

BE/DBI Change Order Workgroup

Best Practices and Guideline

Change Orders on Public Works Projects

In 2022 the BE/DBI Committee conducted a survey of items that cause failure of prompt payment for contractors on public works projects. ~~One area that was identified was the change order process.~~ Two areas of note were retention release and change orders. This document addresses change orders. Change order types, change order process, and payment for changes vary greatly from project to project. It is common on projects to experience confusion and lack of understanding with the change process, which often leads to late, partial or no payment for executed change work by contractors. Issues tend to magnify for lower tier contractors with small disadvantaged businesses (SDBs) being hit the hardest.

Pursuant to discussions with stakeholders including various public agencies, general contractors, and specialty contractors to include SDBs, the most significant contributing factors appeared to be lack of clear communication and process transparency.

Following is a description of the most common change types with specific and global best practices to help navigate the change process on public projects, regardless of situation (Owner to GC, GC to sub or sub to lower tier contractors).

Types of Changes / Best Practices for Each

Lump Sum (Fixed Price) Change – The change scope can be readily quantified and priced in advance of work being performed.

- Negotiate/confirm makeup of changes (rates, direct vs indirect labor, markup structure, schedule information, backup information required, etc.). This is preferably done before any materials are ordered or work is performed associated with this change in scope so the first change such that any differences can be resolved before any additional costs occur early.
- Timely notify client of change and potential cost and schedule impacts.
- Forward price and submit change proposal in a timely manner.
- Meet as necessary to gain acceptance of the change. Modify proposal as necessary.
- Change order is issued & executed prior to change work commencement allowing timely invoicing and payment as work progresses.

Time and Material (T&M) Change – These are suitable when the scope of work is uncertain, or the project requires flexibility to accommodate the change. Payment is based on hourly labor rates and materials used. Sometimes T&M changes are capped with a not-to-exceed (NTE) value.

- ~~Same as lump sum~~ – Negotiate/confirm makeup of changes (rates, markup structure, schedule information, backup information required, etc.). This should be done prior to any work commencing.
- **Do not perform work until direction to do so is provided in writing by the appropriate authority.**
- ~~Receive written authorization to perform this changed work prior to commencing.~~
- Confirm the form and format to be utilized to record daily work (labor, material, equipment, etc.).
- Confirm who is contractually authorized to sign off on daily work documentation and if individuals are to be present during the work. Authorization is typically from the Owner and/or Prime Contractor.
- Submit daily forms and get signatures acknowledging work. Supplement form with additional backup if warranted. Maintain a copy of each signed form.
- Depending on duration of work, confirm when the work can be invoiced. If the change involves multi-month work, request monthly change orders based on approved work completed, properly signed off, and accepted to lessen the timeline for reimbursement.
- Quantify, price and submit a cost proposal(s) for review and approval. For T&M changes with NTE values, it is prudent to quantify work performed on an interim periodic basis to ensure costs are not going to surpass the limit. It is also prudent to share this information with the client. If the work value appears it will exceed the NTE amount, confirm that either the value cap will be increased or that work should end. Ensure this direction is in writing.
- Change order(s) is issued and executed and available to invoice against.
- There may be a section or check box on the T&M forms for protested work. If applicable, check this section/box as this will likely trigger additional contractual steps.

Disputed T&M Change* – When negotiation of a change proposal has not resulted in agreement of scope or value of change by all parties, the contractor may be directed in writing to perform this disputed work. It may come with prescriptive rates and markup structures per the contract that could be less than those for lump sum or traditional T&M changes.

- Same best practices as with T&M work.
- If the allowable rates/markup are prescriptive to the point that contractors lose money, **filing** a claim may be warranted to reserve rights for amended compensation.

*Some Owners refer to this as Force Account (FA) work, however, Force Account may be defined differently. It is good practice to understand the contractual process before performing disputed work.

Unit Price Change – Used when the work can be easily divided into quantifiable units and the quantities may vary during construction. An example would be yards of concrete or tons of aggregate.

- The unit value should be clearly indicated in the contract and bid documents prior to award. There should be little to no mystery in cost basis.
- Prior to commencing work and depending on duration of work, confirm when the work can be invoiced. If the change involves multi-month work, request monthly change orders on approved work completed, properly signed off, and accepted to lessen the timeline for reimbursement.
- Some agencies allow for renegotiation of unit prices if quantities are outside of a certain percentage. This renegotiation is usually captured in a change order.

Zero-Cost Change – Are used when the contractor has identified a change to the project scope, but the change doesn't impact the original contract amount. This is not uncommon on guaranteed maximum price (GMP) projects where the value of the change work will not affect the GMP limit. Zero cost changes are also used for such things as documenting weather delays that may add days to the contract but not dollars.

- It is still important to identify, price, and submit changes to acknowledge, document and receive authorization to proceed for contractual purposes. A zero-cost change order to memorialize the change in scope should be issued to all parties affected by the change in scope. There would be an understanding that a change order for that value is likely not going to be issued.
- Providing proposals even where there is a zero-cost change will create a valuable record in the event the GMP value is exceeded.
- Request that the client ultimately issue a zero-cost change order to memorialize the change if it is mutually confirmed that the GMP limit will not be exceeded.

Best Practices Regardless of Change Type

- Prior to commencement of work, confirm change notification timelines identified in the contract and/or design documents. Determine if there is additional flow down contract language if contractor is multiple levels removed from the prime contract.
 - Typical notification is "x" number of days after recognizing change and another "x" number of days to submit a cost proposal.
 - Depending on the complexity of the notification language, you may want to create a notification matrix as a reference document.
- Understand the client's process relative to approving and issuing changes such that the potential duration is understood by all contracted parties.
 - Is there a \$\$ threshold whereby client (or prime if lower tier) must elevate to another level for approval? Determine how much longer this may take to approve.
 - Is bundling changes a common practice that may lengthen time to receive change order? Does bundling play into the \$\$ threshold above?
 - How are change order paid out, what options are there?

- Some contracts may include allowances for known unknowns such as contaminated soil or asbestos remediation. It is good to understand if special contract language is tied to the allowances. Allowances are almost always the impetus for a change.
- Establish a **robust** documentation system
 - Confirm with the Owner or GC, if a lower tier, what the correct forms are to be utilized and the level of detail/backup required.
 - Keep track of all correspondence associated with a change
 - Maintain consistency with notification and pricing structure.
 - Have a standardized process for submitting change orders. Ensure that the change scope is clearly defined in the change proposal.
- Identify and communicate changes **early**
 - Thoroughly understanding your base scope is key to recognizing changed conditions.
 - Finding changes early may allow the team to find solutions to mitigate the change.
 - When possible, provide a rough order of magnitude (ROM) in both \$\$ and impact to schedule.
 - For not-to-exceed (NTE) changes, ensure you are reporting where costs are versus NTE amount. Some contracts may have percentage thresholds for reporting.
- Continuously monitor and review the implementation of approved changes. This might lead to adjustments to current or future change work.
 - It might be determined that the change work structure (agreed rates, markup structure, etc. may not be appropriate in all cases or may need to be updated for longer term projects)
- Foster a collaborative environment to ensure communication of changes is encouraged.
 - Meet regularly (weekly or monthly) to discuss changes.
 - Create a feedback loop to monitor how the parties are performing and if there are weaknesses that could be improved upon.
- For the **Owner**:
 - Clearly identify who on the team is accountable for the change order process. This is a person who acts as the ombudsman to ensure the process is working at all levels for all parties.
 - To the best of your ability utilize a ROM/estimate the work. If issuing a FA/T&M may want to consider putting a cap on the work (NTE), this could be the Owner's ROM/Estimate. If using FA/T&M, check your procedure, but it may be acceptable to continue negotiating while the work is occurring and settle as a lump sum. In some instances, again pending acceptable procedure, the Owner may be able to finalize lump sum amounts for certain parts of the work and only have to track a limited portion of the change on FA/T&M. It should be the goal to get to a lump sum.

Key Takeaways

- NEVER agree to perform extra work based solely on oral direction.
- Ensure the person authorizing the work, even in writing, has the authority to do so.
- Typically, you cannot get paid for extra work unless you have an executed change order.
- Ensure that any lower tier contractors are aware of the change protocols.
- If allowed, do not forget to request an extension of time associated with your change. As a minimum, it is always prudent to provide schedule impact information (activities affected or defined, anticipated duration of work activities, etc.) with the change proposal. Understand the contractual language around time extensions. This contract language, however, may not be defined in the same section as changes.

Communication

- Both Public owner and prime contractor should:
 - Provide process and timeline for processing change in bid documents, and in contract documents
 - Begin project with explanation of progress payment and change resolution process
 - At regular construction meetings, provide status of change work (initiation, pricing, approval, expected resolution and payment date. Include Ball In Court (BIC).
 - Have a transparent way to know where changes are in the process. Ideally this transparency flows down to all tiers. Part of this process may include a software portal where all associated parties can view status. Having access to the portal should not come with a financial burden to any party.
 - Ensure that each tier understands the process for any disputed work.

Universal Truths

- Quick resolution of changed work and approval of payment benefits all stakeholders. The cost of financing work performed but not paid adds to the cost of doing business which is eventually paid by the public owner.
- It may be acceptable to approve/pay small scopes of completed work instead of rolling the work into a larger scope for which the cost is still being negotiated. Public owners must ensure that this is not a gaming tactic to bypass agency approval authority levels.