

Hidden Releases In Change Orders

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Owner-directed design changes and the resulting change orders during the physical construction of a project are a common occurrence. Some contractors are welcome to change orders because, depending on the specific change order work, it can result in added profits to the project. Other contractors do not like change orders because change orders can have a disruptive impact on a project requiring a contractor to perform its planned work out of sequence and/or in an inefficient manner. No matter the contractor's view of change orders, change order clauses are standard in construction agreements and most contracts are carefully crafted to require all change orders to be signed by the owner or the upper-tier contractor to be binding.

A recent court case highlights the importance of a contractor's thorough review of the proposed change order before it signs off same. In a recent case, the court was asked, on the contractor's motion to dismiss the subcontractor's complaint, to review the parties' subcontract to determine that certain change orders that the subcontractor claimed were due and owing were barred by the no-damage-for-delay clause of the subcontract and that the subcontractor's delay claim was fully compensated through change orders issued on the project.

The Court first analyzed the parties' subcontract and determined that it contained a valid and enforceable no-damage-for-delay clause. While the subcontractor conceded the existence of the no-damage-for-delay clause, it claimed that throughout the course of the project the parties executed change orders that compensated the subcontractor for the delays, impact on its work and productivity and inefficiencies that arose in connection with work being done pursuant to the change orders. The court, in reviewing the executed change orders, found that they not only provided the subcontractor with additional compensation and time beyond that set forth in the subcontract, but that the parties agreed that the subcontractor would be entitled to additional compensation for work performed as a result of delays on the project. As a result, the court held that the contractor could not argue that restrictive clauses in the subcontract or trade contract (incorporated into the subcontract) prevented the subcontractor from seeking compensation for extra work performed as a result of certain delays, when such payment was provided in the executed change orders.

The court then analyzed the specific change orders to determine whether the subcontractor could assert its delay claims in the litigation. The contractor argued that the executed change orders precluded the subcontractor from seeking additional compensation, including compensation related to delays on the project. Notably, the executed change orders stated that the "amount of this change order represents full compensation for all costs, including delays and impacts resulting therefrom." The subcontractor did not deny executing change orders with the waiver language, however, it attempted to argue that the contractor's issuance of multiple change orders with delay damage components demonstrated that the parties understood, on an ongoing basis, that

extra work may be required as a result of delays or for other reasons and that the subcontractor would be entitled to compensation. The court disagreed with the subcontractor. The court held that based on the restrictive language in the change orders the subcontractor had waived its right to seek additional compensation for delay in connection with any change order issued that contained the waiver language. The court further held that the issuance of multiple change orders demonstrated that the parties attempted to address certain unexpected delays by providing the subcontractor with additional compensation and that each change order issued contained the restrictive language with respect to compensation for future delays.

Commentary

This case illustrates the importance of parties' conduct during construction and the need to closely scrutinize every document and change order executed during a project. In this case, the waiver language in the executed change orders was the death knell to the Subcontractor's delay claim.

Whether you are a contractor or subcontractor this is an important case and a lesson for change orders. While this case pits a contractor against a subcontractor, this dilemma also appears when the owner is issuing change orders to the contractor. Any contractor or subcontractor should be mindful that a decision to issue additional compensation for delays can set a precedent and may ultimately lead to a court finding that the carefully negotiated no-damage-for-delay clause in the contract has been vitiated by the course of conduct of the parties. Contractors and subcontractors should also carefully scrutinize the language in the change orders for waivers and releases. Many public owners have waiver language in their change order forms. Such language could be explicit like in this case or can be as subtle as directing the contractor to insert 0 for days of delay associated with the change order. In the latter example, a contractor cannot later claim delay associated with a change order, if it executed a change order that states that there is no delay associated with the same.

Contractors and subcontractors should push back and reserve rights for delay and/or impact damages and attempt to insert days of delay into change orders. This practice should be in place from the first change order issued on the project. Often times one change order issued at the beginning of the project may not cause a delay, however, the cumulative impact of successive change orders can. Waiving the right to seek delay and impact damages in the first change order may hurt the contractor/subcontractor later on in the project.

Change orders are very important and should not be haphazardly executed. Feel free to contact me to discuss and review what needs to be included and excluded in change orders.