Construction Changes & Differing Site Conditions

Presented by
John P. Ahlers
(206) 515-2226

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AIA 201 1997 Article 7

7.1 Changes

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, . . .
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; . . .

7.1.3 The **Contractor shall proceed promptly** . . .
Federal Acquisition Regulation (FAR 52.243-5) Changes and Changed Conditions (APR 1998)

(a) The Contracting Officer may, in writing, order changes in the drawings and specifications within the general scope of the contract.
(b) The contractor shall promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.
(c) If changes under paragraph (a) or conditions under paragraph (b) increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d) upon submittal of a “proposal for adjustment” (hereafter referred to as proposal) by the Contractor before final payment under the contract.
(d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) unless

(1) The contractor has submitted and the Contracting Officer has received the required written notice; or

(2) The Contracting Officer waives the requirement for the written notice.
(e) **Failure** to agree to any adjustment shall be a **dispute under the Disputes clause**.
Purposes of the Changes Clause

- Flexibility (new technology)
- End Product Quality Improvement
- Procurement Authority to Add Work
- Claims Process
Limitations on Owner’s Right to Order Changes

*Owner* has authority to issue change orders.

*Contractor* has no guaranty to perform work.
Limitations on Owner’s Right to Order Changes (cont.)

- Authority (actual and/or apparent)
- Within the general scope of the contract
- Competitive bidding restrictions
- Owner free to buy changed work from others
Limitations on Owner’s Right to Order Changes – Cardinal Changes

• Substantial changes occur which are not covered by the contract and are not within the contemplation of the parties (*Bignold*, 1965).
• Demolished the Contractor’s intended cost structure and time structures (*V.C. Edwards*, 1973).
Limitations on Owner’s Right to Order Changes – Cardinal Changes

• The change did not reflect a fundamental alteration of the project because “there was not the slightest change in the shape or square footage of surface painted.” (Hensel Phelps, 1990).

• No contractual remedies for delay/disruption. (Douglas Northwest, 1992).
Quantum Meruit
Total Cost Not Favored

- The bid was reasonable.
- Costs were reasonable.
- None of the incurred costs were caused by the Contractor’s acts or failures to act.
- Job was so disrupted by the Owner’s breaches that the Contractor could not segregate and prove its damages on a “cause and effect” basis.
Notice of Claims

Three hurdles to cross:

1) Timely written notice of the event giving rise to the claim;

2) Written documentation of the entitlement and cost backup to support the claim; and

3) Follow the contract claim resolution procedures.
Reasons for Written Notice Requirement

• Allow owner to **explore cost reduction options**.
• Keep Owner informed as to costs (allow Owner to track costs).
Reasons for Written Notice Requirement

• Protect Owner from paying for work it does not want.
• Ensure work was ordered.
• Evidence that work is extra.
MMJ Dilemma

An Owner can:

demand additional work outside the scope of the original contract, observe the Contractor perform that work,
MMJ Dilemma

An Owner can:

**discuss** the work with the Contractor, and yet
MMJ Dilemma

An Owner can:

deny fair compensation for services rendered if the Contractor fails to submit a written request for compensation/time for the demanded work in the required format.
MMJ Dilemma

The Owner can direct work be done, and the Owner is **not prejudiced** by the Contractor's failure to abide by the technical requirements of submitting a claim for payment, but the Contractor nevertheless forfeits its claim.
Requirements for Written or Oral Change Orders

- Notice provision strictly enforced.
- Notice/oral change orders:
  - Actual knowledge
  - Failure to give notices induced by actions or statements of the government.
  - Notice to the contracting officer would have been useless.
Requirements for Written or Oral Change Orders (cont.)

- The contracting officer considered the claim on its merits.
- The owner showed no prejudice that might have been avoided if the contractor gave timely notice.
Duty to Proceed

- Owner’s right to terminate the contractor for default.
- No duty to proceed where changes to be performed are outside the general scope of the contract ("cardinal change").
  - No **right** to perform changed work.
  - No **obligation** to perform cardinal change.
Change Order Impact Costs

- Change order provisions are silent as to impact damages.
- Contract documents provide that all costs shall be included in the change order.
• **Change Order Full Compensation**  Payment of the changed work or the granting of a time extension provided herein, shall be full compensation for any change or extra work, including payment for costs of all delays in connection with such change and including full payment for any expenses for inconvenience, disruption of schedule and/or loss of efficiency or productivity of any nature whatsoever by contractor and/or subcontractors, suppliers and/or materialmen.
• **Reservation of Rights** This change order is based solely on direct cost elements such as labor, material and normal mark ups and does not include any amount for changes in the sequence of work, delays, disruption, rescheduling, extended overhead, acceleration and/or impact costs, which is not possible to assess at the present time. Right is expressly reserved to make claim for any and all of these related items of compensable cost overrun prior to final settlement of this contract.
Change Order Issues

- Duty to Proceed
- Contractor's Gamble in Refusing to Proceed – *F.S. Jones Constr. v. Duncan Crane*
Change Order Issues

• Owner's Limitation on Directing the Contractor to Proceed
  ▪ Authority
  ▪ Writing
  ▪ Within the General Scope
  ▪ Competitive Bid Restrictions
Differing Site Conditions
What to Do When Conditions on the Job Change

• **Common Law General Rule:** Risk Of Unforeseen Difficulties During Performance Falls Upon The Contractor

Where one agrees to do, for a fixed sum, a thing **possible** to be performed, **he will not be excused** or become entitled to additional compensation, because unforeseen difficulties are encountered.
What to Do When Conditions on the Job Change (cont.)

- Fraud, Negligent Misrepresentation of Conditions or a Mutual Mistake of Fact
- Breach of Implied Warranty of the Sufficiency and Adequacy of the Plans and Specifications
- Constructive Change
- Failure to Disclose Superior Information
Risk Shifting Clause

FAR 52.236-2 Differing Site Conditions (Apr 1984)
(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site, of an unusual nature, which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered, and generally recognized as inhering in work of the character provided for in the contract;
Risk Shifting Clause (cont.)

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do (1) materially so differ and (2) cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the condition, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.
(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the **written notice** required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) **No request** by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if **made after final payment** under this Contract.
Purpose of the Differing Site Conditions Clause

- No windfalls and no disasters for the contractor.
- The government benefits from more accurate bidding, without inflation for risks which may not eventuate.
Scope of the Risk Shifting Clause

- **Type 1 Conditions**: Subsurface of latent physical condition differing materially from the conditions which are indicated in the contract documents.
  - Contract Documents
  - Subsurface latent
  - Express or implied
  - Induces reliance
Scope of the Risk Shifting Clause (cont.)

- **Type II Conditions**: Unknown and of an unusual nature differing materially from those ordinarily encountered and recognized as inhering in the work.
  - Unknown
  - Unusual
  - Nondisclosure
Limitations of the Differing Site Conditions Clause

- Site Investigation Clauses
- Disclaimer/Exculpatory Clauses
  - Implied Warranties
  - Misrepresentation
  - Constructive Changes
Site Investigation And Conditions Affecting The Work (Apr 1984)

(a) The contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials;
(2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the confirmation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself
as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory Work done by the Government, as well as form the drawings and specifications made a part of this contract. Any failure of the contractor to take the actions
Site Investigation And Conditions Affecting The Work (Apr 1984) (cont.)

described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully the work without additional expense to the Government.
(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representations made concerning conditions which can affective work by any of its officers or agents before the executions of this contract, unless that understanding or representation is expressly stated in this contract.
Typical Disclaimer Clause

Any information shown on plans as to soil or material borings or tests of existing materials is for the convenience of the Contractor. The information is not guaranteed, and no claims for extra work or damages will be considered if it is found during construction the actual soil or materials conditions vary from those indicated by the boring.
Notice – Promptly Before Conditions are Disturbed

• Purpose of the Notice Provision
  ▪ Opportunity to do investigation and verify
  ▪ Possibly alter work to avoid excessive costs

• Constructive Notice
• No Prejudice