**STEVEN M. SIEGFRIED**

**SIEGFRIED, RIVERA, LERNER,**
**DE LA TORRE & SOBEL, P.A.**

# *CHANGE ORDERS IN FLORIDA*

## §VI CONTESTED CHANGE ORDERS AND EFFECT ON LIEN RIGHTS

A. Basic Clause Coverage

B. The Contractor's Scope of Work

[1] Modifications

C. The Requirement of Writing

[1] Waiving the Requirement

D. Contractor's Duty to Proceed with Disputed Work

E. Effect of Failure to Proceed

F. Constructive Changes

G. Contractor's Duty to Seek Clarification

H. Cardinal Change

[1] Accepting a Cardinal Change

I. Deductive Change Orders v. Convenience Termination

J. Performance Specifications v. Detailed Specifications

K. Rules of Contract Interpretation Applicable to Scope of Work Disputes – Decisions of the Architect

L. Notice of Protest and Bookkeeping Requirements

M. Pricing Adjustments for Changed Work

[1] Pricing Change Related Costs

N. Exculpatory Clauses

O. Claims Preservation and Defenses

P. Accord and Satisfaction

Q. Remedies

## §VI. CONTESTED CHANGE ORDERS AND EFFECT ON LIEN RIGHTS[1]

### A. Basic Clause Coverage

The contract documents, which include the specifications, determine whether a contractor is entitled to additional compensation for changes or extra work. Generally, a contractor is obligated to do the work specified in the contract documents. In the absence of a changes clause in the contract, a contractor need not perform any work different from or beyond that specified in the contract documents. Thus, most construction contracts contain clauses which permit owners to make changes and order extras as necessary and provide a mechanism for approval and payment.

A typical changes clause provides that construction contracts generally give the owner has the right to makes changes in the work; that the contractor must perform owner ordered changes; that the change order must be written and signed; and provides the method of pricing the change. A typical change clause states:

> A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after execution of the Contract, authorizing a change in the Work or an adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates his agreement therewith, including the adjustment in the Contract Sum or the Contract Time. The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being

[1]Special thanks is given to Jeffrey R. Cruz, Dana Wordes Robert Rubin of Postner & Rubin for allowing me to use portions of materials prepared by them for a similar seminar offered by Lorman Education Services dealing with Change Orders in New York.

> adjusted accordingly. All such changes in the Work shall be authorized by Change Order and shall be performed under the applicable conditions of the Contract Documents.[2]

Part of an AIA form contract between an owner and contractor Changes in the Work article provides that the "Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly."[3]

The exercise of authority to order changes and add or delete work must be done within the conditions set forth in the contract. Thus, if the contract states that changes may be made if "necessary," the ordered change must have been necessary. The necessity need not be absolute, but must be reasonable, such as it being impractical to build the project as planned due to unforeseen unstable soil conditions.

Changes clauses typically include requirements that any orders for changes, extras, or additions be in writing. Such clauses may also provide a mechanism for a contractor to reserve its right to claim for additional compensation if it is ordered to do work which the owner or its agent contends is contract work, but which the contractor believes is extra work.

---

[2] The AIA Document A201 (1997) contains similar provisions in Articles 7.1 and 7.2.

## B. The Contractor's Scope of Work

Payment for changes is available only if the contractor performed work beyond that or different from that specified in its contract, generally referred to as the contractor's scope of work. The contract documents are the ultimate guide in determining whether extra work has been performed. A contractor cannot recover extra compensation for remedial work it was required to perform when its original work failed to meet the contract standards. Similarly, in the absence of bad faith by the owner, a contractor cannot recover a higher unit cost when it is required to excavate more than estimated in the contract documents; generally, excess excavation is not an extra, but is work within the contract.

### [1] Modifications

A modification of a contract is binding only if the parties mutually assent. That is, no party may unilaterally modify a contract. Moreover, since a modification in essence substitutes a new contract for a preexisting agreement, the contractual requirements of offer, acceptance, and consideration apply. Although the offer and acceptance requirements are usually satisfied, the absence of any new consideration often creates a problem. For example, contractors frequently want a higher price to complete work that they are already obligated to do. Generally, this kind of modification is

---

[3] See AIA Document A201 (1997).

unenforceable because the contractor is offering the owner no additional consideration. Furnishing additional labor and materials in exchange for more money is adequate consideration to support modification, as is forbearing to exercise a legitimate right to terminate the contract. However, a promise of additional payment for work within the "Scope of Work" of the Contract is unenforceable.

Modifications need not be in writing unless the Statute of Frauds or the original contract itself so requires. Construction contracts often contain a provision requiring that "all modifications, changes, or extras shall be enforceable only if in writing." Often the provision can be avoided through findings of waiver or detrimental reliance.[4]

### C. The Requirement of a Writing

Construction contract changes clauses usually require that all orders for changes or extra work be in writing signed by the owner and architect or other designated person(s). In general, such provisions are designed to protect the owner from unexpected costs or unjustified claims for additional compensation. Absent a waiver, a contract provision requiring a written order is binding and will bar recovery for extra work or changes performed without one.[5] A failure to follow contract requirements regarding extra work is, in effect, a waiver of a claim for compensation for that work. There may

---

[4] Broderick v. Overhead Door Co. of Ft. Lauderdale, Inc., 117 So.2d 240 (Fla. 2d DCA 1959); Forest Constr., Inc. v. Farrel-Cheek Steel Co., Fla. Diversified Properties Div., 484 So.2d 40 (Fla. 2d DCA 1986).

[5] Phillips & Jordan, Inc. v. Department of Transp., 602 So.2d 1310 (Fla. 1st DCA 1992); Tuttle/White

be some question as to what constitutes a writing. The answer depends upon the particular contractual requirements and the facts of each case. If the contract is clear and rigid in its definition of what will suffice, little else will do. More often, the contract is not definite and there is room to argue that there is a written order despite the apparent absence of one. For instance, revised specifications accepted and approved by the owner in writing may be a written order for extras. On the other hand, plans or drawings of proposed alterations unsigned by the owner may not constitute a written order within the meaning of most construction contracts.

### [1] Waiving the Requirement

Like any contract requirement, a requirement for written orders may be waived by the parties or their agents, if the agent has the authority to do so.[6] Rarely will an agent have the authority to waive a writing requirement. An owner is not bound by its agent's unauthorized waiver. Frequently, the provision on change orders will not specifically identify the person required to sign them. In that case, common law doctrines of agency apply. Obviously, the owner may individually sign any orders. In addition, family members, employees, and members of the owner's organization may have express, implied, or apparent authority to act on the owner's behalf. Unless power is expressly

---

Constructors, Inc. v. State of Fla. Dept. of Gen. Servs., 371 So.2d 1096 (Fla. 1st DCA 1979).

[6] Doral Country Club, Inc. v. Curcie Bros., Inc., 174 So.2d 749 (Fla. 3d DCA), *cert. denied*, 180 So.2d 656 (Fla. 1965).

given, however, it has been held that neither architects nor engineers have any inherent power to authorize changes. Likewise, no inherent power rests in the project representative or a state inspector. Although these people have no inherent or implied authority, they may be given apparent authority by the owner's action. For example, by permitting increases and decreases in the contract price with just the signature of the architect, the owner was held to have given apparent authority to the architect to execute change orders.[7]

Another important issue concerning changes in the work is how to arrive at fair compensation for the change. Like changes in the original contract, changes in the work can be compensated for by applying one of three basic measures: lump-sum, cost-plus, or unit price. The contract documents should always fix the method of calculating compensation for change sin work; it need not be the same method that is utilized for valuing specified work provided in the original contract.[8]

A party may waive a writing requirement inserted for its protection; i.e., a contractor may not waive a writing requirement which is intended to protect the owner; the owner would have to waive it. A writing requirement may be waived in three ways: by oral order; by acquiescence; or by conduct.

---

[7] Fletcher v. Laguna Vista Corp., 275 So. 2d 579 (Fla. 1st DCA 1973), *cert. denied*, 281 So.2d 213 (Fla. 1973).

[8] Siegfried, Florida Construction Law, Aspen Law & Business, (2001), §

## D. Contractor's Duty to Proceed with Disputed Work

Disputed work issues arise when the owner or its agents order the contractor to perform work the contractor believes to be extra work but the owner contends is contract work. Most contracts give the owner or its architect or engineer the right to direct the contractor to proceed with disputed work. For instance, Article 7.3 of AIA Document A201 – 1997, provides:

> 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 the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract 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.
>
> 7.3.3 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 states 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 fee; or
.4 as provided in Subparagraph 7.3.6.

7.3.4 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 of the Contract Sum or Contract Time.

Under such a clause, the contractor must proceed (unless the work in question is so far beyond the scope of the contract as to be a cardinal change) and give notice that it is working under protest, reserving its right to make a claim for payment for the work. If the contractor refuses to proceed, it can be held in default and its contract terminated. Once the job is completed, the contractor, assuming it has reserved its right to make a claim by giving all contractually required notices, may bring suit against the owner to recover its damages due to the disputed work.

## E. Effect of Failure to Proceed

If a contractor refuses to proceed it faces the risk of being considered in default and having its contract terminated. Even if the contractor is later found to have been correct – the work was extra work and entitled the contractor to extra compensation – its failure to proceed under protest can result in a default of its contract and damages.

## F. Constructive Changes

Constructive changes are changes caused by the owner but not acknowledged by it as changes. The term constructive change developed under federal construction contracts and is often used by construction lawyers, but less often by the courts. Simply put, it is a breach of the contract by the owner. In a constructive change, the contractor asserts that an action or order of the owner or its architect or engineer amounts to a change which requires an adjustment of time or money; the owner denies that there is a change. Typically, a constructive change arises from a dispute in contract language interpretation. When an owner requires a contractor to perform work or use materials which the contractor considers to be different from that required by the contract, but will not issue a formal change order, the contractor may treat the order as a constructive change order and later make a claim for additional compensation under the claims clause of the contract.

A constructive change may result from owner interference with the work, defective specifications, owner non-disclosure of technical information, over-meticulous inspection, owner dictation of performance methods, or contradictions between performance and detailed specifications.

## G. Contractor's Duty to Seek Clarification

Government, and perhaps private contractors, have a duty to seek clarification of

ambiguities which may exist in the contract prior to the submission of their bid. Even if a court believes that the contractor's interpretation of contract language is reasonable, it may still bar recovery for the contractor if that interpretation grows out of an ambiguity that is clear on the face of the contract.[9] This requirement is intended to protect the Government from a contractor who intentionally submits a low bid in order to make claims for extras later on by claiming ambiguities during performance.

While no Florida case appears directly on this point, federal case law clearly sets forth this duty of clarification for government contractors. In 1963, the United States Court of Claims in Beacon Construction Co. v. United States[10] recognized and upheld the contractor's duty to seek clarification where a clause in the contract required prospective bidders to immediately inform the Contracting Officer of discrepancies in the drawings or specifications.

The court stated that if the bidder is on notice of a problem involving the language of the contract but chooses to ignore it, he cannot later rely on the fact that ambiguities in contracts written by the Government are held against the drafter. In fact, the bidder is under an affirmative obligation to call attention to the ambiguity or omission if he intends to interpret it in his favor. Otherwise, the bidder's failure "to resort to the remedy proffered by the Government" with regard to an obvious discrepancy will be

---

[9] Ralph C. Nash, Jr., Government Contract Changes. (Washington: Federal Publications, Inc., 1981) p.233.

[10] 314 F.2d 501, 161 Ct.Cl. 1 (1963).

interpreted against him.[11]

Soon after Beacon was decided, in another case the Court of Claims in W.P.C. Enterprises, Inc. v. United States[12] restated the Beacon rule, but this time there was no clause in the contract requiring clarification. However, the court emphasized that if a particular provision in a government contract is usually interpreted a particular way and the contractor reasonably interprets it that way, the interpretation will be adopted. While the contractor may have some duty to inquire about a major discrepancy, stated the court, he is not normally required to seek clarification of all ambiguities.[13]

Today, it is held that the duty to request clarification is "inherent" in bidding on Government contracts if a bidder is faced with a "major patent discrepancy, obvious omission or drastic conflict in provisions.[14] For instance, pre-bid clarification should have been sought where there was a direct conflict between specifications and the project electrical handbook concerning responsibility for installation of telecommunication and data cabling. Nielsen-Dillingham Builders vs. United States, 43 Fed. Cl. 5 (Fed. Cl. 1999). The existence of a provision in a contract requiring clarification of ambiguities is not determinative of whether clarification will be held to be required in a particular instance. The test used is whether a reasonable businessman would have recognized the

---

[11] Id.
[12] 323 F.2d 894, 163 Ct.Cl. 1 (1963).
[13] Id.
[14] Id. at 235 (citing Merritt-Chapman & Scott Corp. vs. US, 458 F.2d 42, 198 Ct.Cl. 223 (1972).

discrepancy or ambiguity during bidding.[15] Where the ambiguity is latent, there is no duty to seek clarification. If both parties' interpretations are reasonable, the ambiguity will be construed against the drafter of the specifications or contract. Metric Constructors, Inc. v. NASA, 169 F.3d 747 (Fed.Cir. 1999). A contractor can get around the rule if he can convince the court that his interpretation was made in a good faith effort to make sense out of the entire package of specifications and drawings.[16] In addition, a contractor must submit requests for clarification in a timely manner in order to recover.[17]

While the above concept usually arise in the government contract setting, many contracts for private projects have similar "duty of inquiry" provisions, making it possible for private owners to rely on the cases cited in this section.

## H. Cardinal Change

An owner's right to make changes under a changes clause is limited by the general scope of the work described in the contract. An owner may not make changes of such magnitude that the essential or main purpose of the contract is altered. It is to be anticipated in a construction project that the owner will want to make changes in the work as construction proceeds on the job, and contracts commonly provide procedures for communicating the changes, making adjustments in the contract price and time for

---

[15] Id. at 235.
[16] Id. (citing Tenney Engineering, Inc., ASBCA 7352, 1962 BCA ¶ 6189).
[17] Id. at 235.

performance, and resolving disputes related thereto.[18] If, however, the change sought by the owner constitutes such a drastic departure from the original scope of work, the contractor may take the position that the owner has breached the contract. This is called a "cardinal change" and may be recognized both in the case of a single, radical change and where there has been a series of small, "nibbling" changes, the aggression of which finally has the same effect that a single, drastic change in the work would have had.[19]

The test to be applied is whether the supplemental work [or change] ordered so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract that it constitutes a new undertaking. Thus, one must look at the essential identity or main purpose of the contract to determine if a cardinal change has occurred. If the addition or omission is incidental, there is no cardinal change. Whether a change is incidental does not depend upon the percentage of work or cost involved but on the character of the work. Thus, elimination of 10 percent and even 41 percent of the work may be permitted, while elimination of two and one-half percent of the work may not be.[20]

---

[18] See AIA Document A201 (1997), Article 7.

[19] Siegfried, Florida Construction Law, Aspen Law and Business (2001) § 6.05[B][3].

[20] While no Florida cases deal with this issue, New York has several cases which address the issue of cardinal change. See Albert Elia Bldg. Co. vs. New York State Urban Dev. Corp., 54 AD2d 337, 338 NYS2d 462, 467 (4th Dept. 1976).; Del Balso Constr. Corp. v. City of New York, 278 NY 154, 15 NE2d 559 (1938); Kinser Constr. Co. v. State, 204 NY 381, 97 NE 871 (1912); Litchfield Constr. Co., et al vs. City of New York, 244 NY 251, 155 NE 116 (1926); C. Norman Peterson Co. v. Container Corp. of Am., 172 Cal.App.3d 628, 218 Cal. Rptr. 592 (1985); Westcott v. State, 264 AD 463, 36 NYS2d 23 (3d Dept. 1942); De Foe Corp. vs. City of New York, 95 AD2d 793, 463 NYS2d 508 (2d Dept. 1983), appeal dismissed, 66 NYS2d 759, 497 NYS2d 1028 (1985).

### [1] Accepting a Cardinal Change

In private construction, a contractor may perform or "accept" a cardinal change if it chooses. The performance of a cardinal change results in either a new agreement or is a breach or abandonment of the contract by the owner. If breach or abandonment is found, the contractor may be able to recover in *quantum meruit*, a measure of damages which may exceed the contract price. Further, contract damage limitations, including no-damage-for-delay, and other exculpatory clauses may be inapplicable.

In public construction, acceptance or performance of a cardinal change may result in a contractor doing work for free.[21] If a change is cardinal, it may be barred by applicable competitive bidding statutes. A public owner may order changes within the general scope of the work, but it may not make a different or new contract without complying with competitive bidding statutes.[22]

---

[21] County of Brevard v. Miorelli Eng'g., Inc., 703 So.2d 1049 (Fla. 1997); Frenz Enters., Inc. vs. Port Everglades, 746 So.2d 498 (Fla. 4th DCA 1999). See also, W&J Constr. Corp. vs. Fanning/Howey Assocs., 741 So.2d 582 (Fla. 5th DCA 1999).

[22] *See* Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley & Beckwith, Inc.; 66 So. 2d 818 (Fla. 1953). ("[A]n agreement that is violative of a provision of a constitution or a valid statue, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void....When a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice." Also, in this case the court noted that "[t] he cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity."); Armco Drainage and Metal Products v. County of Pinellas, 137 So.2d 234 (Fla. 2d DCA 1962). ("If competitive bidding is not only allowed but required by statute or charter, any contract awarded without competitive bidding is void and unenforceable. The same rule applies when a municipal ordinance requires competitive bidding...Thus, a contractor may not recover even on a *quantum meruit* basis, if the contract was let without compliance with mandatory bidding requirements.") *See also* Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14, 69 A.L.R. 689 (Fla. 1930). (Where there is a charter or incorporating act requiring the officers of a city to award public works contracts to the lowest

In a public contract, the risk of performing a cardinal change is wholly on the contractor despite the fact it is a breach of contract by the owner. When faced with what it believes to be a cardinal change, a public works contractor can either perform the change under protest or refuse to do so and, if wrong, face termination for cause by the owner and consequential loss of the profits it could have made had it completed the job. If the contractor performs the change and a court later determines that the change was cardinal and so clearly outside the scope of the contract that the contractor should have known it was unauthorized, the contractor may not be entitled to payment for the extra work.[23]

## I. Deductive Change Orders v. Convenience Termination

At times, owners may decide that they do not wish to complete their projects or that they wish to eliminate large portions of them. Along with such decisions is the desire to avoid additional expense, including paying their contractors' lost profits or termination damages. To avoid termination damages, some owners attempt to eliminate significant portions of work through change orders. If the contract expressly reserves to

---

responsible bidder for the work, a contract made in violation of such requirements is illegal and void.) However, recovery in *quantum meruit* will be allowed if the work performed or the materials used were enjoyed by the municipality and applied beneficially the municipality's authorized objects. It is important to note that is applies only to contracts which are simply unauthorized as distinguished from contracts which are prohibited by law or charter, or are *malum en se*, or violative of public policy. See Knappen v. City of Hialeah, 45 So.2d 179 (Fla. 1950). See also Webb v. Hillsborough County, 128 Fla. 471, 175 So. 874 (Fla. 1937).

the owner the right to terminate or abandon the work at any stage, a contractor cannot claim lost profits as there would be no breach due to the owner's termination of the contract or elimination of a large portion of the work. In the absence of such a reservation, however, an owner is obligated to allow a contractor to complete its work; any pre-emptory termination or unfounded elimination of work is a breach of contract entitling the contractor to damages. An owner cannot, through the issuance of change orders, abandon its contract. Under many contracts, the deduction or elimination of work from a project is governed by a requirement of necessity. Such changes clauses reserve the right to delete work as "may be necessary" or as the owner "deems necessary." In such cases, a contractor may be entitled to its lost profits for any work eliminated where it can demonstrate that the elimination was not founded upon necessity.

## J. Performance Specifications v. Detailed Specifications

Performance specifications set forth the standard to which a contractor's work is held, such as providing air conditioning equipment which can maintain a 70° indoor temperature on a 95° day. Detailed specifications state how the contractor is to perform the work or what specific materials it is to provide, such as installing a model 1 Brand X air conditioner. In one federal contract the performance specification sets forth the allowed moisture content for an embankment while the detailed specifications set forth

---

[23] County of Brevard vs. Miorelli Eng'g., Inc., 703 So.2d 1049 (Fla. 1997).

how many passes with a specified roller should be made over the embankment; the court found that the performance specification was impossible to meet for all practical purposes, as it required the use of much additional equipment and time to meet.[24] However, a contractor will not be liable for the failure of materials it installed to meet warranties of fitness and merchantability, unless it expressly warrants to do so.[25]

## K. Rules of Contract Interpretation Applicable to Scope of Work Disputes – Decisions of the Architect

Standard rules of contract interpretation apply to construction contracts and scope of work disputes. In scope of work disputes, the issue is not so much which rule of interpretation applies but who has the power to determine what the contract documents mean. Many contracts, particularly those for public works, provide that in the event of a disagreement over what the contract, plans, and specifications require, the project engineer or architect will resolve disputes.

A contract may provide that the engineer's decision is final where it involves the "...quantity or quality of materials, classification or amount of work performed, or a calculation as to a final estimate."[26] So long as its determination is free from "fraud, bad

---

[24] Tombogbee Constructors v. United States, 420 F.2d 1037 (1970) R. Rubin, S. Guy, a. Maevis & V. Fairweather, Construction Claims: Analysis, Presentation, Defense, at 38 (1983).

[25] Leisure Resorts, Inc. vs. Frank J. Rooney, Inc., 654 So.2d 911 (Fla. 1995); Wood-Hopkins Contracting Co. vs. Roger J. Au & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978); City of Orlando vs. H.L Coble Constr. Co., 282 So.2d 25 (Fla. 4th DCA 1973).

26. Id.

faith or palpable mistake, the decision of the [owner's] engineer is conclusive and binding upon the contractor."[27]

## L. Notice of Protest and Bookkeeping Requirements

When a contractor is directed to perform work it believes to be extra work without a change order or adjustment of contract price or time, most contracts require the contractor to give the owner notice of the contractor's contention and that it is working under protest, and to keep detailed records of the disputed work. For instance, one state contract required a contractor to give the state written notice if it believed it was ordered to perform extra work. The contractor was to continue its work and keep daily records of the labor, materials, and equipment used in the disputed work. In Frenz Enterprises vs. Port Everglades, 746 So.2d 498 (Fla. 4th DCA 1999), the contractor was barred from making claims for extras where it failed to serve written notices of claim within the time required by the contract. The court, also citing Miorelli, stated that the contract's written notice requirement could only be waived by a written document, and without a written change order, the doctrine of sovereign immunity precludes recovery of the cost of the extra work. Under such a clause, a contractor cannot recover unless it gave timely written notice. The same may apply to the requirement to keep records.

Generally, the form of the notice of protest is not crucial; neither is its wording.

---

[27] Metropolitan Dade County v. Recchi America, Inc., 734 So.2d 1123, 1125-1126 (Fla. 3rd DCA 1999).

What is important is that the contractor notifies the party designated in the contract in writing that it considers the work to be disputed or extra and is performing under protest.

## M. Pricing Adjustments for Changed Work

Often when a change occurs or extra work is ordered the issue is not whether the contractor is entitled to compensation for that work but, rather, the measure of compensation. The price adjustment for changed work is dependent on the type of contract involved (i.e., does it provide for lump sum, unit price, cost-plus, or some other method of pricing changes) and the nature of the changed or extra work. Generally, an owner must pay for extra work required due to its actions or orders and a contractor is entitled to payment based on a computation method which adequately and, as nearly as possible, fully compensates the contractor for its work.

Where the contract does not specifically address the means of pricing change orders but gives the engineer the power to decide issues relating to change orders, the decision of the project engineer as to how a change order should be priced is controlling in the absence of fraud, bad faith, or palpable mistake.[28] Thus, an engineer's decision that change order work would be paid for on a cost-plus basis is controlling, despite the fact it meant less compensation than the contractor would have received under its preferred method of computation. Similarly, it is for the project engineer to determine

---

[28] Metropolitan Dade County v. Recchi America, Inc., 734 So.2d 1123, 1125-1126 (Fla. 3rd DCA 1999).

whether the extra work falls into a contract work classification -- and hence the rate of compensation due -- where the contract provides that extra work which falls into a contract work classification will be compensated at contract specified unit prices, whether or not the extra work was indicated on the plans, and that work which does not come within a contract work classification shall be compensated on a cost plus basis.

Means of pricing changed work include the cost of labor and materials used plus profit and overhead percentages, the contractual unit price, the contractual unit price plus profit and overhead, *quantum meruit* measurements if a cardinal change has occurred, lost profits on deleted work, lost profits due to extra work, and cost plus impact costs.

The AIA contract forms, Federal contracts, and many other contracts provide that changes shall result in an "equitable adjustment" of the contract price. An equitable adjustment may be an increase or decrease. It is intended to "keep a contractor whole when the [owner] modifies a contract."[29] It is not intended to provide a windfall for either the owner or contractor. The general measure is not the value of work received by the owner but "must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification", i.e., the reasonable cost.[30] Reasonable cost may be the actual cost, the fair market value, or the historical cost, but is more often determined through an objective test. Elements used to determine reasonable cost include the contractor's situation at the time the cost was incurred, the

---

[29] Bruce Constr. Corp. v. United States, 324 F.2d 517, 518 (Ct. Cl. 1963).

exercise of the contractor's business judgment, and the contractor's costs. There is a presumption that actual costs paid are reasonable. The presumption must be overcome by the party which alleges that actual cost is unreasonable.

### [1] Pricing Change Related Costs

If unit prices are not applicable to the changed work, it is best if the parties agree on a firm price for the change before the work has begun. Each side should estimate the cost of the change and negotiate any difference, with each thoroughly analyzing the other's estimate in good faith. The agreed upon pricing method may be lump sum, unit price, cost plus, guaranteed maximum, or any other arrangement upon which the parties can agree.

Impact costs must also be considered. If the change will disrupt the contractor's other work on the project or significantly delay the work, these issues should be addressed and appropriate compensation made. A contractor should not look to make an unexpected windfall, but neither should an owner fail to consider the real and total cost of the change. If the parties cannot agree on the impact costs or, due to the emergency nature of the change do not have time to fully consider them, the change order should specifically state that the issues of impact costs and adjustment of contract time are reserved for later determination and that the contractor does not waive its right to claim

---

[30] Id.

them. If the parties agree that impact costs are not appropriate or that the agreed upon price is to be full compensation for the change, the change order should specifically state that it represents "full compensation" for all costs arising out of or in connection with the change, including delay, disruption, and impact costs. – should be clear in the Change Order.

## N. Exculpatory Clauses

Exculpatory clauses of particular relevance to changes and extras are contractual requirements that an order for an extra must be in writing, that daily records be maintained or recovery may not be had, and those relating to performing work under protest.

## O. Claims Preservation and Defenses

A contractor can have the most clear cut case of an extra which entitles it to compensation but lose its right to that compensation if it has not preserved its right to make a claim. Contractual notice provisions must be strictly adhered to; releases and waivers of claims must be carefully read and tailored so they release only what the contractor intends they release; claims must be timely filed, with the proper entity, and contain the proper information; final payment must not be accepted if a claim is still outstanding. The potential pitfalls are numerous and easily catch an unwary contractor

and its attorney.

It is not unusual for an owner to require that a contractor waive its claim for damages in exchange for an extension of time to complete the contract. If a contractor executes such an agreement without specifically exempting its claims for extras, its claims may be forfeited. Obviously, if a contractor executes a release which specifically mentions but does not reserve change orders on which the contractor intends to make further claim, the contractor may be held to its release regardless of the merit of its claim for additional compensation.

Many private contracts include notice of claim requirements and specify when notice must be given and to whom. A failure to follow contractual notice provision can be fatal to a claim for extra compensation. In public works, in addition to contractual notice requirements there may be statutory notice provisions. A failure to fully and strictly comply with its provisions will defeat the great majority of claims for extras.[31]

## P. Accord and Satisfaction

One of the most frequent ways a changed work claim is lost is through the doctrine of accord and satisfaction. Acceptance of "final payment" may operate as a release of claims for extras, even if it is clearly not the contractor's intention to release its claims. If the contractor specifies that acceptance of final payment operates as a release

[31] Phillips & Jordan, Inc. v. Dept. of Transp., 602 So.2d 1310 (Fla. 1st DCA 19992); Tuttle/White

of the owner from all liability, the contractor's acceptance of the final payment will have that effect. Its attempts to accept the final payment while unilaterally reserving the right to claim for extras may prove ineffective, even if the owner knew of the contractor's claim before it issued the final payment. Under such a clause, a separate general release may be unnecessary.

In the absence of a clause making acceptance of final payment a release, a contractor may cash a check designated as final or full while still preserving its rights to make claims for extra compensation by noting in its check endorsement that the check is cashed "under protest" or other words to that effect which show an explicit reservation of the right to make further claim against the payor.

## Q. Remedies

Generally, to be entitled to recover for extras, a contractor must have substantially performed its contract. It may sue for extras under the contract, for breach of contract, or in *quantum meruit*, depending upon the work done and the contract.

Changed work is compensated according to the contract or in *quantum meruit*. *Quantum meruit* is available only if the contract has been repudiated, abandoned, or waived. This is not to say that the measure of damages available under the contract or for breach of contract may not appropriately be a *quantum meruit* one, but that the

---

Constructors, Inc. v. State of Fla. Dept. of Gen Servs., 371 So.2d 1096 (Fla. 1st DCA 1979).

contractor's theory of recovery cannot be based in *quantum meruit* unless the contract is not applicable. Further, if the extra work was so outside the contract as to exceed it (i.e., a cardinal change occurred) and no new contract made, the contractor must make its claim in *quantum meruit*; it cannot recover in contract.

Before a contractor may file suit upon its claim for extras, its claim must be ripe. If the contract provides a procedure through which claims for extras are evaluated, such as a review and determination by the project engineer, the contractor must await the engineer's determination before its claim is ripe.