

Opinion

CHANGE ORDER IN CONSTRUCTION CONTRACTS.

a Change Order is an amendment to a construction contract. By convention, a Change Order is typically an amendment that relates only to a change in the scope of work to be performed, the contract price, or the key dates, but there is no reason why it cannot also amend any other provision of the underlying contract. Since it is an agreement in writing signed by both parties, its legal characterization is an amending agreement. However, given that Change Orders are usually prepared by project personnel, rather than legal, it is good practice to put in place internal controls that restrict Change Orders to scope, price and schedule changes and use an amending agreement if any of the terms and conditions of the contract need to be revised. Change Orders are extremely common on projects, and there may be anywhere from a dozen on a smaller project to hundreds on a larger project. They usually arise from one of two circumstances: either the owner wants to make a change to the project after the contract has been signed or an event has arisen which requires a Change Order, such as a force majeure event or if certain required materials are not available and an alternate must be used.

The terms of a Change Order can quickly become contentious because by the time Change Orders are being issued on a project, the contractor is usually the owner's only practical option for any new or modified scope and the contractor knows this. If a project has previously encountered difficulties, then the Change Orders become that much more contentious because both parties may see it as an opportunity to try and correct for the earlier issues.

For cost-reimbursable contracts, the impact of a Change Order on the contract price is usually not controversial since the full cost of the work is already to the owner's account, whether it was part of the original scope or under the Change Order. Similarly, for contracts that are priced on a unit price basis, it is not difficult to value a Change Order. However, determining the impact of a Change Order on the contract price of a fixed-price contract can be a difficult negotiation between owner and contractor.