist) allowed the contractor to get extra compensation, especially since it exceeded the original contract by almost three times.

**Ambiguous drawings.** Here you have a better chance of winning. Assuming you do not have a design-build contract and, instead, the owner has hired their own design professional who prepares ambiguous plans, reasonable change orders are usually allowed if it becomes unexpected work during the course of construction.

On larger jobs, you should send an RFI (request for information) to the architect to get clarification before going further. On smaller jobs or ones without a design professional, informally ask the owner for clarification before you start doing the work.

**When in doubt, should I performed the change?** Not so fast. Always try to work out some arrangement before, even if you are paid half the amount. It is better than nothing. One solution is the special provision in the standard form home improvement contract on this web site which allows, as a compromise, the contractor to be paid on a time and material basis without profit and overhead (that is the compromise) if there is a dispute. You don't get everything, but it is a handy way of resolving the problem.

**Who Usually Wins in Court?** This depends upon the facts described as follows:

#### CHANCE OF WINNING

#### FACTS

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|---------------------|---|
| 1. Clear chance     | Signed change order   |
| 2. Very good chance | Owner directs change. Agreement on terms, contractor sends change order, owner does not sign, owner disputes the extra after it is performed. |

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| 3. Good chance   | Same as above, but although no agreement on terms, owner does agree it is an extra.  |
| 4. Okay chance   | Owner directs the change, no agreement on terms or that it is an extra, contractor performs and sends an invoice (but not a change order) shortly after. |
| 5. Little chance | Same as above, but invoice sent out at end of the job.   |
| 6. No chance     | Same as above, except owner does not request change—it is done solely by the contractor.   |

***Good Luck.***

***NationalLienLaw***