

# ALERT

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## When Is A Cardinal Change "Cardinal"?

by: **Henry L. Goldberg**



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A cardinal change is a rare event in construction. However, when it "provably" occurs, it can turn the relative rights of the parties to a construction dispute upside down. A recent New York case bears this out.

A general contractor on a New York City School Construction Authority project subcontracted to a masonry subcontractor. The subcontract called for the performance of a "complete masonry installation" at a purchase price of \$5,320,000.

The subcontract also specifically excluded "out of sequence work operations, except for coordination with other trade installations, and premium/overtime/extended shifts unless required due to subcontractor's fault."

In addition, the subcontract provided that the general contractor, "at any time, in any quantity or amount... without invalidating or abandoning the contract, may add or delete, modify or alter, the work to be performed under this agreement, including, without limitation, ordering changes or extra work."

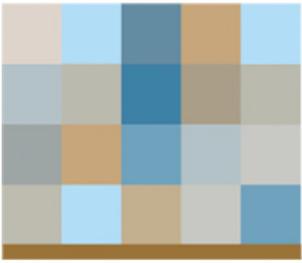
Finally, the mason was not allowed to perform any change in the work unless it received a duly signed change order or field order from the general contractor.

While the work on the project was ongoing, numerous disputes arose between the general contractor and masonry subcontractor about delays in the mason's work and their causes. The mason eventually made claims for an additional \$500,000 for "increased manpower, supervision, and additional summer shifts in order to complete the work as originally scheduled."

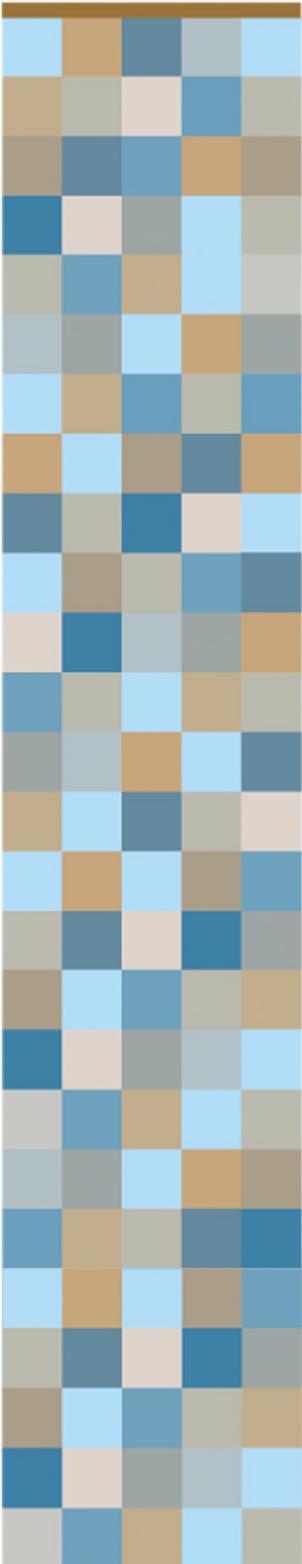
In response, the general contractor issued an "Addendum #3" to the subcontract that deleted a substantial portion of the masonry work.

At that time, the mason had only completed approximately 30% of its original subcontract work. Addendum #3 deleted approximately 30% of the subcontract price, including the claimed change orders. Accordingly, following Addendum #3, approximately only 35-40% of the masonry's work remained.

The mason responded to Addendum #3 by notifying the general contractor that it would immediately stop working on the project. The general contractor replied, taking a "you can't quit, you're fired" approach, that it was terminating the subcontract due to the mason's material breaches and "abandonment" of the project.



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In response, the mason commenced a lawsuit. In doing so, it alleged that the general contractor had interfered with its work and wrongfully deleted an excessive portion of the subcontractor's work in material breach of the subcontract. In other words, in its defense it asserted the "cardinal change doctrine."

While clauses in a contract that permit the deletion of work are commonplace and clearly enforceable, courts have construed such clauses to permit deletions in contracts only so long as they do not alter the "essential identity or the main purpose" of a contract. An owner's right to make changes under a changes clause is limited by the general scope of the work described in the contract. An owner may not make changes of such magnitude that the essential or main purpose of a contract is altered. If it does, a cardinal change has occurred and the contract has been breached by the owner. The use of a "changes and/or omissions" clause requires a finding that such changes or omissions were reasonable and fair.

The court observed that the written stated purpose of the subcontract was a "complete masonry installation." Addendum #3 had the effect of altering the essential identity and main purpose of the subcontract. The court further stated that a contract provision could not be construed to allow the general contractor to take 35-40% of the work from the plaintiff-masonry subcontractor and then, at the same time, attempt to compel the plaintiff to complete the balance of the original scope. As such, the general contractor did not establish, as a matter of law, that the mason materially breached the subcontract by stopping work on the project in response to Addendum #3.

## **MHH Commentary**

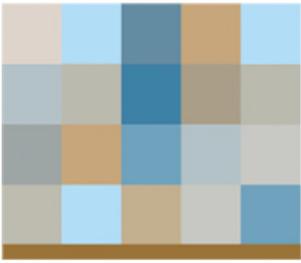
Reasonability has its limits.

The financial health of a subcontractor may not be "eviscerated" by a general contractor's change orders and deletions. Conversely, a subcontractor must only assert a cardinal change with care. Doing so, as a predicate to "walking off" a job, is fraught with risk.

To compel the subcontractor to finish only a minority portion of its original subcontract is problematic. Contract work, of course, can be deleted, but only so long as it does not alter the essential identity and purpose of a subcontract. Compelling the mason to complete only a minority of its work could directly frustrate the "benefit of the bargain" for the subcontractor. Subcontractor overhead and profit margins would be directly and negatively impacted by compelling it to complete only a relatively small portion of its work while its "full-project" overhead continues without being adequately absorbed by the balance of the contract price.

As always, "the devil is in the details." Under the Constructive Change Doctrine, both quantitative and qualitative analyses must be made regarding the nature of any changes and deletions. The question does not solely depend upon a precise percentage of work or cost involved, but on the character of the work as well.

The standards for finding a cardinal change are imprecise; courts have wide discretion. What, in fact, is the "essential identify" and "main purpose" of your contract? Here, the court failed to find the subcontractor in breach for walking off the job.



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Is this a safe option? Typically, no. But, as this case demonstrates, under the right circumstances, a contractor can defend its interests in the face of abusive changes and/or deletions, both quantitatively and qualitatively.

One further consideration: In public construction, acceptance and performance of a cardinal change may result in a contractor losing its right to be compensated for the changed work. If the change is cardinal, it may be barred by applicable competitive bidding statutes. While this could certainly be the topic of its own in depth article, for now keep in mind that a public owner may order changes within the general scope of the "work" of a project, but it may not make a different or new contract without complying with competitive bidding statutes.

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at (516) 873-2000 or by email at [hgoldberg@moritthock.com](mailto:hgoldberg@moritthock.com).



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