4.4.8. Control of changes

FIELD CHANGES

During construction administration, one of the key influences on construction cost is change orders. Field changes are a fact of life and it is not uncommon that projects have changed during the course of construction. The three principal reasons for change orders are errors and omissions in drawings and specifications, unexpected field conditions, and owner's requests.

By thorough constructability reviews with the Designers, errors and omissions can be avoided.

Unexpected field conditions are unavoidable. As an example, the quantity of rock excavation cannot be determined until it is actually encountered on site. This is covered in the contract by an allowance. The contract should also have a unit price schedule. The quantity of rock removed will be measured by the contractor and verified by the construction manager. The change order in this case is straightforward and the payment will be by the unit price in the schedule.

Owner requests vary and have to be dealt with judiciously because the owner pays for the extra work or change in scope of work. For example, the addition or deletion of a door can easily be addressed by using the unit price schedule

Change orders are written on a standard form and include a complete description of the change and its effect on the contract price and schedule.

It is the construction manager's responsibility to ensure that all extra work items requested by the contractor are properly analyzed and reviewed. Field changes regarding specifications or exceptions to plans should always be referred to the designer, who will analyze the change order request in light of the specific design or contract requirements. The construction manager will then review and evaluate the request considering the actual field conditions and the value of work. The change order is then recommended or not recommended, as the case may be. If recommended, a change-order authorization is issued and the contract amount is revised by the change order amount. If oral approval is given because of time constraints this should be documented as soon as possible.

CHANGES, TERMINATION AND DAMAGES

Changes and Additions to the Contract:

The change clause in a construction contract allows the owner to make changes in the contract without affecting the validity of the contract. This type of change, one that is made by only one party to a contract is called as a unilateral change. The law allows unilateral change to the contract as long as the owner pays the contractor for the change.

In many contracts the parties agree in advance on certain items, such as overheads and profit to be paid to the contractors for changes. If the parties do not agree in advance, the law will require the owner to pay a reasonable amount.

It is also possible, although extremely rare, for the court to simply destroy the original contract between the parties when a large number of changes have been made. The party performing the work is paid a reasonable amount for the work completed, usually under the legal principles of promissory estoppel. Under this doctrine a contractor seeking payment for work is allowed recovery even though no contract has been formed, or the contractor has failed to follow the procedures outlined in the contract for changed work.

Another theory available to the contractor or subcontractor seeking payment for changed or additional work is the doctrine of waiver. Waiver is the knowing relinquishment of a known right. Any provision of a contract can be waived, including provisions requiring approved written change orders or approved written orders for extras.

Termination of the Contract:

Terminating a construction contract is a very rare event as the law does not allow a party to terminate the construction contract, even if the other party breaches the contract. A construction contract can be terminated only for a material or major breach. Termination for a nonmaterial breach is itself a breach of the contract and subjects the terminating party to liability for damages.

Contract Damages:

Damages are one of the primary types of relief that courts can give or grant to parties that bring lawsuits. Relief is the term commonly used in the law to mean what the court will give to the winner of a legal claim. There are several kinds of contract remedies available, if the other party breaches (breaks) the contract:

1. **Specific Performance**

When court orders the party who broke the contract to perform his or her obligations as agreed in the contract, this is known as specific performance.

For example, A enters into a written agreement to purchase B’s house at a specific price and on exact terms. If B refuses to sell, A may be able to bring a lawsuit to force B to sell at the agreed-upon price.

Specific performance is usually available when the contract involves some kind of unique goods or other unusual benefit to the other party, and ordinary money damages aren’t sufficient. Real estate is often the subject of specific performance because, in most cases, each piece of property is unique. Specific performance may also be applied in the sales of one-of-a-kind items such as antiques or items of special personal value.

2. **Compensatory Damages**

It makes up for the economic loss caused by a broken contract.

For example, when a seller, A fails to deliver 10 boxes of books to the buyer, B at the agreed price of $10 per box on the set date of delivery, compensatory damages would equal either $100 or the difference between the market price of the box of books and the contract price, if B bought the boxes from another seller.

3. **Consequential Damages**

Consequential damages are those caused indirectly by the broken contract.

For example, a retail store buys customized software to run its cash registers and inventory system. One day the system breaks down completely. As a result, the store must close for the day to repair the system. The store’s loss of business for that day is a consequential damage of the broken contract.

4. **Liquidated Damages**

Liquidated damages are damages specified in the contract itself. They may operate as an incentive not to break the contract, but don't have to be directly related to the actual loss caused by the breaking of the contract.

For example, A wants to have his kitchen remodeling job finished in time for his big party, so he includes a provision in the contract that says the contractor, B must pay him $100 per day for every day after the completion date that the job isn't completed.

Courts don't like liquidated damages clauses. They will be enforceable as long as the amount due is reasonably related to the contract damages and is not a penalty or having the effect of being a punishment.

5. **Punitive Damages**

Punitive Damages: Punitive damages are damages that punish the wrongdoer in a breach of contract lawsuit. They aren't based on actual economic loss like compensatory damages, but are designed to make an example out of the party who broke the contract and punish them for their wrongful conduct. One usually can't recover punitive damages in a contract lawsuit.

6. Mitigation of Damages:

Mitigation of damages means that the damaged party must take all reasonable steps to limit his or her damages. A damaged party cannot take advantages of the injury to maximize the amount of recovery. If the court or the arbitrator finds that the damaged party has not mitigated its damages, then the court or arbitrator can reduce the damage award.

MISTAKES

A mistake is a 'belief that is not in accordance with the facts'. The law of mistakes can be divided into three areas:

– **Unilateral mistake**: It is a mistake made by one party to the contract. The most common type of unilateral mistake occurs where a contractor or sub-contractor makes an error on a bid for a construction job. The legal rule is that unilateral mistakes do not alter the existing contract, and both parties must perform the contract as written. Three requirements which must be satisfied before the mistaken party may avoid the contract are basic assumption, material effect, and the risk on the other party, plus must show either that the mistake is such that enforcement of the contract would be unconscionable or the other party had reason to know of the mistake, or the other party's fault caused the mistake.

– **Mutual mistake:** If both parties have the same mistaken belief, the mistake is said to be 'mutual'. A mutual mistake makes the contract or that portion of the contract voidable at the election of either party.

Mistake in transcription: It is a mistake made when an oral agreement is put into writing. For example, the parties agree on a price of 60,000 to build a house, but the contract contains a price of 70,000, and neither party notices this error until after the contract is signed, a mistake in transcription can be reformed.

Dispute Resolution

1. **Negotiation (attorneys not involved)**

Negotiation is an affirmative communication between parties to a dispute and designed to resolve a dispute. It usually involves looking at alternatives and compromises by both parties to terminate the conflict. When a Dispute has arisen and negotiations between the regularly responsible persons have reached an impasse, either party may give the other party written notice of the Dispute. In the event such notice is given, the parties shall attempt to resolve the Dispute promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for the matter. Within days after delivery of the notice, the receiving party shall submit to the other a written response. Thereafter, the executives shall confer in person or by telephone promptly to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored.

2. **Mediation**

Mediation is a process focused on bringing the parties to a dispute together in an attempt to try to work out a settlement. It is the use of a third party to help parties resolve a dispute. If the dispute has not been resolved by negotiation within [30] days of the disputing party's notice, or if the parties have failed to confer within [20] days after delivery of the notice, the parties shall endeavor to settle the dispute by mediation. The mediator, unlike the judge or arbitrator, does not decide who is right or who is wrong. The mediator may discuss strengths and weaknesses of issues but does not make any decision one way or the other.

3. **Arbitration**

Arbitration is most often used to settle contractual or commercial disputes. Rather than going to court or mediation, the parties can agree in advance (in the contract) that arbitration will be used to settle any disagreements. The arbitrator may be an attorney, judge, or a businessperson.

After the parties have defined their dispute, there will be a hearing, often in the arbitrator's office, at which the parties present evidence and witnesses in a fairly informal manner without the formal rules of evidence used in court litigation. After the evidence has been presented, the arbitrator reaches a decision and usually later sends the parties a written opinion. Arbitration is usually quicker, simpler, and cheaper than litigation, but there is one perceived disadvantage – no appeal. With a few narrow exceptions, like fraud, there is no way to appeal an arbitrator's decision.

4. Litigation

Litigation is the use of the government – provided dispute resolutions system. If the dispute has not been resolved by mediation within 90 days of the initiation of such procedure, either party may initiate litigation, unless the agreement under which the dispute arose provides for arbitration. A negative aspect of this system is that it is complex and time – consuming.