

**MAKING CHANGES & RESOLVING DISPUTES**  
***DURING* THE CONSTRUCTION PROJECT**

**Melissa Dewey Brumback**

Ragsdale Liggett PLLC  
2840 Plaza Place Suite 400  
Raleigh, NC 27612

Phone: 919-881-2214 (direct)  
Email: [mbrumback@rl-law.com](mailto:mbrumback@rl-law.com)

My blog: <http://www.constructionlawnc.com>

RAGSDALE  LIGGETT

OUR LAWYERS. YOUR ADVANTAGE.

## **MAKING CHANGES TO THE CONTRACT AND CONTRACTED WORK**

### **Changes Prior to Contract Execution**

1. **The Form Contract**
2. **Scope of Services**

### **Changes During Construction**

1. **The contract change clause**
  - A. When the terms are agreed upon
  - B. When the terms cannot be agreed upon
  - C. Authority to Issue Contract Changes
    - (1) Implied Authority
    - (2) Ratification
    - (3) Oral modification
2. **Types of Changes: Ordered and Constructive**
  - A. Ordered changes
  - B. Constructive changes
3. **Requirements for Making Changes**
  - A. Notification
  - B. Timeliness
  - C. Documentation
  - D. Liability Issues
    - (1) Waiver
    - (2) Standard of Care
    - (3) Oral modifications

## **RESOLVING DISPUTES DURING THE CONSTRUCTION PROCESS**

1. **Site conditions**
2. **Disruption**
3. **Delays**
  - A. Excusable delay
  - B. Compensable delay
  - C. Concurrent delay
  - D. Delay by other Prime contractors
4. **Acceleration**
5. **Avoiding contract provisions**

## **CONCLUSION & ENDNOTES**

## **MAKING CHANGES TO THE CONTRACT AND CONTRACTED WORK**

*The only constant is change.*

--- Heraclitus, Greek Philosopher

Change happens. And, like death and taxes, changes on a construction project are pretty much inevitable. Because of the unique nature of the construction “product,” the need for flexibility on the part of owners, and the need for assurance as to compensation for the contractor, the contract “change” clause was created. The “change” clause is unique to the construction contract.

A contract change is one in which the work is modified by events or conditions not accounted for in the contract itself.

Changes can include:

- (1) additional or reduced scope of work;
- (2) material specification changes;
- (3) defective plans or specifications;
- (4) poor performance by other trades that disrupts your work;
- (5) scheduling changes, especially to the critical path;
- (6) sequence of work changes;
- (7) acceleration demands; and
- (8) unexpected/unforeseen site conditions.

A change can result in additional time, money, or both, depending on the circumstances. The better your ability to recognize, accept, and manage changes can make a good project better, or keep a bad one from ending in litigation.

The first place to start is to customize the contract and deal with potential conflicts before the contract is even executed.

### **Changes Prior to Contract Execution**

By being proactive, you can minimize conflicts that can arise when a changed condition or design occurs in your construction project.

## 1. The Form Contract

The majority of complex construction projects use one of three standard contract forms—the American Institute of Architects (AIA) documents, the Engineering Joint Contracts Document Committee (EJCDC), or the ConsensusDOCS (based on the now discontinued Associated General Contractors of America forms). Other standard contract forms include the Construction Owners' Association of America (COAA) documents and the Design-Build Institute of America (DBIA).

The benefits of utilizing a standard form contract are that (1) the terms are well defined; (2) there is a familiarity of all parties with their expected roles; and (3) the courts have already issued decisions based on many form contracts. On the other hand, the form agreements are not customized to allow for unique situations. Whether or not a form contract is used, your contract should contain a provision for dealing with changes on the project. Even in very informal situations, it is worth the time and effort to spell these items out in a written contract at the beginning of the project.

A simple contract provision which is fair to all parties can assist in early resolution of time or money disputes related to construction changes. The changes clause, therefore, is the key clause to review regardless of what form your construction contract may take. Consider the following:

- what events or conditions are considered changes to the scope of work;
- the notification requirements for construction changes; and
- method of dispute resolution in the event the time and cost issues are disputed.

It is also important to identify who is authorized to approve additional work within the contract documents themselves. Usually, the design professional is authorized to approve additional or different work so long as it is minor and does not create cost or time issues. Other changes are usually reserved to the owner or its representative.

Change clauses, also known as “change order provisions,” may specify lump sum, unit price or other clear compensation measures that may occur during the project. They may also state the method for determining time extensions; for example, requiring a “time and materials” provision for any additional scope of work. However, it is impossible to predict every change that might occur on a project, and therefore the change order and

construction change directive provisions in the standard contracts are vital in navigating this treacherous area.

## **2. Scope of Services**

It is vital that the Scope of Services be specified completely and accurately. The more detail provided in the Scope of Services, the less confusion on the part of the owner as to what he is paying for, and the less confusion on the part of the contractor as to what he actually contracted to provide.

If, for example, you are providing Construction Administration services, you should specify the number of site visits per week/month required and the number and nature of construction meetings that includes. As a contractor, if your bid is based on an assumption of a certain quantity of material on site (such as rock) which you need to remove, you should state what quantify of rock is included in the base bid or scope, and what levels will be deemed change condition or additional services. If you do not clarify this, you may find that as the contractor you are responsible for unexpected conditions on the project.

It is also imperative that you have a list of Excluded Services. While it might seem obvious that anything not specifically admitted in the Scope of Services is automatically excluded, lawsuits have been filed over this very issue. Because Scope of Service terms tend to be broad or ill-defined, the owner may assume the contractor is agreeing to perform services which the contractor is not prepared to do. Agreements can and do erupt over whether or not a particular item is included in the Scope. Therefore, if your carefully drafted Scope of Services does not clarify the issue, you can have a fall back safety measure of the Excluded Services in which to resolve the issue amicably.

Furthermore, by having complete lists of both included and excluded services, there is much less chance that the parties will mistakenly have different ideas of what each parties' role is on the project. After all, "an ounce of prevention is worth a pound of cure," as the old saying goes.

## **Changes During Construction**

While many changes can be dealt with on the front end, the vast majority of changes are unforeseen and must be dealt with as they occur. This is where the contract change clause in your contract comes into play.

## 1. The contract change clause

All standard contracts contain mechanisms for dealing with change on a construction project, for both when terms are agreed upon and for when the parties disagree on the terms.

### A. When the terms are agreed upon

When the parties can agree to the appropriate change to compensation and/or time for a change on the project, it is fairly straight-forward to execute a change.

The AIA A201, which was most recently updated and modified in 2007, contains the following:

*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.*

Note the requirement in A201 that all parties sign the agreement. A contractor that performs without a signed change order in hand is risking not being paid for that work. (We will discuss equitable remedies for at least partial recovery below).

Likewise, the ConsensusDOCS allows for easy change orders where parties can agree to the terms. ConsensusDOCS 200 states that the owner and contractor shall negotiate in good faith.

*8.1.2 The Owner and the Contractor shall negotiate in good faith an appropriate adjustment to the Contract Price or the Contract Time and shall conclude these negotiations as expeditiously as possible. Acceptance of the Change Order and any adjustment in the Contract Price or Contract Time shall not be unreasonably withheld.*

Similarly, the EJCDC C-700 contains provisions for performing changed work.

### 10.03 Execution of Change Orders

A. Owner and Contractor shall execute appropriate Change Orders recommended by Engineer covering:

1. changes in the Work which are: (i) ordered by Owner pursuant to Paragraph 10.01.A, (ii) required because of acceptance of defective Work under Paragraph 13.08.A or Owner's correction of defective Work under Paragraph 13.09, or (iii) agreed to by the parties;

2. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed in accordance with a Work Change Directive; and

3. changes in the Contract Price or Contract Times which embody the substance of any written decision rendered by Engineer pursuant to Paragraph 10.05; provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, Contractor shall carry on the Work and adhere to the Progress Schedule as provided in Paragraph 6.18.A.

#### B. When the terms cannot be agreed upon

The standard contracts also contain provisions for when the parties cannot agree upon the monetary or time compensation related to a particular change on the project. This is generally done through a Construction Change Directive (CCD)

Partial payment for such work is also contemplated by AIA A201, as set forth below:

*7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:*

*.1 Mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;*

*.2 Unit prices stated in the Contract Documents or subsequently agreed upon;*

*.3 Cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage of fee; or*

*.4 As provided in Section 7.3.7.*

*7.3.9 Pending final determination of the total cost of a Construction Change Directive to the Owner, the Contractor may request payment for Work completed under the Construction Change Directive in Applications for Payment. The Architect will make an interim determination for purposes of monthly certification for payment for those costs and certify for payment the amount that the Architect determines, in the Architect's professional judgment, to be reasonably justified. The Architect's interim determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a Claim in accordance with Article 15.*

If the contractor fails to promptly respond to or expresses disagreement with the method of calculating an adjustment, the adjustment is made by the architect on the basis of reasonable expenditures and savings attributed to the change, including a reasonable allowance for overhead and profit. (§7.3.6).

Similarly, the ConsensusDOCS 200 provide for changed work to be performed in the absence of complete agreement on the compensation terms. Moreover, it also provides for partial payment of that disputed work, to prevent the contractor from, in effect, providing the owner with a cost-free loan.

*8.2.1 The Owner may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the Contractor on the adjustment, if any, in the Contract Price or the Contract Time.*

*8.2.2 The Owner and Contractor shall negotiate expeditiously and in good faith for appropriate adjustments, as applicable, to the Contract Price or the Contract Time arising out of an Interim Directed Change. As the Changed Work is performed, the Contractor shall submit its costs for such work with its application for payment with beginning with the next application for payment within thirty (30) Days of the*

*issuance of the Interim Directed Change. If there is a dispute as to the cost to the Owner, the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work. In such event, the parties reserve their rights as to the disputed amount, subject to the requirements of Article 12.*

*8.3.3 If the Owner and the Contractor disagree as to whether work required by the Owner is within the scope of the Work, the Contractor shall furnish the Owner with an estimate of the costs to perform the disputed work in accordance with the Owner's interpretations. If the Owner issues a written order for the Contractor to proceed, the Contractor shall perform the disputed work and the Owner shall pay the Contractor fifty percent (50%) of its estimated cost to perform the work. In such event, both Parties reserve their rights as to whether the work was within the scope of the Work, subject to the requirements of Article 12. The Owner's payment does not prejudice its right to be reimbursed, should it be determined that the disputed work was within the scope of Work. The Contractor's receipt of payment for the disputed work does not prejudice its right to receive full payment for the disputed work, should it be determined that the disputed work is not within the scope of the Work.*

While the EJCDC C-700 does not have a separate construction change directive mechanism, it incorporates such owner-dictated changes into its work change order process. Where unit prices or lump sum fees are provided for in the contract, they are applied. Otherwise, a set percentage of the cost of the changed work is allowed by the contractor under §12.01.C.2:

*1. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:*

*a. for costs incurred under Paragraphs 11.01.A.1 [payroll and labor charges] and 11.01.A.2 [material and equipment costs], the Contractor's fee shall be 15 percent;*

*b. for costs incurred under Paragraph 11.01.A.3 [payment to subcontractors], the Contractor's fee shall be five percent;*

*c. where one or more tiers of subcontractors are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of paragraph 12.01.C.2.a and 12.01.C.2.b is that the Subcontractor who actually performs the Work, at whatever tier,*

*will be paid a fee of 15 percent of the costs incurred by such Subcontractor under Paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and Contractor will each be paid a fee of five percent of the amount paid to the next lower-tier Subcontractor.*

### C. Authority to Issue Contract Changes

The owner is usually the only one authorized to issue change orders on a project. The owner can, however, give that authority to the architect as his agent. Moreover, if the architect is held out as having implied authority to issue change orders, that too may be binding on the owner.<sup>1</sup>

If a contractor proceeds with changes requested by someone other than the owner or his authorized representative, he risks not being able to be compensated for that work. There are, however, equitable theories under which courts will usually allow at least partial compensation in such situations.

#### (1) Implied Authority

The designer is usually not expressly authorized to make changes to the contract, other than minor changes that do not change the cost and time. Usually, however, an architect has implied, if not actual, authority to bind the owner under an agency theory.<sup>2</sup> The general rule is that a principal is liable for the notice which his agent receives when that agent is acting within the scope of his authority.<sup>3</sup> Courts generally find that the designer has implied authority to authorize changes. The one exception to this, however, is in Federal government contracts, where only the person with express authority can order additional work.

It is important to remember that courts will not always find implied authority—they will look to see if the designer acts in such a manner as to lead the contractor to reasonably believe that he had actually authority.

#### (2) Ratification

Another equitable theory that a court can use to allow compensation for extra work is ratification. That is, if the owner has knowledge of the change, and acts in a manner that implies the contractor will be compensated for that change, the owner in effect has ratified the extra work and the contractor is entitled to compensation.<sup>4</sup>

### (3) Oral modification

A third equitable theory in which courts will sometimes allow the contractor recovery is that of oral modification of the contract. Even where a contract states that no oral modification is allowable, if the parties act consistent with an oral modification the court will allow the contractor compensation.<sup>5</sup>

You should never rely on oral modification for contract changes, however. Strengthen your claim by following up in a writing to the owner if something happens in the field which will require additional time or money.

## 2. Types of Changes: Ordered and Constructive

### A. Ordered Changes

Some contract changes are straightforward. The owner, or his authorized representative, orders a change to the scope of the project. This is done for a variety of reasons, including budget issues, scope changes, better materials entering the market, or numerous other reasons. Ordered changes are, essentially, construction change directives. If the parties agree upon the compensation to which the contractor is entitled (or other contract adjustments), a change order is signed and the project moves forward.

In general, it is better to only perform additional work after a written change order has been approved. In reality, this is not often feasible. If it is not, you should put the matter in writing, stating that you consider the work a change in the contract, and that you will seek additional time and compensation for the additional scope of work. This prevents later arguments from owners with faulty (or fraudulent) memories from denying the agreement ever took place.

### B. Constructive Changes

Constructive change is one in which the owner requests work that is different in some manner than that allowed under the contract, but the owner does not offer a change order for the differing work. Examples include remediation of defective plans, meeting higher performance standards, or altering the means and methods of performance.<sup>6</sup> Compensation will be based on the value to the owner, however, and not on the costs incurred by the contractor.<sup>7</sup> If, however, there is an express provision relating to the extra work, the court will generally insist that the requirements be satisfied.<sup>8</sup>

In the case of a disputed construction change, you should keep complete records under separate cost codes to document, as closely as possible, all costs associated with the changed work. This will be needed for later negotiations and, in the event those negotiations fail, in any litigation over the matter. This is also crucial in the event of liquidated damage provisions—by documenting owner ordered changes and delays, the contractor is in a better position to argue against the assessment of liquidated damages.

### **3. Requirements for Making Changes**

#### **A. Notification**

Written notice is usually required for claims for additional compensation resulting from changed or unforeseen conditions. The better practice is to always provide written notice, as soon as possible.

However, the failure to provide a written notification of a change is not usually fatal. North Carolina case law allows a written contract to be modified or waived by the parties through an agreement or conduct which naturally and justifiably leads the other to believe the contract provision has been waived or modified.<sup>9</sup>

For example, one court found that the owner waived any expectation of following the contract schedule specified in the contract by his actions. The owner had refused to allow the grading contractor to waste wet material when requested, and yet the owner knew that the wet, unstable material could not be used on the project. Therefore, the court found the contract schedule waived by the owner's conduct.<sup>10</sup>

In another case, the court held that a contractor could recover extra duration-related costs for staffing the project six months after the scheduled completion date due to a gross underestimate of the amount of rock to be excavated and removed. The court found that the excessive rock was not within the contemplation of the parties, and thus was a mutual mistake.<sup>11</sup>

#### **B. Timeliness**

The timely filing of a notice is required, and varies according to the contract:

| <b>Document</b>   | <b>Number of days for Notice</b> | <b>Pertinent contract section(s)</b>        |
|-------------------|----------------------------------|---|
| ConsensusDOCS 200 | 14 days                          | 3.16.2 (site conditions);<br>8.4 (claims)   |
| AIA A201          | 21 days                          | 3.7.4 (site conditions);<br>15.1.2 (claims) |
| EJCDC C-700       | 30 days                          | 10.05                                       |

Failure to comply with the notice provision under the contract can bar a delay claim.<sup>12</sup> However, courts sometimes, but not always, take a lenient view with regard to this provision.

In one case, the court held that the contractor's demand for increased costs due to delay in construction was not untimely, since the delay did not occur on a specific date, and that therefore, the written notice within 20 days of occurrence provision was not a necessary condition to the making of a claim.<sup>13</sup> It is better practice, however, to note the condition on the first day it happens.

### C. Documentation

If the owner initiates the change, the design professional usually prepares the documentation. If the contractor initiates the change, to which the owner consents, the contractor typically prepares the documentation, which is then reviewed by the design professional.

To be effective, a change order should include:

- description of the additional or changed work to be performed;
- number of days the work is extended for this additional/changed work;
- amount of money contractor is to be compensated for the additional/changed work;
- signature and date of owner, architect, and contractor; and
- back-up proposals, invoices, logs, etc. to support the change order requested.

No other information is necessary to execute an enforceable change order. If the price is not yet determined but the parties have agreed to a unit price, the agreement for the unit price should be included in the change order. A follow-up

revised change order can then include the actual number of units, and compensation, involved in the changed work.

#### D. Liability Issues

There are a multitude of liability issues that surround construction contracts. A few of the major ones include waiver, standard of care, and oral modification of the scope of work.

##### (1) Waiver

In the absence of specific contract provisions dealing with liability issues, common contract law will apply to construction contracts. Common construction law dictates that even standard form documents are not absolute. Despite the significant benefits in using the standard form contracts, the terms within them are not fully defined by case law. A court, therefore, will still look for the intent and understanding of the parties. As the Court of Appeals has stated: “While [standard construction] documents are widely used in the construction industry, both for convenience and because they provide for many of the problems which practical experience has shown to be expected to arise in the course of a construction project, there is nevertheless no magic in the printed word. The problem remains here, as in other contract cases, of ascertaining the true intent and understanding of the parties.”<sup>14</sup>

Where the parties through custom or practice routinely waive certain requirements of one another, those requirements may be deemed by the courts to have been taken out of the contract. For example, the requirement for written notice for extensions of time can be waived by the owner if the contractor asks for an extension of time and the owner never responds. Courts have held that in such cases, the contractor is not required to continue to fruitlessly submit further requests for extensions of time.<sup>15</sup>

##### (2) Standard of Care

Generally, each party is liable to perform in acceptance with the standard of care of others employed in the same profession in the same locale. An architect must act as other architects would in the same situation; a contractor must act as other contractors would. The parties sometimes attempt to add indemnity provisions to their contract whereby one party (usually the contractor) indemnifies the other in the event of any third party lawsuit. Indemnity provisions are fraught with potential liability issues, including the potential that by agreeing to such an

indemnity provision you might inadvertently waive your insurance coverage. All such indemnity provisions should be examined by your attorney and/or your insurance carrier, or stricken from the contract.

### (3) Oral modifications

Memories fade. People leave. Once any litigation occurs, it is a guarantee that many verbal conversations will be in hot dispute. Therefore, oral change orders should be avoided if at all possible to limit your liability.

To the extent that an oral change or directive is given, you should attempt to have it reduced to writing. At the minimum, you should write a letter to the architect and owner to confirm the oral change order and agreed upon price, even if you have to send the letter at the end of the day to confirm the conversation and work that took place that day. Meeting minutes are good, but an actual stand-alone letter is better.

Oral change orders can be enforced under the legal theory that the owner waived the written change order requirement of the contract, or under theories of equity such as *quantum meruit*. However, the equitable remedy is the fair market value for the services performed, not the agreed-upon price for those services.

North Carolina courts have enforced some oral change orders. In one particular case, a contractor was ordered to utilize stronger 18 gauge material in lieu of the 20 gauge material originally specified in the contract. The Court held that the contractor was entitled to make a claim for the oral change order despite the requirement of written change orders specified in the contract. “The provisions of a written contract may be modified or waived by a subsequent parol [oral] agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived . . .”<sup>16</sup> In another case, the court held that the owner was required to pay where (1) the owner had ample notice of the “changed conditions” and the “extra work;” (2) the architect had ordered the work to be performed; and (3) the contractor notified the owner of the price estimates prior to performing the extra work.<sup>17</sup>

In some cases, though, the courts have refused to allow a claim based on an oral change order, strictly adhering to the language of the express contract where no “waiver” was found.<sup>18</sup> Therefore, contractors should not rely on an oral change order but insist upon a writing for all changes to contract time or amount.

## **RESOLVING DISPUTES DURING THE CONSTRUCTION PROCESS**

### **1. Site Conditions**

Unforeseen site conditions are a frequent dispute in the construction arena. A unforeseen site condition is a physical condition encountered in performing the work that was not visible, known, or anticipated to exist at the time of bidding and that is materially different from the original assumptions relating to the site. Differing site conditions are usually considered “constructive changes” to the contract.

A contractor is entitled to compensation for a differing site condition when the conditions at the site would not have been revealed had he made a reasonable site inspection and examined all available information (e.g., geotechnical reports). An example of a differing site condition occurred in *Davidson & Jones* case.<sup>19</sup> In that case, the contractor encountered four times the amount of anticipated rock (based on the owner’s own figures). The court found that 10-15% was a reasonable variation, and it allowed compensation for the extreme conditions on site.

If a contractor discovers significant unforeseen conditions, the court may treat the contract as one in which there is a “mutual mistake” as to vital facts, meaning that both parties to the contract did not know of the conditions. The court may then allow compensation regardless of the contract terms.<sup>20</sup> For example, excessive wetness which requires a large overrun in undercut excavation has been deemed a changed condition for which compensation was justified.<sup>21</sup> The purpose of changed condition clauses is to encourage low, competent bids. Without this type of clause, cost contingencies would be added to the bid prices, artificially inflating the bids.

The AIA A201 document breaks constructive changed conditions into two types:

- Type I claims: actual conditions differ materially from that shown on the contract documents
- Type II claims: actual conditions differ materially from those ordinarily found to exist or expected in work of that nature

Both Type I and Type II claims can be the basis for a Change Order or Construction Change Directive. However, where the parties to a contract expressly remove a “changed conditions” clause from their contract, the courts

have refused to allow the contractor extra costs incurred because of unexpected amounts of excavation which were required.<sup>22</sup>

In the Federal contract context, differing site conditions are often considered “cardinal changes.” A cardinal change refers to a change which is so material that the essential nature of the contract is altered. Under the doctrine, if a change requires the contractor to perform duties materially different from those originally bargained for, it is deemed a cardinal change which essentially nullifies the contract.<sup>23</sup> No North Carolina court has recognized a “cardinal change,” so unless you are on a federal job or working in another state, any unforeseen conditions would likely be addressed under the “changed conditions” clause of the contract.

## **2. Disruption**

Disruption to the progress of the work is considered a changed condition or delay. If severe enough and not the contractor’s fault, it entitles the contractor to compensation. Each of the standard contracts contains provisions allowing the owner to stop work for its own purposes or for no reason whatsoever.

Under AIA A201, work which is suspended for “owner’s convenience” is addressed in Article 14.3. Contract sum and contract time are adjusted to account for increases attributable to the suspension, delay, or interruption.

ConsensusDOCS 200 provides for owner suspension under Article 11.1. It requires immediate compliance by the contractor to suspend, delay, or interrupt work if ordered by the owner. The contract price and time are then equitably adjusted by change order for the increased cost and delay resulting from any such suspension.

In EJCDC C-700, Article 15.01 addresses owner suspension of the work. This provision limits the suspension to not more than 90 consecutive days. The contractor is entitled to an adjustment in contract price or an extension of contract time, or both, if directly attributable to such suspension.

## **3. Delays**

Projects inevitably experience some delay, often multiple delays from multiple sources. As the saying goes, “time is money,” and on construction projects, every party has a duty to not delay or get in the way of any other party to the project.

The most crucial time issue on a construction project is, of course, the critical

path. Many, though not all, construction projects begin with a critical path method (CPM) schedule at the start of the project. It is important that all parties review and understand their obligations under the CPM. If the delay affects the critical path, a milestone, or the date of substantial completion, the parties need to determine whether or not the delay is excusable and/or compensable.

A. Excusable delay

An excusable delay is one that is not foreseeable and is not in control of either of the contracting parties. If, for example, the steel market suddenly dries up causing delays in fabrication of key building components, this was likely unforeseeable (and not controllable) and, therefore, an excusable delay.

An excusable delay may entitle the contractor to a time extension. However, it does not necessarily allow the contractor monetary damages. For example, under AIA A201, Article 4.3.8.2, extremely adverse weather conditions may be an excusable delay where the weather is not foreseeable and it effects the scheduled construction. Other examples include “acts of God”, labor strikes, and differing site conditions.<sup>24</sup>

B. Compensable delay

If a delay is not excusable, then by definition it is one that has been caused by one of the parties. If the delay is the owner’s fault (or that of another contractor or the designer), the contractor is entitled to money damages. Likewise, if the delay is the contractor’s fault (or its subcontractor), the owner is entitled to money damages if it delays the date of substantial completion.

Actual damages have to be proven by the party claiming damages. This is accomplished through the careful documenting of costs, invoices, time sheets, and related damages. If there is a valid liquidated damages provision, it will determine the amount of compensation for a compensable delay.

Indirect damages may be recoverable, if they are allowed under the contract and can be proven with a reasonable degree of certainty. These can include extended overhead, interest, lost profits, rents, equipment idle time, labor idle time, mobilization and demobilization fees, increased material costs, and related damages.<sup>25</sup> While such damages must be proved to a reasonable degree of certainty (i.e., they cannot be speculative), there is no requirement of complete or absolute certainty.

It is important to note that, left unaltered, “consequential damages” are limited or waived in the standard form contracts. Consequential damages include the indirect damages listed above.

| <b>Document</b>   | <b>Cite</b> | <b>Parties</b>           | <b>Language</b>                                    |
|-------------------|-------------|--------------------------|--|
| AIA A201          | §15.1.6     | Owner-Contractor         | Claims for Consequential Damages—mutual waiver     |
| AIA B101          | §8.1.3      | Owner-Architect          | Consequential Damages Waiver                       |
| ConsensusDOCS 200 | §6.6        | Owner- Contractor        | Limited Mutual Waiver of Consequential Damages     |
| ConsensusDOCS 240 | §5.4        | Owner-Architect/Engineer | Limited Mutual Waiver of Consequential Damages     |
| EJCDC C-700       | §12.03      | Owner- Contractor        | No damages paid to Contractor by Owner or Engineer |
| EJCDC E-500       | §6.10.E     | Owner-Engineer           | Mutual Waiver of Consequential Damages             |

Some contracts contain “no damages for delay” clauses, in which a contractor’s right to recover for time delays is limited. [Standard construction contracts typically do not contain explicit, all-encompassing, no-damages-for-delay clauses.] In those cases where a “no damages for delay” clause is present, the contractor’s remedy is time extension only, and not money. Even with such a clause, money may be recovered if the contractor can show that the owner was grossly negligent, the delays were not anticipated, or the delays were so unreasonable that they essentially changed the scope of the contract.

To establish a delay claim, the key is accuracy. You have to show the extent of the delay with a reasonable degree of accuracy, and you must accurately show that the delay caused direct damages.

C. Concurrent delay

Concurrent delays, where both parties are at fault, are generally not compensable in North Carolina unless otherwise provided for within the contract itself.<sup>26</sup>

D. Delay by other Prime contractors

In projects with multi-prime contracts (for example, those with the State of North Carolina or one of its entities), any party can sue any other party directly for

damages, including delay damages, without regard to their contractual relationship.<sup>27</sup> This includes the project's architects and engineers. Thus, if you delay any other trades on a state project, you can expect to be held accountable for those delays as well as the costs of the delay to the owner.

#### **4. Acceleration**

Acceleration is the term used when a contractor is required to expedite the work through overtime and trade stacking. This can be voluntary, if a contractor is behind schedule. Often it is done by owner demand, in which case the contractor is entitled to monetary compensation for either explicit acceleration or constructive acceleration based on the owner's demands.<sup>28</sup>

As always, to be compensable, the contractor must timely request a time extension. Further, the owner must be requiring the contractor to complete a schedule that has not been extended through the change order process for this same work.

#### **5. Avoiding contract provisions**

While not the purpose of this presentation, know that there are several defenses available to a contractor to avoid a contract provision under certain circumstances. These include, but are not limited, to:

- Impossibility/impracticability (where, for example, performing exactly under the contract will result in extreme difficulties or economic waste)
- Misrepresentation or Mutual Mistake (concerning, for example, the general quantity of rock under a site)
- Duty to Disclose (where the owner has knowledge pertinent to the project he fails to disclose to the contractor bidding on that project)
- Breach of Implied Warranty (the Spearin doctrine, in which the owner impliedly warrants that the plans and specifications are complete and meet the standard of care)

### **CONCLUSION**

Proper planning in advance of your construction project can ensure its success. Just as you spend time reviewing plans for preparing your bid, you should spend time reviewing the contract documents and requirements.

Most standard form contracts attempt to account fairly for the inevitable changes, disputes, and delays. It is vital you follow all proper notification, documentation, and other requirements to ensure you obtain the time and money to which you are entitled.

---

## **ENDNOTES**

<sup>1</sup> See *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988), *rev denied* by 321 N.C. 744, 366 S.E.2d 862 (1988); *Son-Shine Grading, Inc. v. ADC Const. Co.*, 68 N.C. App. 417, 315 S.E.2d 346, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984).

<sup>2</sup> See *Son-Shine Grading, supra*.

<sup>3</sup> See *Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 421 S.E.2d 370 (1992); *Foote & Davies, Inc. v. Arnold Craven, Inc.* 72 N.C. App. 591, 324 S.E.2d 889 (1985).

<sup>4</sup> *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980); *Phillips v. Restaurant Management of Carolina, L.P.*, 146 N.C. App. 203, 552 S.E.2d 686 (2001), *rev denied* by 355 N.C. 214, 560 S.E.2d 132 (2002); *Son-Shine Grading, supra*.

<sup>5</sup> See *Inland Const. Co. v. Cameron Park II, Ltd, LLC*, 181 N.C. App. 573, 640 S.E.2d 415, *aff'd* by 181 N.C. App. 573, 640 S.E.2d 45 (2007); *Triangle Air Conditioning, Inc. v. Caswell County Ed. of Educ.*, 57 N.C. App. 482, 291 S.E.2d 808 (1981); *rev. denied* by 306 N.C. 564, 294 S.E.2d 376 (1982).

<sup>6</sup> See *Industrial & Textile Piping, Inc. v. Industrial Rigging Services, Inc.*, 69 N.C. App. 511, 317 S.E.2d 47, *rev denied* by 312 N.C. 83, 321 S.E.2d 895 (1984).

<sup>7</sup> *Environmental Landscape Design Specialists v. Shields*, 75 N.C. App. 304, 330 S.E.2d 627 (1985).

<sup>8</sup> *Handex of Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 607 S.E.2d 25 (2005).

<sup>9</sup> *Shields, Inc. v. Metric Constructors, Inc.*, 106 N.C. App. 365, 416 S.E.2d 597 (1992).

<sup>10</sup> *S.J. Groves & Sons and Co. v. State of N.C.*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *rev denied* by 302 N.C. 396, 279 S.E.2d 353 (1981).

<sup>11</sup> *Davidson and Jones, Inc. v. N.C. Dept. of Admin.*, 315 N.C. 144, 337 S.E.2d 463 (1985).

<sup>12</sup> See *D.W.H. Painting Co., Inc. v. D.W. Ward Construction Co., Inc.*, 174 N.C. App. 327, 620 S.E.2d 887 (2005); *American Nat'l Electric Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 604 S.E.2d 315 (2004).

<sup>13</sup> *Triangle Air Conditioning, supra*.

<sup>14</sup> *T.A. Loving Co. v. Latham*, 20 N.C. App. 318, 201 S.E.2d 516 (1974).

---

<sup>15</sup> See, e.g., *J.R. Graham & Son, Inc. v. Randolph County Bd. Of Ed*, 25 N.C. App. 163, 212 S.E.2d 542, *cert denied* by 287 N.C. 465, 215 S.E.2d 623 (1975).

<sup>16</sup> *Metric Constructors, supra*. See also *Centex-Rodgers Construct. Co. v. Wake County*, 993 F.2d 228, 1993 WL 147487 (4<sup>th</sup> Cir. 1993 (N.C.)) (unpublished disposition).

<sup>17</sup> *Centex-Rodgers, supra*.

<sup>18</sup> See, e.g., *Brokers, Inc. v. High Point City Board of Education*, 33 N.C. App. 24, 234 S.E.2d 56, *rev denied* by 293 N.C. 159, 236 S.E.2d 702 (1977).

<sup>19</sup> *Davidson & Jones, Inc. v. North Carolina Dep 't of Admin.*, 315 N.C. 144, 337 S.E.2d 463 (1985).

<sup>20</sup> *S.J. Groves & Sons, supra*.

<sup>21</sup> *Ray D. Lowder, Inc v. Highway Comm'n*, 26 N.C. App. 622, 217 S.E.2d 682, *cert. denied* 288 N.C. 393, 218 S.E.2d 467 (1975).

<sup>22</sup> *Thompson-Arthur Paving Co. v. N.C. Dept of Transport.*, 97 N.C. App. 92, 387 S.E.2d 72, *rev denied* by 327 N.C. 145, 394 S.E.2d 186 (1990).

<sup>23</sup> *Hancock Electronics Corp. v. Washington Metropolitan Area Transit Authority*, 81 F.3d 451 (4<sup>th</sup> Cir. 1996), *cert denied* 519 U.S. 929 (1996); *Exec. Business Media, Inc. v. U.S. Dept. of Defense*, 3 F.3d 759 (4<sup>th</sup> Cir. 1993).

<sup>24</sup> See, e.g., *Lea Co. v. N.C. Bd of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983).

<sup>25</sup> See, e.g., *Biemann and Rowell Co. v. Donohoe Companies, Inc.*, 147 N.C. App. 239, 556 S.E.2d 1 (2001).

<sup>26</sup> *Terry's Floor Fashions, Inc. v. Crown General Contractors, Inc.*, 184 N.C. App. 1, 645 S.E.2d 810 (2007) (subsequent history omitted).

<sup>27</sup> N.C. Gen. Stat. §143-128; *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 380 S.E.2d 796 (1989) (subsequent history omitted).

<sup>28</sup> *Watson Electrical Constr. Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420, *disc. rev. denied*, 334 N.C. 167 (1993).

---