Constructive Changes – A Primer

A “constructive change” occurs when an owner action or omission not formally acknowledged by the owner to be a change in the contract’s scope of work forces the contractor to perform additional work. Constructive changes are not formal change orders, but informal changes that could have been ordered under a contract’s changes clause if the change had been recognized by the owner. The constructive change doctrine recognizes that being informally required to do extra work is similar to a formal change order and should be governed by similar principles. Thus, if it is found that a constructive change order did occur, the contractor may be entitled to payment for additional costs incurred, and an extension to the contract performance period.

Constructive changes most often arise where there is a dispute regarding contract interpretation, defective plans and specifications, acceleration or suspension of work, interference or failure to cooperate with the contractor, misrepresentation or nondisclosure of superior knowledge or technical information, over inspection, or a delay in providing requested information crucial to the contractor’s ability to continue work.

There are four general categories of constructive changes for both public and private contracts. The first occurs when an owner informally directs or orders extra work. This happens any time an authorized representative of the owner directs a contractor, verbally or in writing, to perform work beyond the original scope of the contract, but does not issue a formal change order. If this informal order is determined to be a constructive change, the contractor may be entitled to recover its additional costs incurred and possibly an extension of the contract time. However, it is important to not confuse informal change orders with advice, comments, or suggestions that are offered by technical representatives of the owner. In order to prevail under this category, a contractor should provide proper notice to the owner that the directive is considered to be a change. Special attention should be given to the required notice period for such a change in the contract, and the contractor should document all additional costs expended and delays experienced.

The second category of constructive changes occurs when the contractor is required to expend extra effort because drawings or specifications are defective. This category is based on the Spearin doctrine, which provides that when an owner supplies the plans and specifications for a construction project, the contractor cannot be held liable for an unsatisfactory final result attributable solely to defects or insufficiencies in the plans and specifications. The theory is owner-supplied plans and specifications have an implied warranty that if the contractor complies with the plans or specifications, then a satisfactory product will result. Therefore, the delivery of defective plans and specifications is a breach of the warranty. A contractor can recover its additional costs when defective plans and specifications cause extra or remedial work. For example, if owner-provided specifications understated the amount of material needing to be excavated, the owner breached its implied warranty of the adequacy of the plans and specifications, and the contractor may recover its extra costs under the constructive change doctrine if the contractor reasonably relied on the plans and specifications.

The third constructive change category occurs when the owner or its
representative misinterprets the contract and erroneously rejects work that satisfies contractual requirements or requires an unreasonably high standard of performance. Specifically, this category may arise from the owner's implied duty not to hinder or delay the contractor in the performance of its work, which is an implied obligation contained in every contract. Such interference by over inspection would be a constructive change if unacknowledged by the owner. For example, when the contract provides for a certain method of performance or material, or states the contractor can choose a method of performance or material, but the owner requires the contractor to use a method or material that is more complicated and expensive than what the contractor planned in its bid, the owner has constructively changed the contract. This third category can also arise when the owner interprets a contract ambiguity in its favor. An example of this would be when the plans indicate the contractor only needs to “rough in” piping, but the owner directs the contractor to supply and install all internal piping. In order to prevail in either situation, the contractor must establish that its interpretation was a reasonable one and that it relied on its interpretation during the bidding phase. Failure to prove the latter element may defeat an otherwise valid claim.

The fourth category of constructive changes occurs when the owner denies the contractor an otherwise justified time extension, thereby forcing the contractor to accelerate performance. Also known as “constructive acceleration,” this occurs when the owner does not explicitly direct acceleration, but instead refuses a valid request for a time extension or threatens other action so the contractor must accelerate to complete work within the originally specified time to avoid liquidated damages or other loss. The constructive acceleration doctrine allows recovery for extra expenses incurred as a result of the contractor accelerating after the owner’s refusal to grant the warranted time extension. To prevail on such a claim, the contractor must show 1) that an excusable delay existed, 2) timely notice of the delay and a proper request for an extension was given, 3) the time extension request was postponed or refused, 4) the owner ordered either by coercion, direction, or other manner that the project must be completed within its original performance period, and 5) the contractor made efforts to accelerate its performance and incurred costs as a result.

Regardless of which category a contractor’s constructive change may fall into, the contractor should pay special attention to the requirements in its contract’s changes clause for presenting a change to the owner, especially change notice submission time frames, support, and format requirements.

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