

# WHO, WHAT & HOW



## Key Questions to Ask When Dealing With Changes on a Project

By Matthew DeVries

As a father of seven young children, I am often called into the room to resolve disputes. Whether I am acting as a mediator to help the kids work out their problem or whether I am acting as an arbitrator to determine who was right or wrong, the resolution invariably turns on “who” said or did “what” and “how” it happened. In the construction industry, these same questions have to be answered when a dispute arises.

### THE CONTRACT

The first place you need to turn when a problem arises during a construction project is the contract. Perhaps the two most important provisions you need to review are the “changes” clause and the “disputes” clause. With respect to changes, the contract should outline what process needs to take place in the event of a change that results in an impact

to the contractor’s time or cost of work. There is usually a notice provision that instructs you on what must be done to notify the other party of the basis for the change in work and the potential damages. Finally, the changes clause (which varies in application, depending on whether it is a state or federal project) addresses alterations or changes in quantities that ultimately change the character of the work under the contract. In such a situation, the contractor may receive an increase in compensation and additional time for the change in the work.

The disputes clause identifies the procedures that will be followed when the parties have a dispute. Is mediation a condition precedent to other forms of dispute resolution? If you have an opportunity to do so during contract negotiation, then you should make mediation mandatory before proceeding further with other forms of dispute resolution.

### ABOUT THE AUTHOR

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Also, as the contractor, you want to make sure that the owner does not get to unilaterally select the dispute resolution method at the time of the dispute. You should agree in advance to either litigation or arbitration. Most important, do you have the right to recover attorneys' fees, or is it one-sided in favor of the owner? If so, either delete it or make it mutual so that the "prevailing party" gets their attorneys' fees.

### THE REAL WORLD

Although the contract may be clear about the change order process, many disputes arise because those procedures are not followed in the field. In some instances, the owner directs changes or additional work and verbally promises to compensate the contractor. Other times, the contractor simply fails to properly document the parties' agreement regarding the change. In either event, when the parties fail to follow the change order process outlined in the contract, disputes will arise.

This exact scenario was illustrated in a recent decision in *Carolina Conduit Systems, Inc. v. MasTec North America, Inc.*, where a federal court in Virginia held that the subcontractor could not recover costs for extra work because the subcontractor failed to follow the contract specified change order process. The contractor entered into an agreement with the owner to relocate and improve existing underground conduit on a rail project. After encountering problems in the field, the conduit installation subcontractor determined that the "project could not be built as designed." On more than one occasion, the contractor informed the subcontractor "not to worry" about the increased costs because there were plenty of funds available.

The subcontractor submitted a claim at the end of the project for the increased costs for extra work. The court rejected the claim because the subcontractor did not follow the correct procedure for changes. The court held: "Contractual provisions requiring written change order requirements maintain order and predictability in the construction business, and are meant to avoid subsequent disagreement and prevent controversy." Additionally, the court held that the verbal statements by the contractor's representatives were

insufficient to prove a modification of the contract or a waiver of the procedures through a course of dealing. In the end, the subcontractor was not entitled to recover the extra costs.

### CONCLUSION

What a party says in the field may be helpful in some circumstances.

However, if the parties' written contract contains a change order process, then the party seeking additional time and/or money is well advised to follow those procedures. This may create an administrative burden on your field personnel, but it is worth the time and effort to properly preserve and document the claim. ■

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