



CONSTRUCTION **SUPER**CONFERENCE

2025

CONSTRUCTIONSUPERCONFERENCE.COM



Kicking the can down the road

Moderator/Outside Counsel: Lawrence M. Prosen, Shareholder, Cozen O'Connor

The Owner: John Eaton, Senior Director, Inova Design & Construction, Inova Health System

The General Contractor: Scott Ayler, Chief Counsel - Major Projects And Operations, Quanta Services, Inc.

The Consultant: Brent Sadauskas, President - Dispute Resolution, Aegis Dispute Resolution



Learning objectives

- Understand when and how to notify the owner about time-related issues while trying to maintain the relationship.
- Identify and explain problems originating from missing schedule information in updates.
- Learn from real-world examples how ethical contract administration fosters successful projects and future collaboration.
- Identify best practices in planning and scheduling and how to maintain & manage strong relationships during complex negotiations.

Larry Prosen - Attorney-at-law

- BS in Architecture from the University of Maryland
- I have practiced law for over 27 years in the fields of construction litigation and government contracts
- Involved in hundreds of construction disputes and P&P bond cases across the country and around the world.
- I have represented Champion for several years.
- I represent large and medium-sized contractors and subcontractors around the world, including:
 - Coating & blasting
 - MEP
 - Concrete
 - Masonry



Brent Sadauskas - President, Aegis Risk, LLC

- BS in Nuclear Engineering from the University of Virginia
- Over 35 years of experience in the construction industry managing and solving complex industry related problems
- Prior to my role in dispute resolution, I designed mechanical and I&C systems for commercial nuclear facilities followed by managing numerous heavy industrial projects for general contractors
- Testifying expert in forensic delays, costs, project management, and planning and scheduling



John Eaton - Senior Director, Design & Construction, Inova Health System

- Experienced program manager with a strong background in healthcare projects
- Career includes work as a trade contractor, general contractor, and owner on large capital projects
- Skilled in project initiation, design oversight, budgeting, scheduling, and quality control
- Experienced in purchasing, financial management, commissioning, and space activation
- Leads in-house project management teams delivering new and replacement capital projects across acute care hospitals and ambulatory or specialty service sites





Scott Ayler - Chief Counsel, Major Projects and Operations Quanta Services, Inc.

- Experienced and results-driven legal professional and business partner
- Broad background in handling complex transactions and overseeing
 - Commercial matters
 - Litigation matters
 - Project matters
- Joined Quanta Services, Inc. in January 2015
- Former General Counsel for several affiliated entities in the oil and gas midstream sector
- Previous experience in private practice
- Serves as board member for Easter Seals Colorado



Changes

Who agrees with the following statements?

- If there were no scope changes on a construction project, there would be significantly fewer disputes, claims, and litigation.
- Changes are inevitable.

You must be prepared to deal with changes within the terms of your subcontract and the prime contract.

Changes - when, how, by who & how much?

- Are changes inevitable?
- The game of pending change orders - does this sound familiar?
 - Contracts generally require change orders to be executed before doing extra or changed work.
 - This is the “Unicorn” scenario
 - How it’s supposed to occur, but it rarely happens this way.
- General contractors & owners' inability or refusal to promptly process change orders because work needs to be put in place while change orders are pending
 - This causes lower-tiered contractors to bear the cost burden.

Changes - when, how, by who & how much? (cont.)

- Refusal to do the extra work leads to threats of claims for project impacts, unduly forcing lower-tiered contractors to grin and bear it.
- Pending change orders often become claims resolved at project end, leaving lower-tiered contractors with less than full recovery.

What is a “Change”?



Changes

Insert Presentation Materials

What is a “Change”?

Insert Presentation Materials

FREE Standard Logo COMPANY NAME HERE
123 MAIN STREET
YOUR TOWN, STATE AND ZIP

CHANGE ORDER

Number _____

PHONE _____ DATE _____

TO _____

JOB NAME/LOCATION _____

JOB NUMBER _____ JOB PHONE _____

EXISTING CONTRACT NO. _____ DATE OF EXISTING CONTRACT _____

(123) 456-7890

We hereby agree to make the change(s) specified below:

NOTE: This Change Order becomes part of and in conformance with the existing contract.

WE AGREE hereby to make the change(s) specified above at this price

DATE _____	PREVIOUS CONTRACT AMOUNT	\$	
AUTHORIZED SIGNATURE CONTRACTOR _____	REVISED CONTRACT TOTAL	\$	

ACCEPTED — The above prices and specifications of this Change Order are satisfactory and are hereby accepted. All work to be performed under same terms and conditions as specified in original contract unless otherwise stipulated.

Date of acceptance _____
Signature _____ OWNER

Construction changes in scope

- Directed changes
 - Constructive changes
 - *What's the difference?*
- Image?

Construction changes in scope

- A directed change is a change that the prime contractor or owner acknowledges.
- A constructive change, which can be verbal or written, is one for which the prime contractor or owner does not acknowledge entitlement.
- The latter is almost the more important one, as you need to recognize that it is a change and may have an impact on cost or time.

Example of constructive change

H&R Contractors is contracted to build a new steel-framed office building. During the shop drawing review process, the owner's Architect/Engineer adds structural steel members that were not shown on the contract drawings and stamps the drawings "revise and resubmit."

The shop drawings are forwarded to H&R Contractors by the owner. The added steel will cost only \$8,000 but will delay the project by two months.

Why is this a constructive change?

The owner has not acknowledged entitlement to a change in time of performance.

A change occurs if the work (the added steel members) was not included in the original contract scope and was not reasonably inferable.

What happens when change occurs?

- Cost of performance may increase - triggering requirements to fulfill contract obligations of notice and quantification
- Changes often cause delay and impacts to labor productivity that add to the cost
- Changes may result in acceleration to maintain the schedule
- Disputes may arise as to the change cost and impacts



• What else?

What happens when change occurs?

Changes often delay schedules and reduce labor productivity, adding to costs.

Do changes always add field erection labor costs to *your* contract? Suppose an owner or prime changes the scope of another trade's work that requires your firm to re-coordinate already coordinated areas of the project, but adds no additional quantities of materials or field erection labor to your scope.

Is that a potentially compensable change?

Construction change orders

Potential impacts of changes

- Time impacts - delays & re-sequencing
- Mitigation - acceleration
- Labor inefficiencies
- Escalation - labor & materials
- Cumulative Impact

What else?

Notice: Identifying & understanding triggers - different perspectives

- Identify what triggers notice
 - An event that could give rise to relief or an actual impact
 - Example clauses: AIA, FAR
- Perspectives: owner, contractor, and consultant
 - When to notify
 - How to communicate
 - How strictly are clauses followed
 - How often are claims of waiver or release due to failure to follow clauses levied?
- When impact is unclear, but the clock is ticking
 - Provide a Rough Order of Magnitude (ROM) estimate & time impact
 - Reserve rights and follow the disputes clause
 - Submit a complete claim once time and cost impacts are defined
 - How do we address the clause that states to the effect that “a formal claim with backup, documented costs and time impacts shall be submitted within 7 days....”?

What is a “claim”?



8.4 CLAIMS FOR ADDITIONAL COST OR TIME Except as provided in subsection 6.3.2 and section 6.4 for any claim for an increase in the Contract Price or the Contract Time, the Constructor shall give the Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after the Constructor first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Thereafter, the Constructor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. The Owner shall respond in writing denying or approving the Constructor's claim no later than fourteen (14) Days after receipt of the Constructor's claim. Owner's failure to so respond shall be deemed a denial of the claim. Any change in the Contract Price or the Contract Time resulting from such claim shall be authorized by Change Order.

The FAR disputes clause

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

DISPUTES (MAY 2014)

(a) This contract is subject to 41 U.S.C. chapter 71, Contract Disputes.

(b) Except as provided in 41 U.S.C. chapter 71, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) *Claim*, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71 until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under 41 U.S.C. chapter 71. The submission may be converted to a claim under 41 U.S.C. chapter 71, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

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

(c) *Claim*, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71 until certified. A voucher,

(d)(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in 41 U.S.C. chapter 71.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in (FAR) 48 CFR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

What is a “dispute”?

- A request to adjust the contract, either the time, cost, scope, or other terms.
 - Arise from changes, differing site conditions, etc.

33.204 Policy.

The Government’s policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except

33.213 Obligation to continue performance.

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer’s decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its *Alternate I* (see 33.215).

What is a “dispute”?

33.201 Definitions.

As used in this subpart—

Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

33.206 Initiation of a claim.

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

What is a “claim”? According to the FAR

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

NOTE: Under the FAR, a “claim” is NOT the same as an REA.

Defective certification means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

Notice: Balancing compliance and relationships

Pros

- Following contract language
- Notice is neither final nor definitive (in many cases)

Cons

- Does following a contract harm relationships?
- Will a notice of one issue impact negotiations on another?

Best practices

- Give timely, factual notices
- Balance compliance with collaboration
 - Possibly providing a “heads-up” before submitting notice

**Question: The contract sets the rules - the owner may be upset, but isn't the GC just following those rules?
Thoughts?**

Understanding change vehicles

Best practices for change management

- Team to establish change protocols
- Team to establish early entitlements
 - Direction to proceed, proceed & price, price only, etc.
- Identify funding categories: allowance, contingency, and contract change amounts.

What is a change?

- Each contract defines how changes may be made
- Formal/Express vs. Constructive Changes

Types of change

- Unilateral, change directives or bilateral changes
- Should all be treated the same as contract work?

Formal changes

- Acknowledge and respond per contract
- Promptly notify of difficulties in resolving cost and time

Understanding change vehicles

Constructive change channels

- Via Submittals
 - Changes happen during submittals.
 - The team must support the changes with the vehicle that modified the contract documents.
- Via Requests for Information (RFIs)
 - RFIs can trigger contract changes depending on the response detail
 - It can modify contract documents and lead to cost or schedule adjustments.

Supplemental instructions

- Supplemental instructions without direction to incorporate do not authorize work
- Who provides such direction in this case?

Defective or ambiguous documents

- A defective or unclear set of documents may cause multiple changes, but does not serve as a formal change vehicle.

Differing site conditions

Understanding change vehicles (con't)

- When changes come too often
 - Difficult to evaluate and track accurately
 - Impacts to Building Information Modeling (BIM) coordination
 - Potential delays and cost overruns due to unrecognized changes
 - Who is responsible for these issues?
 - Cumulative impact risk
- Change resolution - best practice
 - Address changes as they occur, not at project end
 - Avoid “kicking the can”
 - Contractors will try to mitigate or fail to track adequately
 - Facts and memories will become fuzzier
 - Team turnover does not eliminate the need for reconciliation
- What happens if payment for changes is withheld
 - Do you perform the work
 - Do you include in the schedules

Understanding change vehicles: Audience question

Who thinks that a change resolution should be addressed:

- A. At the end of the project?
- B. When they occur/are recognized, or are discovered?

Understanding change vehicles

- ADD DISPUTES CLAUSE

Collaboration

- Trust starts at the Notice to Proceed (NTP) or earlier during contract negotiations and should continue through project completion when teams collaborate effectively.
- Increasingly complex projects introduce concepts or issues that are not always addressed in contracts, making collaboration a key component of success.
 - **But are there limits?**
- Give and take from all parties is required throughout the project.
- This balance is difficult but remains the cornerstone of successful outcomes.

Collaboration (Audience question)

- Have you participated in a successful partnering?
 - Does it work?
 - Examples/Types?
- When does it fail and why?
 - Is Integrated Project Delivery (IPD) alive and well?
- Failure starts with a lack of understanding of what partnering is, and why it is essential.
- Over the course of the project, if disciplined partnering sessions do not occur, partnering will not organically continue or occur.

Collaboration (con't)

- Negotiating in good faith tends to result with in-kind responses
- Bad faith negotiations can destroy future negotiations and potentially future work/reputations

How to deal with changes

Tactics

- Negotiate immediately
- Negotiating at the end of the project
- Negotiating after the fact (no prospective negotiations)

• Image?

Unrealistic owner deliverables

- Why re-baseline/mitigate/accelerate schedules?
- Total accommodation may be expected, but is not feasible

Acceleration

- Constructive or directed

How to deal with changes

- Claim documentation
 - Follow contract timeframes where possible
- If not achievable, submit:
 - Rough Order of Magnitude (ROM)
 - High-level Time Impact Analysis (TIA)
 - Caveats noting uncertainty
- Interrelated changes may make it impossible to execute a change properly
- Cumulative impacts only exacerbate

How to deal with changes (con't)

- Negotiation focus

- Scope
- Cost
- Time

- Which is the most important to you?

- Image?

- What is released (and what is not/reserved)?

- Full accord and satisfaction?
- Can we agree on direct costs and wait on time and/or cumulative or other impacts?

- What is your preference?

Claims avoidance

- If you have a claim, have you already spent the money?
- How do you avoid?
- Notice, notice & notice works, but we want to try to avoid
- Need to document factually, accurately, and non-accusatory
- If you smell smoke...
 - Try to avoid unnecessary costs and related impacts
 - Release of equipment,
- Try to negotiate and resolve cost and time *up front* if you can
- Know your contract

• Image?

Insert Presentation Materials

Questions?

