Managing Change to Your Contract: Your Contract, Friend or Foe?

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Participants must:
1. Check in with attendance proctor at the door.
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Learning Objectives

By attending this session participants will be able to:

• Identify the risks associated with contract changes & claims.
• Discover ways to mitigate risk.
• Discuss the rights and claims associated with the execution of change orders.
• Discuss the applicable laws and legislative changes from both a federal (public) and private contracting perspective.
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Managing Change to Your Construction Contract

Introducing the Panel of Experts:

• OWNER: John Eaton, Senior Project Manager, Department of Design and Construction, Inova Health

• CM/CG: James Owens, Division Vice President, The Whiting-Turner Contracting Company

• DESIGNER/FORENSIC ENGINEERING: Charles Russo PE, Senior Principal, Simpson Gumpertz & Heger

• SUBCONTRACTOR: David Welch, CEO & Principal, Welch and Rushe, Inc.
The Owner’s Perception of “Change”

“Change Order”

“Original Contract”
Introduction and Purpose

Managing Change to Your Contract

– Provide a discussion as to how a contractor can avoid complicated, time-consuming and expensive claims and litigation and still be fairly compensated for extra and/or changed work and for project delays

AUDIENCE QUESTIONS AND PARTICIPATION WELCOME
Managing Change to Your Contract: Your Contract, Friend or Foe?
Equip Yourself to Settle Potential Disputes and Thus, Avoid Formal Claims, by:

• Understanding your contractual obligations and rights – read & understand your contract and subcontracts
• Competent schedule development & updating
• Performing your work in accordance with the contract and in a timely manner
• Providing timely and proper notice
Equip Yourself to Settle Potential Disputes and Thus, Avoid Formal Claims, by:

• Not waiving your rights on contract forms such as
  – change orders, payment applications or waivers/releases
• Maintaining accurate, contemporaneous project records
  – daily reports, superintendents’ diaries, log books, etc.
  – submitting proper impact analyses in the correct format according to the contract
Understanding Your Contract

• When must you start and finish your work?
• What are the CPM scheduling requirements?
  – What are the delay analysis requirements?
• Are you going to “share the schedule”?
• Is there a “mutually agreed” schedule clause?
• What happens when a change occurs?
Understanding Your Contract

• What are the notice provisions – who do you notify and how much time do you have?
• What are the damages for finishing late?
• What exculpatory/limiting language is included in your contract?
• What happens when a change occurs?
Changes

• If there were no scope changes on a construction project, there would be
  – significantly fewer disputes, claims and litigation
Panel

• Are changes inevitable in construction projects?
  – How do you avoid them “up front”? 
  – Does the quality (or lack thereof) of construction documents impact this?
  – What about type of Delivery System? - Design/Build; Design-Assist; CM At-Risk;
  – BIM & 4D Scheduling?
  – Quality of personnel (on all sides)
What is a “Change”?

• Different **type** or **quantity** of work from that contained in the contract

• Working in different **conditions** and/or in a different **time frame** than could reasonably be inferred from the contract
Construction Change Orders

Two Types:

• Directed vs. Constructive

What’s the Difference?
Construction Change Orders

• **Directed change**: a change which the owner acknowledges, and typically issues as a “formal” change order. Can be unilateral or bilateral

• **Constructive change**: can be verbal or written, is one for which the owner does not acknowledge entitlement as a change to your contract
Why is this a Constructive Change:

• The owner has not acknowledged entitlement to a change or that its conduct results in a change
• A change occurs if the work was not included in the original contract scope and was not reasonably inferable therefrom
Panel - The “Art of the Change”

- What are the respective parties goals?
- What are they bringing to the table – is it constructive or damaging?
- What about notice?
- When should we initiate the change?
The *Spearin* Doctrine in BIM “Coordination”

• One of the landmark construction law cases.

• Owner impliedly warrants the information, plans and specifications which it provides to a construction contractor.
  
  – The contractor will not be liable to the owner for loss or damage which results solely from insufficiencies or defects in such information, plans and specifications “…if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work…the contractor should be relieved, if he was misled by erroneous statements in the specifications."

*United States v. Spearin*, 248 U.S. 132 (1918)
What Happens when Change Occurs?

• Cost of performance may increase – triggering requirements to fulfill contract obligations of timely notice
  – Causation & quantification

• Changes often cause delay and impacts to labor productivity that add to the cost

• Can you document your LOP?

• Changes may result in schedule acceleration

• Disputes may arise as to change cost and impacts
Construction Change Orders

Potential Impacts of Changes

• Time Impacts - Delays
• Mitigation – Acceleration
• Labor Inefficiencies ("LOP")
• Escalation – Labor, Material & Equipment
Managing Your Changes & Avoiding Claims

Have you read your contract?

• Most contracts contain substantial hurdles

• To avoid claims – contractors must understand these hurdles and manage the contract terms

• The purpose of the contract is to shift the risk from someone else to you (i.e.; exculpation)

• and to protect the drafter of the contract, to the fullest extent possible, from your claims of added costs and delay
When Change Occurs:

- Timely notify in accordance with the contract
- Mitigate impacts where possible/reasonable/feasible
- Quantify impacts – schedule & productivity
- For delay – submit time impact analyses ("TIA")
- For productivity – measure actual production
- Prepare costs for identifiable impacts – special coding
Panel

• Should the Prime Share the CPM Electronic Database with the Subs?
• Pros & Cons?
• Why do they or don’t they?
When Change Occurs:

- Do **not** waive rights on change order forms on monthly payment application certifications or partial releases
- Expressly reserve rights where quantification is not possible at the time of price submission
- On federal government projects – understand the obligations and liabilities of claim certification & accord & satisfaction language
Panel – Change Management

• Changes inherently provides one party an advantage over the others

• The “art of the sale” –
  – Different project types/deliveries have different tactics – GMP vs. FFP vs. Cost-Plus, etc.
  – GC must take different “marketing approach”
Managing Your Changes & Avoiding Claims

The following are examples of standard contract clauses that you will probably encounter:
AIA A201 Changes Clause

§ 7.2 CHANGE ORDERS
§ 7.2.1 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.

§ 7.3 CONSTRUCTION CHANGE DIRECTIVES
§ 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in Sum and Contract Time being adjusted accordingly.

§ 7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

§ 7.3.5 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor’s agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.
Changes Clause – Federal Contracts

CHANGES (AUG 1987)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes --

1. In the specifications (including drawings and designs);
2. In the method or manner of performance of the work;
3. In the Government-furnished facilities, equipment, materials, services, or site; or
4. Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
What do “Typical” Contract Change Clauses Require as to Notice and Quantification?
9. The Contractor agrees that whenever it becomes apparent from the current monthly computer-produced calendar-dated schedule that any Contract completion date will not be met, he will take any or all of the following actions, with prior approval of the Engineer and at no additional cost to the District: (1) resequencing construction activities, (2) providing additional manpower, (3) working overtime, or any combination of these actions.

CHANGE ORDERS, DELAYS AND TIME EXTENSIONS:

A. When changes authorized by the Contracting Officer and/or delays are experienced, the Contractor shall submit a written Time Impact Analysis to the Engineer, illustrating the influence of each change or delay on the current Contractor’s Construction Schedule completion date. Each Time Impact Analysis shall include a fragment network analysis (fragnet), demonstrating how the Contractor proposes to incorporate the change or delay into the Detailed Network Diagram. Additionally, the analysis shall demonstrate the time impact based on the
Waiver Language

Each Time Impact Analysis shall be submitted in triplicate and within 30 calendar days after a delay occurs or is recognized, or the Contractor receives a request for proposal for a potential revision from the Engineer. In cases where the Contractor does not submit a Time Impact Analysis for a specific change or delay within the specified period of time, then it is mutually agreed that particular potential revision or delay has no time impact on the Contract completion date and no time extension will be granted. Approval or rejection of each Time Impact Analysis by the Engineer or his authorized representative shall be made within approximately 30 calendar days after receipt of each Time Impact Analysis, unless subsequent meetings and negotiations are necessary. Upon approval, a copy of the Time Impact Analysis signed by the Engineer or his authorized representative shall be returned to the Contractor. Upon mutual agreement by both parties, fragments illustrating the influence of Change Orders and delays will be incorporated into the Detailed Network Diagram during the first update after agreement is reached.
“Knows or Should Have Known”

C. As used herein, claim means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause. However, if the submission subsequently is not acted upon in a reasonable time, or is disputed as to liability or amount, it may be converted into a claim for the purpose of this clause.

D. Within 30 days after contract knows or should have known of the basis for a claim relating to this contract, contractor shall file a written notice of claim with the Procurement Officer.

Is the term “claim” limited to “delay”? 
(k) The contractor shall be prepared to effect schedule revisions in the network in response to changes to the contract under the terms thereof, at the direction of DGS. In the event that change orders are experienced, they shall be reflected as new activities in the network, or as changes in logic and/or time framing of existing activities. They shall be introduced at the next updating after receipt of a change order, and shall be subject to the approval of DGS. Change order logic shall affect only those intermediate activities and performance dates directly concerned. Adjustments required in completion dates for those intermediate dates, or for the contract as a whole, will be considered only to the extent that there is not sufficient remaining float to absorb the additional time which may be authorized for completion of individual activities.

M. Contractor must take all reasonable action to avoid or to mitigate the effects of delays, including but not limited to: (1) rescheduling or resequencing the work, (2) accepting other work and (3) reassigning personnel. When the contractor is responsible for any delay, the State may order the contractor to accelerate construction, work overtime, add additional shifts or manpower, work on weekends, or to do anything else reasonably necessary in order to finish on time, at no additional cost to the State. The contractor does not have the unilateral right to complete the work late and pay liquidated or other damages.

N. Failure of the contractor to request, as required by Section 3.06B and this Section 7.06, a time extension to which he might otherwise be entitled, shall constitute a waiver of contractor’s right to an extension of the required completion date.
What are Ways to Forecast and Control Changed Conditions?

- Know your base contract scope
- Maintain accurate and updated total project CPM schedule
- On-going schedule update reviews and submissions with written narrative reports
- Timely processing of change requests that includes notice and quantification
- Review by legal counsel of events and notices as dictated by project conditions
Panel – Lessons Learned

• Forecasting is everything
• If you have good information at the time you can generally make good decisions on the project.
• MONEY is #1 thing
Schedule Analyses May Be Required

• The contract may require the prime contractor to submit TIAs or “fragnets” as impacts occur
• A TIA is a “time impact analysis” and if it is required by the contract,
  – failure timely to submit the TIA may be construed to be a waiver of rights to claim
• If change order forms contain “full accord” language,
  – the contractor may be limited to the time extension supported by the TIA once the change is executed
• Should consider subcontractor buy-in to time impact analyses before changes are submitted & executed
Time Impact Analysis
Excusable vs. Non-Excusable Delay

**Excusable**
- Owner/Owner’s Representative
- Neither
- Both Owner/Contractor

**Non-Excusable**
- Contractor/Sub-Contractor/Vendor

**Non-Compensable**
- Both Owner/Contractor
- Neither Owner nor Contractor

**Compensable**
- Owner/Owner’s Representative
- Neither Owner nor Contractor
The “Should Haves” for a Proper Change Order Impact Analysis

**Should have:**

- An accurate & current (updated) CPM schedule
- Met the contract requirements for the notice of change and quantification
- Prepared a “fragnet” Time Impact Analysis (“TIA”)
- Devised a way to identify and quantify labor inefficiencies, if applicable
“Full Accord”

• Many owners expect all impact costs to be included in the change order proposal
• Time extension costs
• Labor inefficiencies
• Costs to mitigate delay be Included in the Change Order Pricing
• “Full Accord & Satisfaction” – Beware Bell/BCI
“Full Accord”

G. Execution of a written change order by contractor, or failure of the contractor to dispute the terms of a written order of the Procurement Officer strictly in accordance with contract requirements, shall be binding and conclusive and shall operate as an accord and satisfaction as to (a) all compensation payable to contractor for the work associated with the change order, and (b) contractor’s right to an extension of the contract completion time. Contractor may not execute or accept a change order subject to any conditions or reservation of rights or claims which have not been agreed to in writing the Procurement Officer. Any attempt by the contractor to impose such conditions or reservations shall not be binding on the State. Contractor’s sole remedy for disputing the terms of an order by the Procurement Officer or for making a claim therefor is to follow strictly the procedures stated in this Section 3.07 and Sections 3.06 and 6.13.
The Progress Payment Release

FOR AND IN CONSIDERATION OF THE SUM OF DOLLARS ($__________________) as INTERIM PAYMENT, in hand of the receipt and adequacy of which is hereby acknowledged, the undersigned hereby fully and forever releases, acquires and discharges ______________, its partners, parent, related and affiliated corporations, their agents, employees, consultants, officers, directors, successors and assigns, all of whom are hereinafter referred to as "Releasee" from all manner of action and causes of action, suits, claims, judgments, damages and rights hereafter accrued or accruing in favor of the undersigned including without limitation, any and all liability arising out of or in connection with that certain Agreement ______________, between ______________, as Owner, and ______________, as Contractor, including all work labor and materials furnished, performed or provided pursuant thereto or otherwise in connection with the ______________ General Construction, up to and through

If you didn’t sign the Change Order, but signed this payment release, have you waived your rights?

Can you disagree with this language if the interim payment form is included in the contract?
What do you do if you disagree with this language?

Can you disagree with this language if the change order form is included in the contract?
What Happens When Change Negotiations Fail?
(c) Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(d)(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.
**What is a “Claim”? – AIA – A201**

§ 15.1.2 NOTICE OF CLAIMS
Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.1.3 SUBMISSION BY THE OWNER FOR CONSIDERATION
The Owner may, without cause, send the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for each period of time as the Owner may determine.

§ 15.1.4 TERMINATION BY THE OWNER FOR CONSIDERATION
The Owner may, at any time, suspend the Contract for the Owner’s convenience and without cause.

§ 15.3.4 SUBMISSION BY THE OWNER FOR CONSIDERATION
Claims for additional time shall be submitted by the Contractor in a Claim for an increase in the Contract Price, unless notice of such increased time shall be given in writing to the Owner before proceeding to execute the Work. Such notice is not required for Claims arising in an emergency, unanticipated loss or property sitting under Section 10.4.

§ 15.4.1 CLAIMS FOR CONSEQUENTIAL DAMAGES
If the Contractor willfully makes a Claim for an increase in the Contract Price, written notice of such increased time shall be given in writing to the Owner within 10 days after the Owner’s receipt of such notice, otherwise the Contractor shall be liable for all loss, inconvenience, or any other loss, damage or expense caused by the Contractor’s failure to perform as required by the Contract.

§ 15.4.2 CLAIMS FOR CONSEQUENTIAL DAMAGES
The Contractor and Owner waive Claims against each other for consequential damages arising out of any breach of the Contract. This mutual waiver includes:
1. Damages sustained by the Owner for personal injuries, loss of use, income, profits, business and reputation, and for loss of management or employees; and
2. Damages sustained by the Owner for personal injuries, loss of use, income, profits, business and reputation, and for loss of profit or profit margin anticipated profits arising from the Work.

**ARTICLE 15 CLAIMS AND DISPUTES**

§ 15.1 CLAIMS

§ 15.1.1 DEFINITION
A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.
What is a “Claim”?

• Vernacular - A dispute exists between the parties to a contract. Usually, one party to a contract “claims” that certain events have caused delay and/or added costs for which reimbursement is being sought; for which the other party denies responsibility for the events and/or the requested remedies.

• If changed work becomes the subject of an executed change order, usually a claim does not exist.

• A claim should not be confused with NOTICE. Notice & Claim are different in form and substance & an REA and a claim may also be different.

• A claim is a demand for redress under the contract and contains the particulars of what is being sought as compensation for a changed condition, in time and/or money.
Disputes Clause – What Do I Do?

• “Work Under Protest.”
  – Although the contractor is obligated to obey certain directions and change orders from the owner, the contractor has the right to preserve claims for additional compensation by performing that work “under protest” and notifying the owner or prime of its position and intention to make a formal claim.

• Performance of contested work without reservation or “under protest” language can waive your right to reimbursement or time.
Reservation of Rights - Example

“The execution of this Change Order represents the Contractor’s estimate of direct costs only. The Contractor expressly reserves the right to submit, at a later date, added costs and time extensions attendant to this change order arising from, but not limited to, extended field and home office overhead, labor inefficiency, disruptions, impacts to the critical path, schedule resequencing and acceleration.”
Claims – What you need to do:

• **PUT IT IN WRITING** – Memory is short and often one-sided
• **MUST BE TIMELY**
• **KEEP A DETAILED RECORD AND DOCUMENT EVERYTHING**
• **BE CAREFUL WHAT YOU WRITE AND SAY** – informality of e-mails
• **BE ACCURATE**

• **PANEL- Additional Thoughts**
Preserve Rights to File a Claim

- Review all contract clauses that attempt to restrict your rights to file a claim (for time and/or money)
- Exhaust all opportunities amicably to settle outstanding issues in the form of change orders
Preserve Rights to File a Claim

• Submit timely and properly formatted notice of claim
• Consider subcontractor claims – limit liability to subcontractors filing claims “after the fact”
• Provide an accounting of the direct and indirect costs arising from the claimed conditions
• File the claim in a timely fashion and to the appropriate party; certified if necessary
Points to Remember When Preparing a Claim

• Contractual notice and a claim are (usually) two different documents
• Include in the claim the amount of time and/or costs being sought
• Include in the claim, or as an exhibit, a narrative that clearly defines the conditions giving rise to the impacts and damages in a concise fashion and in a chronological or issue based order, so that the reader can understand each element of the claim
Points to Remember When Preparing a Claim

- Provide sufficient exhibits and backup information (i.e.; notice letters, photographs, e-mails, drawings, accounting forms and similar documentation) to support each element of the claim.
- Include TIAs impact analyses and inefficiency studies identifying and quantifying losses in labor productivity as applicable to the particular claim.
Several Common Components in a Contractor’s Claim

May Include, depending on the nature of the claim:

- A critical path method (“CPM”) schedule impact analysis, such analyses can include fragnets, or time impact analyses (“TIAs”), a windows analysis and/or as-planned versus as-built schedule analysis to support any claim for a time extension.
- Craft level analyses showing as-planned versus as-built craft curves.
- Inefficiency studies identifying and quantifying losses in labor productivity.
Several Common Components in a Contractor’s Claim

May Include, depending on the nature of the claim:

• An accounting of the direct costs arising from the claimed conditions
• An accounting of the indirect costs arising from the claimed conditions
• A narrative of the cause and effect nexus that can include a written description of the events, photographs, citations to the contract, documents such as letters and electronic correspondence, RFIs, change directives and other proof that demonstrates the changed nature of the work, the resulting damage and a summary of the desired relief
Preserve Your Rights – Even if You Don’t Actually File a Claim

• Many contractors have the philosophy that “claims” must be avoided at all cost. While it is certainly desirable to avoid distracting and time consuming disputes, or costly litigation, the failure of a contractor to timely file a “claim” in a timely fashion may forever bar the contractor from the relief (i.e.; costs and/or time extensions) to which the contractor may be otherwise entitled
  — PANEL — THOUGHTS ON THIS?

• Before a decision is made by a contractor to delay or to avoid altogether filing of a “claim”, a thorough evaluation should be made by upper management as to the potential risks and liabilities that result from the decision not to file a claim
Exculpatory Provision – No Damage for Delay Clause

These clauses attempt to immunize one party from the consequences of its conduct. They include, without limitation, hold harmless or indemnity provisions and no-damage-for-delay clauses. Their objective – which often is successful – is to shift the burden of the party’s misconduct to the innocent party.

§ 8.3 DELAYS AND EXTENSIONS OF TIME
§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

Is this a No Damage For Delay Clause?
AIA – Differing Site Conditions

(Concealed Conditions)

Enables a contractor to obtain additional money and time if he encounters conditions at the site not discoverable by a reasonable pre-bid site inspection and which are different from conditions normally to be found in that area (Type 1) or if it encounters conditions at the site that are inconsistent with representations contained in the plans and specifications (Type 2).

§ 4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Section 4.4.
Delays/Suspensions/Disruptions – Owner Interference

• Delays/Suspensions/Disruptions.
  – The Owner has a duty not to interfere - not to delay, suspend or disrupt the performance of the contractor.
  – If it does, the contractor is entitled to claim that its progress has been delayed or that the work in whole or in part has been suspended or that it otherwise has been disrupted in the progress of its contract.
• What are your first steps when a claim is issued?
• Meeting of principles?
• Mediation?
• How do you avoid?
Construction Change Orders

Measuring the Impacts Of a Change

REJECTED
The Fragnet or Time Impact Analysis ("TIA")

• FRAGNETS, or the TIME IMPACT ANALYSIS,
  – A group of activities that describe a potential delay to the schedule.
  – The fragnet is inserted into the schedule at the earliest point at which the changed condition is known, or should have been known.
  – From this process, time impacts are measured in the project schedule update.
Fragnets
Development of the CPM Fragnet

- Identify each new fragnet impact as a set of activities
- Estimate durations for each new fragnet activity
- Leave no gaps in time in the fragnet (estimate waiting periods, owner review periods, etc. as durations & identify as activities)
- Tie the fragnet into the activities which will be restrained by completion of the fragnet activities
An example of an inefficiency exhibit supporting the claimant’s loss of labor productivity:

OFFICE BLDG PROJECT - MCAA INEFFICIENCY ANALYSIS & CREW SIZE COMPARISON

CREW SIZE COMPARISON PLANNED v ACTUAL

NUMBER of MEN

PLANNED BASELINE
ACTUAL

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.
“Cumulative Impact”

- **Cumulative impact** is an adverse condition that arises from the presence of changes in scope (usually multiple) and reduces the labor efficiency of both change work and base contract work (called impacts of the changed work to the unchanged work).

- The reality of **cumulative impact** has been well recognized by courts and boards of contract appeals.

- Cumulative impact can be quantified by several methods, including the measured mile and use of the MCAA Factors – or the Ibbs Study contained in the 2014 edition of the MCAA’s management manual.
“Cumulative Impact”

- It is virtually impossible to quantify, and thus to include, the adverse effects of cumulative impact in a single, discrete change order for the purpose of forward pricing.
- The most accurate measurement of the adverse effects of cumulative impact arising from scope changes is accomplished at the conclusion of the project or project phase.
- Reference the Bell BCI case for potential prime contractor liability to a subcontractor suffering productivity impacts.
“Cumulative Impact”
Reservation of Rights

• The execution of this Change Order represents mutual acknowledgement that the contractor’s price includes only the direct costs for this modification.

• The contractor expressly reserves the right to submit, at a later date, added costs and/or time extension requests attendant to this modification arising from, but not limited to:
  – extended field and home office overhead, labor and equipment inefficiencies, disruptions, cumulative impacts, impacts to the critical path, schedule re-sequencing and/or acceleration.
To Recap:

• Managing Change to Your Contract Means:
  – Vetting your estimate before the project begins
  – Understanding your contract from cover-to-cover
  – Participating in the development of the project schedule
  – Participating in the updates to the project schedule
  – Tracking and reviewing your labor trends
  – Taking steps to avoid waiving your rights
  – Providing timely and proper notice of impacts
  – Reviewing your superintendents’ daily reports
  – Documenting changed conditions (i.e.; digital photos)
  – Apprising senior management when major impacts occur
Conclusion

• “An ounce of prevention is worth a pound of cure” – Get us in early!
• Reserve your rights & perform disputed work “Under Protest”
• **Do Not** Sign releases, waivers or other like documents with “Full Accord & Satisfaction” language
• Keep a detailed, contemporaneous record
  – Logs/daily reports; accounting; keep separate cost codes for claims-issues
• **Be Careful What You Write and Say**
• **Be Accurate**
  – Assume claims are going to be read by third parties
  – **Don’t** take it personally – It’s just business
• **Be Timely**
Thank you for your participation!

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