

Contract Modifications

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Unlike most products, which undergo research, development, testing, and evaluation of prototypes to work out problems, most buildings are one-of-a-kind construction. Therefore, construction does not have the luxury of working out the kinks before it is fabricated for the buyer—changes are typically necessary to adjust the design as the work progresses. These changes are usually handled through what is commonly referred to as a *contract modification*.

Contract modifications are just that: modifications or changes to the requirements of a contract; in this case, construction contracts. Contract modifications typically carry a negative connotation, especially to owners, as evidence of poorly prepared construction documents. Although changes are more common than not, a large number of changes or a few changes with significant associated costs are definitely not desirable, and do have some relevance to the quality of the A/E-prepared documents. But it should be made clear that not all changes are the result of errors in the drawings and specifications.

The American Institute of Architects (AIA) establishes provisions for contract modifications in its Document A201-2007, *General Conditions of the Contract for Construction*, in Article 7, “Changes in the Work.” This article states that changes to the contract may be issued through three basic instruments: the *minor change* in the work, the *change order*, and the *construction change directive*. Let us review these individually in detail.

The Change Order

The *change order* is the more well-known and infamous change instrument provided for in contracts. According to AIA Document A201, the change order is a written document that is prepared by the architect and signed by all three entities: architect, owner, and contractor. When signed, all three entities agree that there is a change in the work and that there is a change in the contract sum, contract time, or both. The process begins typically in one of two ways.

The first involves architects issuing a proposal request to the contractor, either on their own volition or at the request of the owner. The proposal request is not an authorization for the contractor to perform the work, but a means of getting information from the contractor (usually price and time) so that the owner can make a determination of whether or not to proceed with the proposed change.

The other involves the contractor issuing a request for a change to the owner, through the architect, after discovering a condition that needs additional work, such as an unforeseen condition, a constructability issue, or additional work not addressed by the contract documents. This is commonly referred to as a “claim” submitted by the contractor. A “claim” is defined by AIA Document A201 as 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.

Not all claims result in change orders, nor are all change orders the result of claims.

The document that the contractor submits to the architect, whether in response to an owner- or architect-issued proposal request or contractor claim, is commonly referred to as a *change order request*, or COR. However, some contractors may use other names to identify documents that serve the same purpose.

The Minor Change

The *minor change in the work*, or *minor change* for short, is described in AIA Document A201 as a contract change “not involving adjustment in the Contract Sum or extension of the Contract Time.” Unlike the change order, the minor change does not require the signatures of the owner and contractor—just the architect’s. Once the minor change is issued, the change is binding on both the owner and the contractor.

Although called a “minor” change, the scope of the change is really irrelevant as long as there is no alteration in cost or time. For example, a significant portion of the work can technically be modified by a minor change, provided the contractor agrees that there will be no increase or decrease in cost, extension or reduction in contract time, or combination of both. While possible,

the likelihood of a large modification being accepted without a change in cost or time is relatively small.

The A/E should attempt to issue minor changes when, in their best professional judgment, they foresee no expected cost or time change. However, that is not always the case, and the A/E should not be completely surprised if the contractor responds to the minor change with a COR. Sometimes there are costs or time elements associated with the minor change of which the A/E may not be aware. If there is any possibility that a minor change might have a cost or time change associated with it, the A/E would be well-advised to discuss the proposed minor change with the contractor before issuing.

The Change Directive

The *change directive* is an instrument of change that is not as common as the other two. In AIA Document A201, the change directive is referred to as the *construction change directive*, commonly referred to as a CCD. Its purpose is to issue a change to the contractor that affects the contract sum, the contract time, or both; however, the difference between the change directive and the change order is that the change directive is used when there is no agreement on either cost or time. Thus, the change directive is used when at least one of the two following conditions exists:

1. When delaying the work in the change directive until an agreement is reached would affect the overall project.
2. When there is insufficient information available to the contractor to accurately price the additional work or determine the extent of the additional time required.

Examples of the former condition would be an unidentified utility discovered during site excavation which requires relocation before any foundation work can begin, or the owner requires a necessary change but an agreement cannot be reached, potentially delaying the project. For the latter condition, an example would be rock excavation, where the extent of removal is unknown. This example could be determined based on unit prices submitted during the procurement or bid process.

The change directive is also unlike the other two contract modifications in that the change directive is on-

ly signed by the owner and the A/E. Once issued, the contractor must proceed with the work indicated in the change directive. If the contractor signs the change directive, then the contractor agrees to the change in the contract sum and time or the method used to determine them, and a change order should be prepared to record that agreement.

Methods of adjustment indicated in AIA Document A201 include a mutually accepted lump sum amount, unit prices as previously mentioned, a cost determined in an agreed upon manner with a fixed or percentage fee, or, if the contractor does not agree with the other methods, a determination by the A/E based on cost of labor and materials plus overhead and profit.

Once the contractor completes the work required by the change directive, the issues of cost and time would need to be addressed. If agreement is reached, then a change order is required to record the modification to the contract. Otherwise, the claim becomes a dispute, and the method for handling the disagreement follows the dispute resolution procedures of the contract.

Contractors subject to the provisions of AIA Document A201 may view the change directive negatively, since it effectively requires the contractor to finance the work required by the change directive if there is a dispute.

Contract Modification Forms

Although AIA Document A201 describes the three methods of modifying a construction contract, it does not indicate the actual forms that will be used for each—a situation where a Division 01 section should be used. Section 01 26 00 “Contract Modification Procedures” should be included in a project manual to specify exactly which forms will be used to record official changes to the contract.

For change orders, AIA Document G701, *Change Order*, can be used to record the modification. Change directives can utilize AIA Document G714, *Construction Change Directive*, and minor changes typically are issued using AIA Document G710, *Architect’s Supplemental Instructions*, or ASI.

For each of these documents, owners and A/E firms may utilize custom forms suited to their specific procedures and requirements. These alternate forms may also come with a different name; for example, some A/E

firms use the “bulletin” or “field order” in lieu of the ASI. If forms other than the standardized ones mentioned earlier are to be used, the specifications should clearly indicate that. Additionally, sample forms should be included in the project manual so all members of the project team are familiar with the documents. These sample forms can either be included as an attachment to Section 01 26 00 mentioned earlier or included in Division 00 under 00 63 00 “Clarification and Modification Forms.”

When requesting the cost and time impact for a proposed change, AIA Document G709, *Work Changes Proposal Request*, may be issued to the contractor. Use of a single format for proposal requests will help reduce confusion by eliminating other sources of requests, which make it difficult to track the request and for the contractor to determine what is and is not an official request.

In every case, the change document or proposal request should clearly describe the scope of the change or proposed change so there are no misunderstandings. There is no limit on the number of attachments to these documents, so additional pages for description, specifications, and drawings can be added. A word of caution, though, additional drawings and specifications may require a professional seal; consult your state licensing board rules and laws to verify.

Contract Modifications and ConsensusDOCS

Less common than the AIA documents are the ConsensusDOCS, where DOCS stands for Designers, Owners, Contractors, and Surety—an acronym that has virtually disappeared from ConsensusDOCS publications. The ConsensusDOCS’ equivalent to the AIA Document A201 is the ConsensusDOCS 200, *Standard Agreement and General Conditions between Owner and Contractor*¹. In the ConsensusDOCS 200, there are three methods to modify a contract: the *change order*, the *interim directed change*, and the *incidental change*.

The *change order*, as defined in ConsensusDOCS 200, is a “written order...indicating changes in the scope of Work, the Contract Price, or Contract Time.” Like AIA Document A201, the change order in ConsensusDOCS 200 is used for changes that affect contract

time and cost. Additionally, the change order under the ConsensusDOCS 200 only requires the signatures of the owner and constructor—the A/E is not a part of the change order process—which could increase the risk for the owner and constructor.

The *interim directed change* is the ConsensusDOCS’ version of the change directive. The primary difference between the interim directed change and a change directive is that if an agreement cannot be reached on the directed change the owner is required to pay the constructor 50% of the estimated cost. This seems to be reasonable; however, the imprecise grammar used does not indicate upon whose estimate the 50% is based—the owner’s or the contractor’s—which could potentially compound the already disputed change.

It is interesting that, although more construction changes involve a cost increase than not, the ConsensusDOCS 200 does not direct the constructor to pay the owner 50% if there is an estimated decrease in cost. Furthermore, as with the change order, the interim directed change also does not involve the A/E in the change process; only the owner is required to sign the interim directed change document.

The *incidental change* is the ConsensusDOCS’ equivalent of the AIA’s minor change in the work, since it does not involve a change that adjusts the contract time and cost. According to ConsensusDOCS 200, the “Owner will initiate an incidental change” with a written order to the constructor—again, the A/E is not a part of the change process.

Follow the Rules

Construction documents are not meant to be perfect and owners and contractors need to understand that. Whether the result of imperfect documents, unforeseen conditions, or owner-directed revisions, changes on a project are almost always inevitable. The key to a successful project is to comply with the requirements of the contract. The general conditions, whether based on AIA, ConsensusDOCS, or some other format, need to be read and understood by each member of the project team in order to abide by the processes and timeframes established within.

It is understandable that owners, A/E firms, and contractors have a desire to streamline procedures or overlook certain steps in order to expedite an issue and to

¹ ConsensusDOCS documents have generally replaced “contractor” with “constructor.”

keep the project moving along. The occasional deviation from contract procedures may be necessary, especially if it benefits the project. But repetitive deviations or total disregard for contract procedures would likely have negative results.

There are cases where verbal orders for changes or extra work were issued by the owner and the contractor performed the work as requested. However, when the contractor requested payment for that work, the owner rejected the claim stating that the work was performed without written authorization, such as a change order. Contractors are not without options in these cases. Such claims have been upheld in court on the basis that the parties' conduct waived the change order provisions of the contract. Contractors should be well aware of who is authorized to order changes and extra work.

There is no substitution for clear, concise, complete, and correct documents, but mistakes do happen. The introduction of building information modeling (BIM) has helped to some degree to limit the number of errors, but improper application of technology could create more problems than it solves.

In a recent survey of owners², over 25% indicated that the quality of construction documents is somewhat worse than before with 5% stating it is much worse. It is hard to speculate the reason of such high percentages: Are construction documents actually getting worse, or has the recent influx of technology raised owners' expectations?

Until that question can be answered objectively, the contract modification will likely remain the barometer for measuring construction document quality.

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² FMI/CMAA Eleventh Annual Survey of Owners;
<http://www.cmaanet.org/files/shared/11thAnnualOS-PhoenixRising.pdf>.

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