

## **It's Smart to Plan Ahead for Change Orders**

by Joseph Harbeson

Change orders aren't afterthoughts - they are direct factors in a project's bottom line. How changes are managed can determine project profitability, whether work is completed on time, whether liens are filed and must be dealt with, whether subcontractors delay the project or walk off the job, and, of course, whether litigation ensues.

Change orders are important factors even when plans and specs appear to cover all the bases. Site conditions, changes in the owner's project needs, changes in sequencing, or other unexpected events inexorably lead to extra work and payment claims.

Such issues - and the management and legal costs that can follow - increase exponentially on large projects, especially when multiple parties may have a role in approving changes and processing payments. Keeping control of the change order process can thus be critical for bringing projects in on time and at an acceptable budget.

Even routine payment and processing issues can be critical. When a complex project has numerous interested parties beyond the owner and GC or CM - such as joint venture partners, lenders, and consultants - processing significant changes can pose a danger to project health. Problems with addressing, approving, and paying for change orders can lead to project delays and delayed claims, even in the face of contractual "no damages for delay" clauses. Even when contract provisions disallow delay claims, New York courts sometimes allow such claims to move forward in cases where the delays resulted from willful or grossly negligent conduct, from "uncontemplated delays," or from conduct viewed as a "fundamental breach" of contractual obligations.

Avoiding such problems requires focus and planning from the outset of a project, and it starts with contract drafting. Project documents have to be carefully drafted to delineate the obligations of all parties, each of whom should think through procedures for the review, approval, and payment for change orders. If the project lender or a venture partner has a role in approval of additional costs, or if other parties must approve change orders, the contract should realistically assess the time that review will take and build it into the project agreements, so that the GC and subcontractors know these parameters from the outset. A subcontractor already incurring the costs of performing change order work won't find it satisfactory to hear that previously set approval and payment time frames cannot be met because the paperwork required more review.

The AIA A-201 General Conditions, used on many projects at least as a starting point, provide very little - and frankly, inadequate - guidance for change order review. Neither Article 7 covering changes in the work, nor Article 4.2, setting out the architect's duties, impose schedules for change order approval. While this may suit many owners just fine, it can be dangerous. To avoid later disputes, having basic guidelines would be prudent. Another key step is to inform contractors about all parties who must approve changes, so that even in the absence of specific contractual deadlines, these project participants have a realistic idea of how long the approval process will take.

The contracts and general conditions should also provide for expedited meetings of all interested parties to be called on short notice to resolve disputes. These meetings should not be tacked on to regular job meetings, but focus on extra work disputes before they affect the project. Expedited mediation is another possible approach.

Once a project team establishes such procedures, however, they must use them. That means having sufficient project management and estimating staff to properly and promptly assess changes. Having inadequate personnel can lead to cut

corners and disputes that threaten the project. Attorneys involved in change order disputes too often see that an owner or GC, by trying to save a little in administration, spends a lot later in litigation.

Hold regular meetings to work out changes, whether or not the contract requires them. Do not let disputes fester. Finally, pay for the approved changes promptly, in accordance with the contract payment provisions.

---

[Joseph R. Harbeson](#) is a partner and chair of the firm's Construction Practice Group and a member of the Litigation Department and Employment Practice Group. He can be reached at 516-663-6545 or [jharbeson@rmfpc.com](mailto:jharbeson@rmfpc.com).