
Noncomplying Change Orders

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Introduction



Contract Principles and the Structure of Change Order

- Contracts cannot be amended unilaterally
- Requirement of consent give parties bargaining power
- Contracts are written to balance that power
- Change orders require notice and negotiation

§ 7.1 GENERAL

§ 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, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

§ 7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

§ 7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

§ 7.2 CHANGE ORDERS

§ 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 The 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.

§ 7.3 CONSTRUCTION CHANGE DIRECTIVES

§ 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 fee; or
- .4 As provided in Section 7.3.7.

§ 7.3.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

§ 7.3.5 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.

§ 7.3.6 A Construction Change Directive signed by the Contractor indicates the Contractor's agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

§ 7.3.7 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Architect shall determine the method and the adjustment 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, an amount for overhead and profit as set forth in the Agreement, or if no such amount is set forth in the Agreement, a reasonable amount. In such case, and also under Section 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 Section 7.3.7 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.

§ 7.3.8 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change that results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

§ 7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim 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 15.

§ 7.3.10 When the Owner and Contractor agree with a determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and the Architect will prepare a Change Order. Change Orders may be issued for all or any part of a Construction Change Directive.

§ 7.4 MINOR CHANGES IN THE WORK

The Architect has 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 will be effected by written order signed by the Architect and shall be binding on the Owner and Contractor.

Noncomplying Change Orders

§ 7.1 GENERAL

§ 7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by

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Source: AIA A201-2007, **GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION**, (c) 2007 American Institute of Architects (bracketed letters and formatting in Section 7.1.1 was added for emphasis)

Noncomplying Change Orders

- Noncomplying change orders are requests outside the contractual change order process
- Courts fall into two camps
 1. Strict compliance is required and noncompliance bars the change order request
 2. Noncomplying change order is barred if the party being charged would suffer "prejudice"

Noncomplying Change Orders – How Are Tests Applied?

1. Strict compliance is required and noncompliance bars the change order request
 - When a court applies strict compliance, the big question is whether there is some other doctrine to get out of strict compliance (or avoid such doctrines if you are defending against change order)
2. Noncomplying change order is barred if the party being charged would suffer “prejudice”
 - When a court applies this standard, the question is “what constitutes prejudice?”

Common Law Doctrines Ameliorating Strict Enforcement

- Contractor's actual or constructive knowledge
- Substantial compliance
- Disfavor of conditions precedent
- Interpretive rules giving effect to practical interpretation by parties
 - Course of performance
 - Course of dealing
- Waiver/Estoppel
- "New work" under separate oral agreement

Owner's/Contractor's Actual or Constructive Knowledge

Federal law, as developed by the Board of Contract Appeals and the Court of Claims, construes the notice provisions of the Changes Clause liberally; thus, a contractee's actual or constructive notice of the conditions underlying the claim excuses formal compliance when federal law is applied. *See Hoel–Steffen Constr. Co. v. United States*, 197 Ct.Cl. 561, 456 F.2d 760, 768 (1972) (“[N]otice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally where the Government is quite aware of the operative facts.”); *Copco Steel Co. v. United States*, 169 Ct.Cl. 601, 341 F.2d 590, 598 (1965) (“[L]ack of strict compliance with many kinds of contract requirements concerning writings and notifications have [sic] frequently been held to be of no consequence where the conduct of the parties have made it clear that formal adherence would serve no useful purpose.”)

- Perini Corp. v. City of New York, 18 F.Supp.2d 287, 293 (S.D.N.Y. 1998)

Substantial Compliance

Alternatively, the defendants contend that, even if Article 4, referable to work change orders, applied to these claims, the plaintiff waived them by failing to comply with the notice of claim provision in Article 4. However, the notice of claim provision in Article 4 is not a condition-precedent type notice provision setting forth the consequences of a failure to strictly comply. Thus, substantial compliance with the notice provision will suffice. Substantial compliance will be found where there is sufficient correspondence between the parties to give the owner actual notice of the claims. The defendants failed to meet their prima facie burden of establishing that Dekalb did not have timely actual notice of the plaintiff's claims sufficient to satisfy the notice of claim provision in Article 4.

- Peter Scalamandre & Sons, Inc. v. FC 80 Dekalb Associates, LLC 2015 WL 3604613, 2 (N.Y. App. Div. 2015)

Disfavor of Conditions Precedent

Because the law disfavors conditions precedent, whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary. Consequently, absent an explicit intent to establish a condition precedent, courts will not interpret a contractual provision in that manner, particularly when a forfeiture will result.

- Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd., 196 Ohio App.3d 784, 792–93, 965 N.E.2d 1007, 1013–14 (Ct. App. 2011)(pay-if-paid clause).
- *But see* Interstate Contracting Corp. v. City of Dallas, Tex., 407 F.3d 708, 727 (5th Cir. 2005)(dealing with strict enforcement of claims clause: “The law does not favor conditions, and when the parties' intent is ambiguous the terms will be construed as covenants. *Id.* Items 1.37.5 and 1.39, which discuss the claims process, specifically use the words “condition precedent” to describe their requirements for a claim above the contract price to be accepted and paid. Accordingly, despite the law's disfavor of conditions precedent, we recognize them here.”)

Interpretive Rules Giving Effect to Practical Interpretation by Parties

- Course of performance
 - How the parties perform a single contract is evidence of their interpretation of the contract
- Course of dealing
 - How parties perform several similar contracts

Waiver/Estoppel

The master found that, although the parties had entered into a finely drafted contract, the parties disregarded its provisions during the progress of the project. . . . Crane Service further argues that it was error for the master to award Holden compensation for “extras” that it performed because the claimed “extras” were actually required under the subcontract and because the general contract, which is applicable to the subcontract, provides that no payment for “extras” would be made unless the work was approved in advance and in writing. We disagree. Although the terms of the contract are clear, the master nevertheless awarded compensation for these “extras.” Consequently we assume that the master found that the requirement for written approval was waived. The written terms of a contract may be waived orally or by implication. 13 Am.Jur.2d Building and Construction Contracts s 24, at 27 (1964). This is also consistent with the master's conclusion that the written provisions of the contract had been “disregarded by the parties.”

- D. M. Holden, Inc. v. Contractor's Crane Service, Inc., 121 N.H. 831, 834-835, 435 A.2d 529, 531 - 532 (N.H. 1981)

“New Work” Under Separate Oral Agreement

Plaintiff's second claim raises the question of whether subsequent to the written agreements the parties entered into oral agreements for “extras” or modifications. . . . In this case, the requirement under both contracts that all change orders be in writing and approved by the partnership was allegedly waived or modified by the parties. Plaintiff claims that it reached a subsequent oral agreement with the partnerships to undertake extra work without following the contracts' change order procedures. The first Radish Affidavit describes the alleged subsequent agreement and supports its existence sufficiently for purposes of withstanding summary judgment. We must await trial to determine whether any such agreement arose, and if so, its terms and their effect on the written contract.

- J.A. Moore Const. Co. v. Sussex Associates Ltd. Partnership, 688 F.Supp. 982, 988 (D.Del.,1988)

What is Prejudice and How is it Proved?

- Contractor's inability to back-charge other responsible parties
- Contractor's inability to pass change order costs on to owner
- Contractor's/owner's loss of ability to mitigate damage
- Contractor's inability to allocate between original scope and "extra" work
- Contractor's inability to verify quantities in field
- Contractor's inability to track ripple effects of changes
- Documenting changes generally

Contractor's Inability to Backcharge Other Responsible Parties



Contractor's Inability to Pass Change Order Costs on to Owner

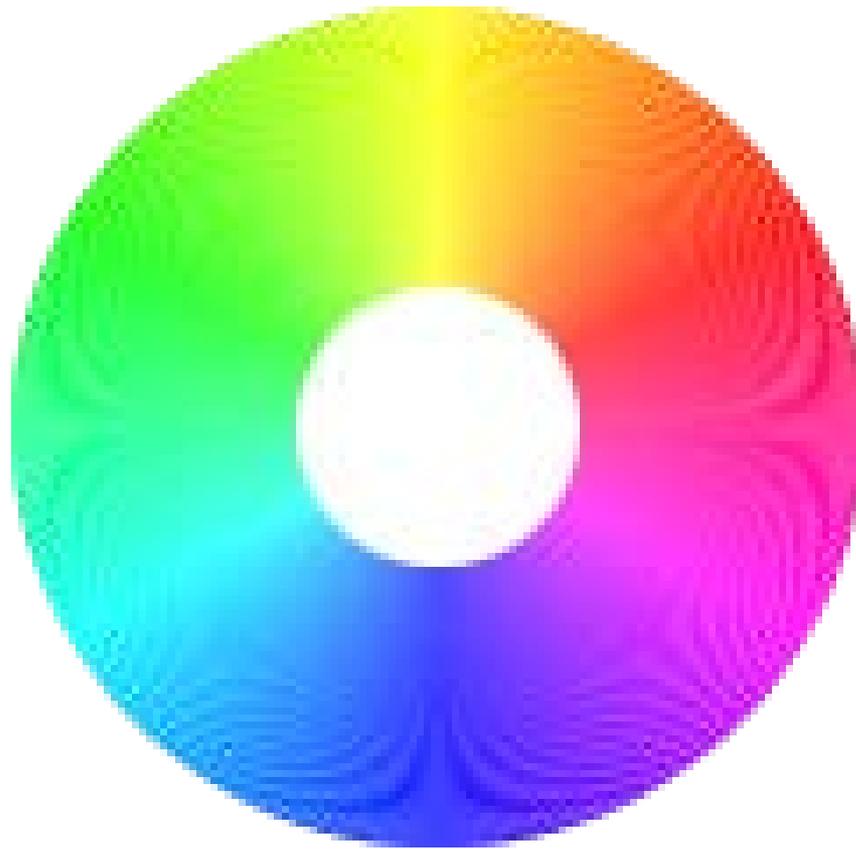
§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

- Source: AIA A401-2007, **STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR**, (c) 2007 American Institute of Architects

Contractor's/Owner's Loss of Ability to Mitigate Damage



Contractor's/Owner's Inability to Allocate Between Original Scope "Extra" Work



Contractor's Inability to Verify Quantities in Field



Contractor's Inability to Track Ripple Effects of Changes



Documenting Changes Generally



Protecting Against Nonconforming Change Orders

- Contract Administration
- No Waiver Clauses
- No Oral Modification Clauses
- Payment Process Protection
- Limitation of Liability for Pass-Through Claims

Contract Administration



No Waiver Clauses

Accordingly, “[t]he contract's notice and documentation requirements for extra work and delay damages are conditions precedent to plaintiff's recovery and the failure to strictly comply is deemed a waiver of such claims” (*F. Garofalo Elec. Co. v. New York University*, 270 A.D.2d 76, 80 [1st Dept 2000], *lv dismissed* 95 N.Y.2d 825 [2000]). And while Plaintiff has not alleged that Defendants had a course of conduct in not requiring a written order which excuses the writing requirement in this case, such an allegation would nevertheless fail based on the Contract's no waiver clause which provides:

[t]he failure of the Owner to insist in any one or more instances upon a strict compliance with any provision of this contract, or to exercise any option herein conferred, shall not be construed as a waiver or relinquishment of the right of the Owner thereafter to require a compliance with such provision of this contract, or a waiver of the right of the Owner thereafter to exercise such option, but such provision or option will remain in full force and effect (Contract at ¶ 30).

- Century-Maxim Const. Corp. v. One Bryant Park, LLC, 2009 WL 1218895, (N.Y.Sup. 2009)

No Oral Modification Clauses

Plaintiff's second claim raises the question of whether subsequent to the written agreements the parties entered into oral agreements for "extras" or modifications. The parole evidence rule bars evidence only of negotiations and agreements which precede or are contemporaneous with a written integrated agreement. Subsequent bargains may arise at any time and may be pleaded and proved by the aggrieved party. *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico*, 297 A.2d 28 (Del. 1972). This rule of law applies notwithstanding any contractual provisions precluding oral modifications to a contract. *Id.* at 33. Such a "no oral modification" clause in a written contract "may be waived or modified in the same way in which any other provision of a written agreement may be waived or modified, including a change in the provisions of the written agreement by the course of conduct of the parties." *Id.* at 33.

- J.A. Moore Const. Co. v. Sussex Associates Ltd. Partnership, 688 F.Supp. 982, 988 (D.Del., 1988)

Payment Process Protection

Similar to contract administration, the best protection is consistency and compliance with change order provisions to avoid payment outside compliance with those provisions, and meticulous maintenance of records.

Limitation of Liability for Pass-Through Claims

§ 5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

In no event shall Subcontractor be entitled to recover from Contractor any additional cost, extension of time, or damages fro delay based on the conduct of Owner except and unless Contractor recovers such additional cost, extension of time, or damages for delay from Owner.

- Source: AIA A401-2007, **STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND SUBCONTRACTOR**, (c) 2007 American Institute of Architects (note: italicized language is not in AIA form)

Conclusion

“The master found that, although the parties had entered into a finely drafted contract, the parties disregarded its provisions during the progress of the project.”

- D. M. Holden, Inc. v. Contractor's Crane Service, Inc., 121 N.H. 831, 834-835, 435 A.2d 529, 531 - 532 (N.H. 1981)

Conclusion



Questions?

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