

## Opinion

### **CHANGE DIRECTIVE IN CONSTRUCTION CONTRACTS.**

A change directive is a tool that may be included in a construction contract that permits the owner to require the contractor to proceed with a scope change in advance of all of the terms of a change order being agreed, leaving the terms that are not yet been agreed to be determined subsequently. It is a particularly valuable tool for owners as it prevents a contractor from holding up a project while the parties settle the terms of a change order, which could take an extended period, particularly if formal dispute resolution such as arbitration is required. From a contractor's perspective, a Change Directive introduces a risk into the contract that the owner could direct the contractor to perform work it had never contemplated doing at the time the contract was signed. To address this, sometimes the right of owner to impose a Change Directive on the contractor is restricted to work "in the general scope of the contract documents", or a more narrow restriction would limit it to changes "that the contractor does not consider unsafe or illegal to perform". From the owner's perspective, it is best to leave this unqualified in order to provide the greatest possible discretion to the owner for changes.

Where a Change Directive is issued, the contract will usually provide that the parties must work towards settling any outstanding terms of the change, whether by negotiation or formal dispute resolution, and then documenting the details once settled in a change order executed by both parties. Typically, the elements that are not agreed up front and give rise to the owner issuing a Change Directive are the cost and schedule impacts of a change to the work. In some cases, these may resolve themselves with the passage of time, as it becomes clear what impact of a change actually was. Often, a construction contract will contain a provision that provides that if the parties cannot agree on the price of change order on a lump sum basis, it shall be determined on a cost-reimbursable basis plus mark-up, as discussed above. However, even this method can give rise to disagreements where it is unclear if certain materials or equipment were necessitated by a change, or if they would have been required even absent the Change Directive.