




Change Orders and Other Documentation



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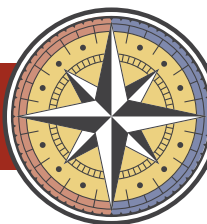
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EDITORIAL PURPOSE

The Contractor's Compass is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness.

Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.

The views expressed by contributors to *The Contractor's Compass* do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).

MISSION

To educate and equip subcontractors and suppliers with the education and resources they need to thrive in the construction industry. Additionally, FASA raises awareness about issues critical to and about construction in the United States.

SUBSCRIPTIONS

The Contractor's Compass is a free monthly publication for ASA members and nonmembers. For questions about subscribing, please contact communications@asa-hq.com.

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EDITORIAL SUBMISSIONS

Contributing authors are encouraged to submit a brief abstract of their article idea before providing a full-length feature article. Feature articles should be no longer than 1,500 words and comply with The Associated Press style guidelines. Article submissions become the property of ASA and FASA. The editor reserves the right to edit all accepted editorial submissions for length, style, clarity, spelling and punctuation. Send abstracts and submissions for *The Contractor's Compass* to communications@asa-hq.com.

ABOUT ASA

ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@asa-hq.com, or visit the ASA Web site, www.asaonline.com.

LAYOUT

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PRESIDENT'S LETTER



Dear ASA Members:

Not to brag, but in Texas we're still enjoying temperatures that don't require jackets or coats, while much of the country is bundling into winter gear and gloves. But no matter what the weather outside, the desire to learn, improve ourselves, and keep our brains and bodies active should always be within us. That's how we grow and become better versions of ourselves.

In this month's issue of *The Contractor's Compass*, we focus on change orders and other documentation. And while I hate paperwork as much as anyone, several authors mention when a confrontation with a contractor occurs - and if you haven't ever encountered that...just wait - having the photos, paperwork, all

the nit-picky details of what you know to be right, can save you lots of your time, aggravation, and money. As in all of our issues, there's tons of good advice. Make sure you do a deep dive in the two articles we have this month from construction lawyers - who experience all of our tales of frustration first-hand - and offer some words of wisdom for preparing our contracts and potential disputes. Much of it is common sense, but it never hurts to be reminded. Sometimes timing is everything.

The Contractor's Compass is just one way we educate the industry. As an ASA member, you want to get everything out of your membership, so take advantage of **monthly webinars** that can be **accessed on demand** if you can't make it in person. Do you know what to do if (when) you get hacked? Check out the webinar. **Info Hub** provides an amazing array of discounts and information for ASA members - from office gear to uniforms, shoes, tech, and more. Our **attorney's council** works with ASA staff to make sure we have updated and helpful tools at our members' fingertips. We keep you updated on all of our advocacy activities, and invite your feedback.

And **SUBExcel** is our mega-learning extravaganza. The educational sessions, inspirational keynote speakers, workshops, and fun and relaxed networking activities, all combine to create a genuine, "feel-great" experience that you just can't appreciate if you haven't been there before. And while it's been two years since we've brought the ASA family together, the memories of my past SUBExcels are still vivid. ASA is truly a huge, wonderful family - Florida is gonna be a blast!

The holidays are here. Take the time to appreciate your loved ones and all the gifts you already have. I hope you have a wonderful and blessed Thanksgiving celebration.

Sincerely,

Brian K. Carroll

ASA President 2021-2022

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CONTRACTOR COMMUNITY

Congress Passes Bipartisan Infrastructure Bill

The Bipartisan Infrastructure Bill contains the largest investment in America's infrastructure since the creation of the Interstate Highway System in the 1950s and was signed by President Biden on November 16. The legislation contains funding to rebuild roads and bridges, eliminate the nation's lead pipes, expand access to high-speed internet in rural communities, and takes steps to address climate change. Per President Biden, "generations from now, people will look back and know this is when America won the economic competition for the 21st century!" The bill passed the House on Friday, November 5th with a 228-206 vote. Six House Democrats voted against the measure, while 13 Republicans supported it. The bill passed the Senate in August by a vote of 69-30.

ASA Supports Bonding in USDA Broadband Opportunities

ASA, along with the National Association of Surety Board Producers (NASBP) and the Construction Industry Procurement Coalition (CIPC), sent a

letter to the United States Department of Agriculture (USDA) Under Secretary for Rural Development, Xochitl Torres Small, recognizing the need for significant investment in the nation's infrastructure, which includes the development of a reliable and comprehensive rural broadband network. Per the letter, "access to broadband is critical to rural communities for expanding commerce, access to telemedicine, and for long-distance learning. As such, we commend the Department for offering loan and grant opportunities to internet service providers (ISPs) who otherwise may not have the financial wherewithal to take on these contracts."

Per the letter, "a performance bond assures that the successful carrier is qualified to perform the obligations in the award, as the surety evaluates the carrier's qualifications in order to merit surety credit. Second, the bond serves as a valuable third-party guarantee in the event the carrier fails in its performance. The first form of protection, prequalification, is the result of the surety's review of the financial strength, experience, equipment, and capabilities of the carrier in determining whether to provide a bond. A surety provides a bond only to those carriers that it believes can perform

the entire obligation. Thus, the Agency would benefit from this thorough prequalification."

Finally, USDA already recognized the usefulness of a surety bond requirement as a condition of receiving loans and grants in its Water and Waste Disposal Loan and Grant Program. In Section 1780.75, which dictates specific contract provisions that any recipient of Agency funds must include, surety bonds are specifically noted: "In all contracts for construction or facility improvements exceeding the Simplified Acquisition Threshold, the owner shall require bonds or cash deposit in escrow assuring performance and payment each in the amount of 100 percent of the contract cost. The surety will be in the form of performance bonds and payment bonds."

Compass by Bespoke Metrics

Compass is a suite of fully integrated preconstruction software applications. Through strict centralized data collection rules, transparent analytics, and powerful visualization tools, COMPASS provides efficient counterparty risk tools with integrated bid management. <https://compass.bespokemetrics.com/index.html>

It's always something

A WESOME

Getting Recognized for Excellence



While ASA recognizes our national subcontractor heroes each year at SUBExcel, it's nice to have some local recognition as well. Hats off to the American Subcontractors Association-New Mexico (ASANM) chapter for paying tribute to contractors, subcontractors, architects, engineers, and vendors with their own annual awards celebration in August.



Starting months in advance, the narrowed-down slate of nominated companies and individuals are eventually presented to the full membership as a ballot, resulting in a winner and first runner-up in every category.

The ASANM makes the celebration lively with a themed show. This year was "The Game of Clue" — a sometimes appropriate description of a jobsite.

A pre-show cocktail hour, dinner, door prizes, room decorations, and music all add up to a popular event - attracting about 350 attendees. Here's a short [video](#) of the highlights.

Congrats to the winners of ASANM awards, and bravo for making this a fun evening with smiles and laughs for all attendees.

P.S. You've still got time to submit nominations for the national ASA awards. They're due December 31, 2021.

Check out the categories and requirements!

The Contractor's Compass is recognizing excellence in ASA's ranks. Every month we are highlighting the activities, achievements, and actions of ASA members that might inspire others. Do you have something you want to share? Send us an email at communications@asa-hq.com.



AMERICAN
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ASSOCIATION

AWARDS TIME!

ASA Awards are the perfect opportunity to shine a light on the incredible work that ASA members are doing in the industry each and every day. Nominate a colleague, another business, your local chapter, or even yourself for a wide variety of ASA Awards. Each award will be presented at SUBExcel 2022.

Available ASA Awards include:

- **ASA Certificate of Excellence in Ethics**
- **ASA National Construction Best Practices Awards**
 - **President's Award**
- **Subcontractor Federal and State Advocate Awards**
 - **Attorney's Council Awards**
- **John H. Hampshire Distinguished Lifetime Service Award**
- **Timmy L. McLaughlin Exemplary Leadership Award**
 - **ASA Outstanding Service Award**
- **ASA Chapter and Chapter Leadership Awards**
 - **ASA Safety Award**

Don't miss out on this incredible opportunity to honor the amazing work being done by ASA members.

APPLICATION DEADLINE: DEC. 31, 2021

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CONSTRUCTION

wants to help you with **Risk Transfer.**

The following are important coverage considerations before executing a sub-contract agreement with an upper tier.

INDEMNIFICATION REVIEW

Are you indemnifying Owner/Developers, GC's and Prime Contractors for contract provisions that are not covered by your Liability Insurance?

ADDITIONAL INSURED REQUIREMENTS

Does your Additional Insured coverage comply with contract language?

COVERAGE RESTRICTIONS & EXCLUSIONS

Do your insurance policies include coverage exclusions and conditions which may either restrict or not respond at all to certain contractual obligations you entered into, and land you in breach of contract litigation?



FEATURE

Customer-Focused Purpose: The True North for Change Orders

by Mark Marone and Robert Graves, Dale Carnegie



Key Insights

In a rapidly evolving business environment, a customer-centered purpose provides everyone with a true north to enact change orders effortlessly.

Customer focus gives people a stable grounding as they navigate toward their objectives, even in the midst of uncertainty and unpredictability.

When employees have a shared purpose centered on the customer,

they're more engaged and empowered to work together, listen to the customer, advocate for project changes, and take action quickly.

When you think about how rapidly the business environment is evolving, the impact of customer demands and expectations is unmistakable. Today's customers are looking for greater value, new features and more options. They also have higher expectations around the

social and environmental impact of the products and services they buy.

At the same time, the data that's being captured through interactions between companies and contractors is revealing new insights. Companies are using technology to anticipate necessary changes in the project's parameters. Many contractors are capturing, at least, the basics when it comes to change orders. "In fact, 72% of respondents

report they are capturing the root cause of the change order,” according to **Kristen Sylva of Digital Builder.**

All of this is happening against a backdrop of unprecedented disruption. At the rate projects are morphing, meeting customers’ needs, even the ones they haven’t yet identified themselves, becomes critical to success. No wonder organizations across industries are scrambling to become more agile, to be able to gather critical data, make decisions quickly and take action to meet evolving demands.

While a host of tools and technologies are helping organizations become more efficient and better able to predict and target customer preferences, technology alone won’t make an organization agile. From tools to skills to the behaviors and mindsets of the people, agile organizations are united around a common purpose that serves as a true north in volatile situations. And for highly agile organizations, that purpose is centered around creating value for the customer.

How a Customer-Centered Purpose Powers Agility

To understand the power of purpose, looking at some tangible examples is key. “One of the first things you want to do in order to properly handle change orders is fully understand what they cost your team. This is key not just to make sure it doesn’t happen again (if it’s avoidable), but also to see how it impacts your profit so you can change your overall strategy,” said **Jenny Clavero in Construction Business Owner.** Not only is that a guiding light for the organization, it connects employees and the work they do directly to the customer.

Change orders often disturb the workflow that has been established between customers and contractors, therefore having a set of best practices in place is vital for change orders to minimize disruption. Having a clear purpose that’s focused on creating value for customers enables agility in several ways:

Establishes the “why”: As the company’s “true north,” the purpose makes it clear why the company does what it does. Agile organizations recognize that they operate in an environment where the path forward isn’t set in stone; it’s understood that new information may prompt a course adjustment at any time. A customer-centered purpose is the compass that allows employees to continue to navigate toward the ultimate objective, even as the path there takes unexpected turns.

Provides the reason for change: That reason—to fulfill the purpose more fully by meeting customer needs more efficiently and effectively—empowers engaged employees to suggest and advocate for changes that will make the project a success and profitable.

And because it keeps the business more closely connected with its customers, employees are more attuned to customer needs and wants. They’re more motivated to capitalize on the intellectual capital of their customer base and create more value that truly matters to the customer.

Breaks down silos: A shared goal that focuses on the customer supersedes functional metrics. As a result, it helps break down silos and helps people work through conflict.

When disagreements arise over change orders, for example, a shared commitment to delivering on the organization’s purpose can help keep people in dialogue, working together toward solutions. Cross functional teams have a common gauge for evaluating what’s most important so they can make the trade-off decisions that may be necessary to keep the project moving forward.

Increases engagement: Having a customer-centered purpose that employees can connect their achievements to helps each person see the value of what needs to be changed. This kind of purpose-driven work increases engagement—and engaged employees help make organizations more agile. When the direction is

clear, empowered people will naturally innovate new and better ways to finish the project in the fastest way possible.

What happens when companies are more connected to their customers? They become more innovative. This is innovation that serves the customer, and the reason it’s possible is because it’s conceived through a shared purpose that encourages people in the company to get on board with change orders, make quick decisions and implement change with confidence. That’s agility.

About the Author and Co-Author:

Author, Mark Marone, PhD. was the director of research and thought leadership for Dale Carnegie and Associates where he is responsible for ongoing research into current issues facing leaders, employees and organizations world-wide. He has written frequently on various topics including leadership, the employee/customer experience and sales. Mark can be reached at mdmarone@msn.com.

Co-Author, Robert Graves, MBA, is a Dale Carnegie Certified Trainer for Rick Gallegos and Associates. His focus is creating sales professionals from average salespeople. He is the author of “Making More Money with Technology.” He often speaks on trends in the Marketing/Sales/Service triad. Robert can be reached at robert.graves@dalecarnegie.com

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Do Change Orders Impact Your Commercial Insurance and Surety/Bonding Programs?

by Gary R. Semmer, Assured Partners

Great question! There has been a lot of debate over the years over how Change Orders (CO) affect your Insurance and Bonding programs.

Let's examine some of the issues, but first let's look at how ConsensusDocs® and AIA define "Change Orders" in their contract language:

ConsensusDocs 200 defines "Change Order" as "a written order signed by the Owner and the Constructor after execution of this Agreement, indicating changes in the scope of the Work, the Contract Price, or Contract."

AIA Document A201 states that "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."

The following Insurance and Bonding areas are most impacted by Change Orders as follows.

Property Insurance

If you're a GC or Prime Contractor and are responsible for providing Builders Risk (BR) property coverage a large CO will require increasing the BR Hard Costs limit to avoid "underinsurance" issues when a BR claim occurs. In addition, the BR increased premium needs to be accounted for in the project costs to protect the bottom line. Lastly, mid-term change orders can result in supply chain delays which can cause job-site scheduling challenges and the need to store materials off-site. The Subcontractors may be responsible for insuring the materials until delivered, incurring additional cost to their Insurance program.

Workers Compensation (WC) and General Liability (GL) Insurance

Larger CO's can increase labor hours causing your Payroll to go up which will increase both your WC & GL premiums. Again, you need to account for the increased premiums in your job costs.

Premiums when they close out the Performance/Payment Bonds which needs to be accounted for in your job costs.

In the end, it is important to review the CO's and make sure your Insurance & Surety program aligns with the changes and that you have all of your costs covered.



In addition, it's important to account for payroll changes in Wrap-Up (OCIP & CCIP) programs to make sure the Insurance Credit (Bid Deduction) is calculated correctly.

Surety/Bonding

It's imperative that the CO document contain "authorized" Individual(s) language that "defines" who has authority to approve change order to assure that once the work is completed they will authorize the payment to avoid non-payment of the CO.

In addition, CO's can cause Underbillings on your Financial Statements that can become a "red flag" for Surety/Bonding companies when they re-evaluate your Bonding capacity.

Lastly, most Surety/ Bonding companies may charge additional Bond

About the Author

Gary Semmer, CIC CWCA is Executive Vice President and Construction Practice Leader with AssuredPartners. Gary specializes in providing Insurance & Risk Management solutions to the Construction and Real Estate industries. He has served as President of the Independent Insurance Agents of Illinois (IIAI) and Associated Risk Manager (ARM) of Illinois. AssuredPartners is the 10th largest Insurance Broker and Consultant in the country providing Commercial Insurance, Risk Management, Employee Benefits through consulting and services. For more information on AssuredPartners, please Gary by email at Gary.Semmer@assuredpartners.com or asa@assuredpartners.com

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A Subcontractor's Continuing Duty to Document

by Mark A Cobb, Cobb Law Group

The success of a construction claim is almost always based upon the quality of the documentation provided. Documentation, in this sense, is generally written, photographic, or recorded evidence that supports a subcontractor's claim. Conversely, proper documentation may be very successful in defeating a claim against another project participant. Given the dollar amounts at stake on a typical construction project and the fact that upper tier contractors are pushing risks down to the lower tiers, it is vital that subcontractors continually document their work in order to protect themselves.

Although there is a great deal of overlap in the way that documentation protects subcontractors, this article discusses documentation in two broad categories: First, we are going to consider the best practices for a subcontractor to document its claim against a prime contractor or owner. Second, we are going to look at ways in which a subcontractor's documentation can be used to defeat a claim from a contractor or owner.

Tips for Subcontractors When Documenting Their Claim

As a project moves forward, Subcontractors will inevitably have claims that arise. Some of these claims are quickly addressed such as a properly authorized, signed change order request. Other claims may not be remedied as quickly. Common claims include change orders but there are many other potential claims such as requests for an extension of time, third-party interference, material delays, and weather-related issues. Most of the requirements for succeeding on such a claim are found in the contracts—the subcontract agreement is the first place to look for this process, but many

subcontract agreements incorporate by reference the prime contractor so it may be important to consult both contracts to fully understand a subcontractor's rights. Key elements contained in the contract will likely include the following:

- a. requirement of a written notice;
- b. a deadline in which to make the notice;
- c. information or a plan to alleviate the problem; and
- d. an appeals process.

Use Letterhead: In order to be successful, a subcontractor must comply with each and every requirement contained in the contract. In addition, it is good-measure to exceed the requirements.

Thus, for example, a contract may require written notice. Do not rely upon a verbal promise; equally important, do not rely upon a text authorization which may, technically, be sufficient as written notice. It cannot be overstated that a written letter, on the subcontractor's letterhead, should be used in every circumstance in which written notice is required. Letters are inherently more formal; they more often include all of the information to prove a claim; furthermore, letters are the first opportunity that a subcontractor has to begin presenting its perspective on the issue. In addition, a letter allows a potential claimant to explain why there is a claim, who or what is responsible, and when and how it will be corrected. More importantly, if the claim goes to a fact-finder such as a judge or an arbitrator, a letter is easy to submit to the fact-finder as proof that the claim was made properly. Paying an attorney to understand and then convince a judge that an email string or a text string is sufficient notice is very expensive, very

time-consuming, and less likely to prove that adequate notice was given. Frankly, a written notice is the subcontractor's first opportunity to professionally, succinctly and accurately present its case, and that builds a successful case for recovery.

Meet the Deadline: Although it may take some time to write the letter, it must be written, and it must be sent within the deadlines required by contract. Although we do not advise using an email string to give notice, it is usually a good idea to send the letter via email as well as sending it overnight delivery. Being one day late may make the difference between succeeding or failing on a claim. Courts frequently calculate the date when the deadline ends upon when the claimant "knew or should have known" that the claim might occur; thus, is it always better to send a written notice as early as possible.

Send Notice to Multiple Parties: The contract may specify to whom written notices are to be sent, but it can be a good idea to send them to other parties as well. For example, if there is an issue with the prime contractor's project manager, consider sending the notice letter to the contractually required parties as well as those higher in the organization.

Solve the Problem: Most people are good at pointing out the problems. The most successful contractors, however, are problem-solvers. Thus, in the notice include why you are making the request along with the plan you intend to implement to mitigate the costs and time to the project. This may later serve as a warning that might have prevented additional costs if the prime contractor does not accept your rededication plan.

Tips for Subcontractors for Using to Documentation to Prevent Claims from Others

Documenting is a non-stop process for construction professionals. There are many applications and software which help subcontractors organize and maintain this documentation. But, since a subcontractor may not learn about claims against them until they have fully performed, subcontractors need to prepare for the unknown. Examples of these claims include back-charges, liquidated damages, and claims of work-interference from other subcontractors.

Thorough documentation takes many forms, but some of the most common include daily logs, photographs, jobsite meeting minutes, written notices, and manpower time-sheets. A subcontractor needs to document every incident which could lead to a problem down the road. Thus, for example, a poorly-timed thunderstorm can impact the critical schedule. If so, this is an obvious time for documentation. On the other hand, a late afternoon shower might not have a similar impact; but, then again, it might, if materials are not properly stored or drainage is an issue at the jobsite. Thus, weather should always be documented.

Daily Reports: As attorneys we see a great deal of complaints about manpower. This is easily documented along with the actual hours an employee worked, as well as where on the project the employee worked. Thus, a subcontractor who keeps sloppy daily reports will find it difficult to defeat a claim against it. However, a meticulously kept daily reporting system will pay-off in the long run. Such types of information include the following: (i) information related to the workforce, the location of the work, and the type of work performed each day, (ii) information

about the equipment rented or used, (iii) the amount of materials received and/or used on a given day (or unavailable), (iv) any issues which may have arisen such as owner-interference, nearby road-closures, weather, and supply-chain issues, (v) safety issues and training, (vi) details about inspections and other visitors to the jobsite, and (vi) the name/signature of the person responsible for the accuracy of the daily report.

Photographic Evidence: With the plethora of phone cameras and drones, documenting work through photographs has become much easier; on the other hand, it is worth developing a company policy and investing in training regarding how to take better photos, when to take the photos, and how to manage and store the photos. Many projects include surveillance videos, they can be useful when pursuing or defending a claim so understand the access, the storage, and the limitations of these videos. It may be wise to photograph the work of adjacent subcontractors as well to protect. If there is reason to believe that a particular video may be useful, send a written request to the owner of the video to (i) send you a copy and (ii) preserve the video.

Blueprints, Specs, Schedules, Etc.

Documents that are actually used to construct the project are invaluable if a claim arises. Thus, it is obvious that they should all be kept. Many of these documents go through multiple revisions. We have seen, however, that general contractors may have multiple incarnations of an important document, and, consequently, they accidentally fail to give the subcontractor the final revisions. Thus, it is important to note when and how each document is received in case the prime contractor claims that its plans dictate a particular detail when the subcontractor's copy of

the plan does not include it. Of course, if a subcontractor knows (or should have known) that they did not have the final edition, then the subcontractor may be at fault unless the subcontractor gave proper notice

Documentation is the on-going record of the role of each party working on a project. Thus, it likely begins with site-visits, review of plans and bid documents, but it results in tangible building. Photographs provide evidence of what is hidden behind a wall and daily reports show you who built a particular aspect. Keeping up with this documentation may be daunting, but it is vital to prosecute and defend claims.

About the Author

For over 25 years, Mark has been practicing construction law throughout the State of Georgia. He remains active in many professional organizations, and he speaks and lectures extensively on Georgia's Mechanics and Materialmen's Law, payment bonds (Miller Act and Little Miller Act claims), construction contracting and risk-allocation & damage mitigation. In addition, he publishes on similar topics regularly. In fact, Mark recently finished co-editing a 50-State Lien Law publication for the American Bar Association's Forum on the Construction Industry and has contributed to several other books and industry publications. More information on Cobb Law Group and Mark Cobb can be found [here](#).



Change Orders – Important Steps for Subcontractors to Protect the Right to Payment

by Benjamin S. Lowenthal, Hendrick, Phillips, Salzman & Siegel, P.C.

Construction contracting is a high-risk business. For subcontractors, work is performed and the cost of such performance is essentially incurred on an “extended credit” basis – subcontractors do the work first and then get paid (or hope to get paid). A Subcontractor’s economic viability depends on a steady, predictable cash flow for work already performed in order to constantly replenish necessary working capital. Importantly, the terms of such compensation – including payment for change order work – are defined in the contractual agreements between the parties. In most cases, the original contractual agreement is formed as a result of a bidding or proposal process. The subcontractor estimates the cost and time necessary to perform the work as then depicted in the original scope of work and design documents. That estimate then forms the basis of the bid and the ultimate contract amount to be paid to the subcontractor for the performance of the work.

However, the scope of work that a subcontractor bids upon and contracts for is rarely the exact scope of work that is actually performed. As every subcontractor knows, construction projects are generally not actually built exactly as originally

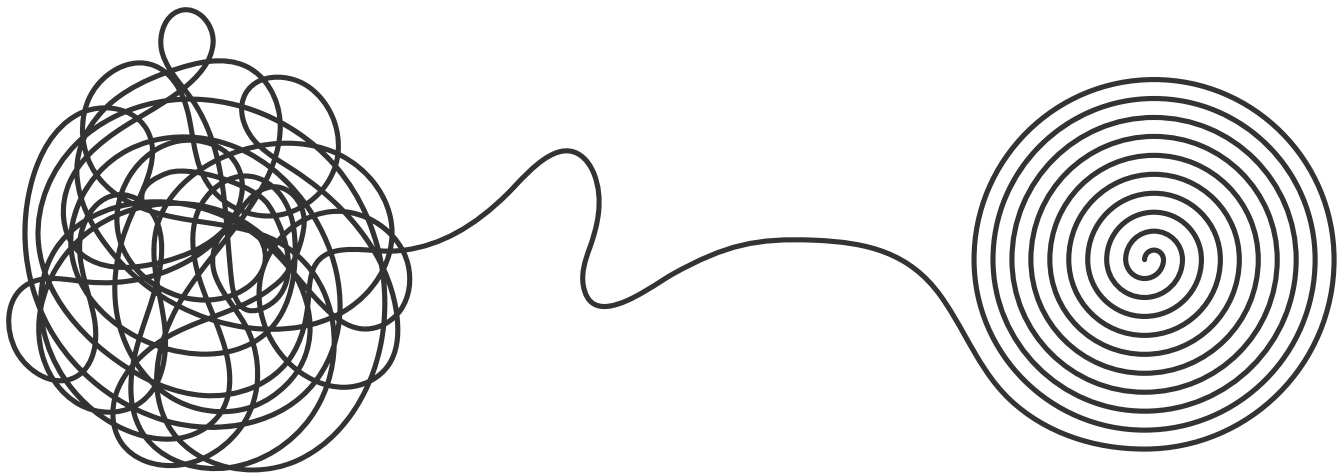
designed and as specified in the plans and specifications. Through the life of a construction project, the original scope of work is often changed, altered, delayed, and disrupted by a laundry list of causes and factors beyond the control of the subcontractor. And every one of these factors potentially impacts the actual cost of performance and the subcontractor’s ultimate liability for any project. At worst, if not properly addressed in the construction contract and properly handled by the parties, changes can blow up into long, costly disputes. As one Federal District Court Judge put it: “informal mutual good faith departures from the original contract and specifications” can blow up into “diabolical dastardly deeds in the harsh light of the letter of document and the law” if not properly handled by the change order provisions of the contract. See *J. A. Jones Const. Co. v. Greenbriar Shopping Ctr.*, 332 F. Supp. 1336, 1343–44 (N.D. Ga. 1971), *aff’d sub nom. J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr.*, 461 F.2d 1269 (5th Cir. 1972) (also stating that no complex construction project “could possibly be completed in accordance with the literal scheme envisioned” by the parties).

So, what steps can subcontractors

take to protect rights to payment when there is a requested change to the scope of work?

Review the Contract

First, for projects not yet under contract, subcontractors should review contract sections that describe the rights, remedies, and procedures relating to changes and claims and determine how the contractor allocates responsibilities and risks. A subcontractor cannot assume that risks are reasonably balanced between the contractor and subcontractor. A review of the contract to determine how risk and responsibility has been assigned is essential to avoid unknown liability. Some items to look out for include limits on “mark-ups” for overhead and profit for change order work that are unreasonable and burdensome/ immediate notice requirements from the event (and not Subcontractor’s knowledge of the event) giving rise to the necessary change order work. At the very least, every subcontractor must review all contracts for language waiving a subcontractor’s right to payment for change order work. The scope of work will likely change. Subcontractors should make sure, at the very least, that they will be entitled to payment for authorized change work.



All projects and contracts are different and there is no one-size-fits-all revision or insert that will fully protect a subcontractor's right to payment for change order work. However, the following language is a suggested insert that can be included in a contract to help protect a subcontractor from nonpayment due to change order work:

If Subcontractor is requested by Contractor to perform extra or changed work that was not part of Subcontractor's original scope of work, Contractor will provide reasonable compensation to Subcontractor for said work. Contractor shall not give orders to Subcontractor for work that is required to be performed at that time and then refuse to make payment on the grounds that a Change Order was not executed at the time the work was performed or the Contractor's representative was not authorized to order the change. Contractor and Subcontractor recognize that in order for construction projects to proceed in a timely and efficient manner, changes in the original specifications frequently are made prior to

execution of formal change order documents. The parties agree to work in good faith with each other so that Subcontractor does not proceed with changed work without authorization and Subcontractor receives fair compensation for authorized, change work.

Know the Notice Provisions

Second, for projects already under contract, all subcontractors should know what kind of notice provisions are required in order to preserve claims for change order work. Know when and to whom the notice needs to be given. Moreover, do not rely on verbal promises that a written and approved change order will be issued before starting the change order work. Subcontractors should demand that contractors issue a written change order pursuant to the terms of the contract before starting any change order work. Otherwise, the subcontractor will truly be taking on the risk of nonpayment.

Construction contracting, especially for subcontractors, is a high-risk business. Prime contractors generally

attempt to put all the risk and potential liability on subcontractors. Subcontractors should not accept contracts "as-is" and should always push back on unfavorable, burdensome terms. This is especially the case for change order work. If a subcontractor is going to perform quality work, it should be paid for such work. Don't let a prime contractor dictate otherwise.

About the Author

Benjamin S. Lowenthal is an associate with Atlanta-based construction law firm Hendrick, Phillips, Salzman & Siegel and is a licensed lawyer in the states of Georgia and New York. Ben's practice includes construction contract drafting and breach of contract litigation. Ben received his undergraduate B.S. from the University of Georgia and his J.D. and LL.M. in Environmental Law from the Elisabeth Haub School of Law at Pace University. For more information, contact the author at (404) 522-1410, bsl@hpsslaw.com or visit www.hpsslaw.com.



Six Ways to Minimize Change Order Disputes

by Patrick Hogan, Handle.com

Changes happen in construction projects all the time. From the design process all the way through project completion, multiple updates and modifications will be made by various stakeholders.

These changes can be related to costs, timelines, and other aspects of construction. To prevent major delays and project issues, all changes must be properly accounted for. They also need to be approved and agreed upon by relevant parties, typically the contractor and the property owner.

Disputes arise when not all construction parties agree on the changes. When parties argue about who should be responsible for covering the additional costs incurred, payment issues and delays can happen, affecting not only the top-tier stakeholders but also subcontractors and material suppliers.

It is therefore imperative for construction projects to establish clear and robust change order processes. Below are some of the strategies that you can use to minimize, if not completely prevent, change order disputes from happening.

1. Ensure that project scopes are clearly defined in the contract

Preventing major disputes in a construction project begins by executing a solid contract. The contract that you sign must be as detailed as possible, and it should clearly outline the scope of the project and the parties responsible for all deliverables.

The contract should also include specific provisions for how change orders must be handled. This way, everyone would know how to deal with modifications to the original contract.

2. Establish communication lines as early as possible

Disputes often happen due to a breakdown in communication. When certain parties are left in the dark or when the stakeholders are not made aware of the changes in project scope, people could point fingers at each other to evade accountability, leading to possible delays in payment and

project timelines.

To prevent expensive and unnecessary delays from occurring, you should establish communication lines with all relevant parties right from the get-go. Sending preliminary notices within the first week of the project is a good way to communicate to top-tier parties. You should also make sure to know who the contact persons are and to inform them when you issue change orders.

3. Understand the required change order process

One key to avoiding change order problems is nailing down a change order process. This process should be discussed before the contract is executed, and you and your clients should agree on the procedures related to issuing and closing change orders.

The process should also be discussed not only with your clients but also within your internal team. For example, when you see a reason to change the project scope, your team should know how to go about writing the change order proposal, who to approve it, who to send it to, and how to close it.

4. Act on change orders right away

Another important strategy is acting on the change orders as soon as possible. One of the most common mistakes that contractors and subcontractors make is not starting the change order process when they have a reason to make updates to the project scope. Procrastinating on your change orders will have serious repercussions and will likely cause problems.

Keep in mind that change orders need to be approved, and they come with associated costs. When you do not act on change orders right away, project timelines may get pushed during negotiations and issuing payments could get delayed.

5. Be specific in your change order documentation

It is important to be as detailed as you can when writing the change orders. Vague and ambiguous details might result in disputes, so you need to write in your change orders specific details and reasons for initiating the changes.

Some of the details that you can add to your change orders include specific updates to the project design. Mention the specific aspect of the design that needs to be updated. Also include blueprints and geotechnical drawings, if possible. If the changes are related to corrections in prices, make sure to include receipts and invoices so you can back up your change order proposal if you get questioned.

6. Keep your files organized

It goes without saying that your files and books must be organized at all times, especially when managing complex construction projects. Your invoices, change orders, payment slips, and everything else must be properly recorded and filed. Failing to organize your documents will likely result in problems, especially regarding change orders.

For example, if a client asks for further documentation on price changes of certain materials and you are not able to provide the correct invoices, your change order request could get rejected, causing you to shoulder the additional costs yourself. You are strongly encouraged to take advantage of available software tools to stay organized and to stay on top of all your projects.

Being prudent and organized goes a long way when running a construction business. The extra mile that you take to stay on top of everything will prove beneficial in keeping change order disputes to the minimum.

About the Author



Patrick Hogan is the CEO of **Handle.com**, where they build software that helps contractors, subcontractors, and material suppliers with late payments. Handle.com also provides funding for construction businesses in the form of invoice factoring, material supply trade credit, and mechanics lien purchasing.



Make Mine Black and White

by Jack Rubinger

No one ever said that documentation is the most fun part of business, but documentation and clear communications separate the amateurs from the professionals.

Even a job as simple and straightforward as a roof repair can be botched when follow-up documents are misleading, filled with industry jargon or are slow in their delivery.

Using the "I'm very busy" excuse is inexcusable, too, as everyone is busy.

Effective change order processes help create strong and positive customer relationships, make your business seem more professional, and add to your bottom line as you become more procedure-oriented when it comes to billing for changes to scope of work.

Some use templates, which are a good idea. They're professional-looking, easily available online and put the small subcontractor on a level-playing field with the big outfit who also have a dedicated customer service phone number, text/phone follow-up, and estimation services.

Best practices dictate that standard change orders should include

- the job name,
- address and phone number,
- owner's name,
- a complete description of new work to be performed,
- total price for materials and labor to complete the change,
- revised date of completion due to the change order, and
- signatures of the company representative.

Often change orders stem from the owner's additional words, omissions in design, lack of coordination between parties, and defective workmanship.

"The number one reason for change orders or RFIs is poor planning, essentially short term planning," said Ed Anderson, AWP Lean Specialist.

Robert Camp, Getting To Lean, believes that good contracts are the result of good relationships. By contrast, Camp believes that adversarial relations between the prime

and subs, or between subs, lead to changes, delays and overruns.

"Great contractors don't originate from good luck or even hard work," said Camp. "They originate in the desire to be great and to accept nothing less from themselves. The corollary to that axiom is that, to be best, you have to surround yourself with subs who can tell you are the best."

Camp offered these four tips/suggestions for a better communication/documentation process to improve relationships between prime and subs.

1. Choose who you work with: The first concern is that too many (and sometimes un(der)qualified) contractors are on the initial bid list. Review your list and reduce the number of contractors to whom the bid goes out. To the extent possible, the revised list should only include the contractors who have previously demonstrated the ability to meet your quality and delivery criteria.

2. Don't make awards on the basis of bid (\$) alone, but on previously demonstrated ability. To pay the least for work that delays other subs, or the overall project, is a pyrrhic victory.

3. Establish a minimum quality threshold based on a contractor's demonstrated ability to perform quality work (as evidenced by the fewest contractor-required change orders on previous work).

4. Examine each contractor's previously demonstrated ability to complete work on time (per the contract), while not impeding other contractors. This would include assessing (on previous work) how easy it is to work with the contractor.

Shonnessy Gilmore, Senior Industrial Hygienist and Construction Safety Professional, EHS International, Inc. believes that, "the number one rule that needs to be taught to each new employee is you NEVER do anything outside of scope without a signed change order."

Gilmore believes that the main cause of screw-ups is manufactured urgency. "Rushing jobs or proposals can lead to missing significant elements to the project, or overworked workers on site that may be bouncing between multiple sites. This to me is the number one cause of changes to

a project, stemming from a desire to meet client deadlines," said Gilmore.

Scott Jennings, SJ Construction Consulting, LLC, Consultant to the Construction Industry, believes there are issues concerning Change Order Entitlement.

"Whether subcontractors know it or not, their biggest worry should be entitlement on changes. Just because the work is performed, if it is not properly documented, it may be deemed as "never having happened," he said.

David McKay, Managing Director at HMK Company works directly with owners and shared his perspective.

"Nobody likes change orders," he said. "But they are inevitable for several reasons." McKay said that errors of omission occur because drawings are complex. There are often ambiguities in each set of documents.

Another cause for error are unforeseen conditions like when a building is being modernized and walls are opened, asbestos may appear.

Also, owners may decide mid-project to change the scope of the project because they see something they'd like to add.

"As an owner's representative, we try to be fair and pay contractors the money they're due," he said. "But owners also have a contingency, knowing that changes orders are likely. I've never had a project without a change order."

The lesson?

Document, document, document! Plan ahead. Be accurate. Take your time. Communicate. Sounds easy. Yeah, right.

About the Author



Jack Rubinger is a freelance writer, with more than 10+ years of workplace safety and construction industry research and writing experience. Looking for an article on a specific construction topic?

Contact: jackrubinger814@gmail.com or

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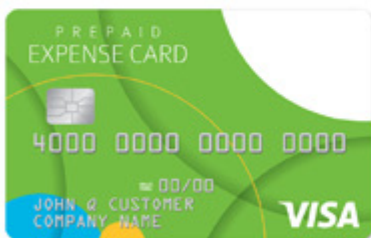
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