Protect Your Contracts With the "Best Ever" Changes Clause

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When it comes to protecting your interests, the ConsensusDocs 200 Changes Clause is probably the best standard form changes clause ever.

Compared to competing standard form general contracts, it is far more equitable in its allocation of risk for the increased cost of changed work. But to take full advantage of this "best ever" clause, you should be familiar with how it works in your favor.

Change clauses assume a perfectly fair owner or design professional who will, when changes occur, recognize them and agree to pay a fair and reasonable price for the increased work.

In the real world, unfortunately, this doesn't always happen. What does is that a standard form changes clause, in conjunction with provisions for liquidated damages and default termination, becomes a tool to force the contractor to finance the increased cost of changed work. This is particularly likely to happen when the changed work results from a latent defect in the plans or specifications. The ConsensusDocs 200 Changes Clause may not look that different at first glance; but it is different, and better for all parties if used correctly.

8.1 Change Order

In the past, the other standard form general contracts have reserved the right to issue a change order solely to the owner or the owner's representative. This is unfair. It allows the owner to ignore constructive changes to the work caused by, for example, acts or omissions of the owner or design professional.

A contractor faced with such a situation has little choice but to proceed with the work as best he can, and make a claim for the work's increased costs. Paragraph 8.1 makes a simple yet radical change: It allows the contractor to request a change. A claim is rarely dealt with before the end of a project; whereas a change request sets in motion the remainder of the Changes clause, and provides the contractor a mechanism to be paid for at least part of its extra work while the project is ongoing.

There are numerous issues that might alert a contractor to submit a request for change. The following list is far from exclusive:

- Unreasonable rejection of "or equal" equipment or materials
- Unreasonable rejection of a proposed contract schedule
- Unreasonable rejection of installed work
- Unreasonable rejection of any submittal
- An unreasonable demand for work not shown on the plans and specifications
- Unforeseen subsurface conditions or other unforeseen obstacles to performance
- Unreasonable over-inspection
- Unreasonable punchlists

This list could go on at great length. The important thing to remember is that requests for changes are not limited to obvious changes in design – any occurrence that increases the cost of construction may give rise to a request for change if it is not the fault of the contractor or an entity within the contractor's chain of responsibility.

8.2 Interim Directed Change

Like the change order provision, this clause is similar to the directed change provision of other standard form contracts. The radical difference is in subpart 8.2.2, which provides for sharing the cost of disputed work. Under other standard form changes clauses, a contractor who disputes the value of a directed change may be obligated to proceed with performance and pursue a claim to the end of the job. Subpart 2.2 provides that the owner will pay the contractor 50% of the estimated cost of the work pending resolution of the dispute. And it is the contractor who prepares the estimate, subject to an obligation to use reasonable skill and judgment.

What happens if the contractor requests a change under Paragraph 8.1 as discussed above and the owner denies that a change is due? Is the owner obligated to issue an interim directed change to allow the work to proceed? Subparagraph 8.3.3, which will be discussed further below, requires the owner to issue an interim directed change if the owner wants the contractor to proceed with the work. Alternatively the contractor might make a claim for additional cost or time under Paragraph 8.4, but doing so might not be to the contractor's advantage. From the contractor's point of view, and in the best overall interest of any project, it is much better for all disagreements about extra work or time to be treated as disputed changes rather than claims.

8.3 Determination of Cost

Virtually all standard form contracts default to a cost-plus model if the work is not covered by unit prices and the owner and the contractor cannot agree on the cost of changed work. While this seems perfectly reasonable on its face, many fixed-price contractors do not have the accounting systems or personnel needed to accurately track the cost of change order work. Nor do many fixed-price contractors include the expense of field cost accounting personnel in their bids for the work.

While not a perfect solution, subparagraph 8.3.1.3.2 does provide for reimbursement of the cost of employees stationed in the contractor's field office "to the extent necessary to complete the applicable work." A good argument can be made that this provision would cover the cost of field personnel required to track and document the cost of changed work. It is also wise for fixed-price contractors to acquaint themselves with the basics of the cost accounting needed to track the cost of disputed changes. To the extent that project budgets will allow it, detailed cost records are also an excellent source of productivity information for future bidding.

8.3.3 – The following language from Subparagraph 8.3.3 is arguably the most significant part of Article 8:

> *If the Owner and the Constructor disagree as to whether work required by the Owner is within the scope of the Work, the Constructor shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations. If the Owner issues a written order for the Constructor to proceed, the Constructor shall perform the disputed work and the Owner shall pay the Constructor fifty percent (50%) of its estimated cost to perform the work. In such event, both Parties reserve their rights as to whether the work was within the scope of the Work, subject to the requirements of ARTICLE 12.*

Many contractors have suffered severe financial damage as a direct result of financing changed work pending the resolution of disputed changes under the claims provisions of standard form contracts. This provision has the potential to change that "always bad outcome." While the paragraph does not mandate that the owner issue an interim change directive, it implies that the contractor is not obligated to proceed without such a directive.

Contractors should attempt to frame their change requests in such a way as to persuade the owner or design professional that a change is in the best interests of the project. Probably the best way to do this is to document the reason for the change in as much detail as possible, including an explanation of the basis for the contractor's estimate.

As discussed above, it is conceivable that an owner might refuse authorization to proceed with disputed work, but threaten default termination if the contractor refused to proceed in accordance with the owner's wishes. Keep in mind that even the best drafted standard form contract will never put lawyers out of business completely. Sometimes, claims are inevitable.

8.4 Claims for Additional Cost or Time

This paragraph covers those instances where the contractor doesn't request or the owner refuses to issue a change order or interim directed change. As above, the language is similar to other standard form contracts, but there are important differences in the details. Specifically, contractors should be alert because the 14-day notice period for making a claim appears to be shorter than in the other major standard form contracts. While this may appear to be a disadvantage, it is not. Claims, if they must be made, do not improve with age.

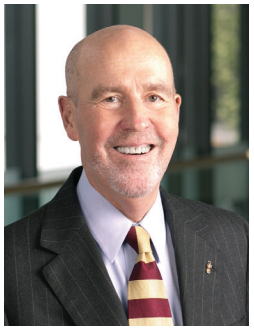
It is virtually always in a contractor's best interest to give notice and document a claim while the circumstances giving rise to the claim are fresh in everyone's mind and the necessary documentation has not been deleted or otherwise trashed. The longer a contractor waits to give notice, the more difficult it can become. Simply put, the 14-day notice period is good for contractors who comply, because they will be able to do a far better job of documentation and will have more opportunities to lower their claims handling costs. Early notice is akin to dealing with a dental cavity before it becomes an abscess.

The 14-day notice period for claims does not apply to change requests. Paragraph 8.1 does not place a time limit on change requests. To avoid disputes about timely notice, it is best to always start with the change request if it is in any way possible. If the owner ultimately denies a directed interim change and demands continued performance, the start of the 14-day clock will at least be plainly defined.

Concluding Thoughts

Claims are never good for construction projects. While an owner might see a short-term advantage to denying a contractor's request for additional pay, the long-term cost of a disputed claim is likely to far outweigh any anticipated savings. For contractors, claims can be disastrous.

Contractors should attempt to banish the "claim" word from their project vocabulary. Any event that is likely to give rise to increased costs should be treated as a change, and a change request submitted. If, in the end, a claim becomes unavoidable, give notice and provide backup immediately. Claims should be avoided if at all possible, but, if they can't be avoided, the sooner they are dealt with, the better.



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