**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 7: Changes in Plans or Scope of Work**

In Lesson 5 we considered Article 7 of A201, which governs changes in a design-bid-build project. Recall the distinctions Article 7 makes between “Change Orders” and “Construction Change Directives.” When the owner and the contractor agree on the pricing and schedule impacts of a change, they should amend the contract by agreeing to a change order that specifies both the change and those impacts. For all but the simplest projects, however, the parties must anticipate that circumstances may require that some changes be implemented promptly even if the pricing and schedule impacts must be resolved later pursuant to an agreed process. A201’s Construction Change Directive provisions govern that second kind of change. With variations in terminology and procedures, other standard industry forms routinely provide similar provisions for making changes when a complete change order is not feasible. In this way, provided that the contractual change provisions work as planned, orderly construction can proceed when the owner unilaterally directs a change. From an efficiency perspective, this approach functions reasonably well even when the parties ultimately must resort to litigation or another dispute resolution process to settle their disagreements over the correct pricing and schedule impacts. Unfortunately, the change process itself sometimes breaks down.

The problems typically fall into one of four categories. First, one or both parties may fail to follow the contractual timing or notice procedures. This often leads to difficult questions about whether (1) one or both parties have waived the contractual procedures (or should be equitably estopped from relying on those procedures) or (2) the contractor has forfeited the right to pricing and schedule adjustments attributable to the change Second, the contractor may believe that the owner is abusing the unilateral change process by forcing or attempting to order a change that goes beyond the general scope of work the parties originally contemplated. The courts developed the “cardinal change” doctrine to provide appropriate remedies for the contractor in these situations. In effect, an owner who orders or forces a cardinal change breaches the contract. Third, a “constructive change” may occur when the owner’s directions, complaints, or other behaviors induce the contractor to make a change but the owner refuses to negotiate a change order or to initiate the process for documenting a unilateral change. Fourth, certain unanticipated circumstances may trigger the contractor’s right to an equitable adjustment under a distinct contractual provision, commonly called a “differing site conditions” clause. This lesson considers the first three situations. Lesson 8 (Concealed Conditions) covers the fourth one.

To explore procedural problems, cardinal changes, and constructive changes, read the following:

* *Watson Lumber Company v. Guennewig*, 226 N.E.2d 270 (Ill. App. Ct. 1967).

This is a classic case illustrating how changes can get out of hand and how problems can be amplified when the parties do not adhere to the contract’s notice and claim procedures. While the case involved a relatively small residential project, the same issues often arise in major commercial ones.

* *Change orders v Construction Change Directives: The Devil Is in the Details*, 36 Constr. Law. 34 (Winter 2016), by William B. Westcott.

This article considers changes primarily from the builder’s perspective. After briefly summarizing the AIA approach (based on the 2007 version of A201), the author focuses on the cardinal change doctrine, which serves as a guardrail against the potential abuse of an owner’s unilateral change authority. The author proposes modifications to the AIA provisions to simplify the challenge of determining when an owner’s unilateral direction goes so far beyond the “general scope” of the original contract that it amounts to a cardinal change. The author then discusses how a builder can address risks associated with construction change directives in ways that can preserve the relationship with the owner, avoid the risk of being in default for refusing to follow a directive, and yet protect the right to appropriate pricing and scheduling adjustments. (On this final point, the author’s “Paper the Change” advice focuses mostly on price adjustments, but you should recognize that schedule impacts can be equally important from the contractor’s perspective.)

* *Kiewit Infrastructure West Co. v. United States*, 972 F.3d 1322 (Fed. Cir. 2020).

This case demonstrates that a constructive change claim may succeed even when the owner has not done or said anything to cause the contractor to perform additional work or to implement any changes in the work. Information the government agency included in bid solicitation documents provided the basis for additional compensation because the contractor incurred unanticipated expenses when that information turned out to be inaccurate. To a significant extent, the opinion turned on how the court interpreted the controlling documents in the contractor’s favor. Two other aspects of the case merit brief mention for our purposes. First, as an alternative argument, the contractor asserted a right to additional compensation based on a differing site conditions clause in the contract documents. The court did not need to rule on that argument because the contractor prevailed on the constructive change claim. As already mentioned, Lesson 8 covers different site conditions. Second, the United States Court of Federal Claims, which rejected the contractor’s claim in the first instance, and the Court of Appeals for the Federal Circuit, which reversed in the contractor’s favor on appeal, are specialized courts whose rulings under the Contract Disputes Act often influence developments in construction law. (While the Court of Appeals for the Federal Circuit has issued many important decisions in federal construction cases, it is known even more for its opinions on federal patent law matters.)

For Review and Discussion

1. This lesson references the AIA approach to changes for a design-bid-build project, which assigns a central role to the owner’s architect under the provisions governing a construction change directive. Other standard industry contracts, including the ConsensusDocs series, provide procedures and guidelines for the owner and the contractor to determine those impacts via direct negotiations without the input of an intermediary. Read Article 8 of ConsensusDocs 200 (2019), *“Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum)”* for a design-bid-build project). Also read Article 9 of ConsensusDocs 410, “Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder (Cost of the Work Plus a Fee with a GMP)” for a design-build project in which the parties have agreed to a guaranteed maxim price (GMP). What factors should the parties consider in deciding which approach is best for resolving pricing and scheduling impacts when the owner unilaterally directs the contractor to make a change?
2. Does the court’s opinion in *Watson Lumber Company v. Guennewig* articulate evidentiary standards sufficient to produce an equitable resolution on retrial? How could the parties have avoided the dispute in the first instance?
3. In *Kiewit Infrastructure West Co. v. United States*, the court determined that the owner essentially represented that the contractor would not need to purchase the wetlands mitigation credits at the heart of the dispute. The constructive change doctrine, however, does not afford the contractor a remedy when the owner merely insists that the contractor perform the work according to the agreed plans and specifications. See *Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 389-90 (1991) (rejecting a claim for additional compensation where the evidence showed that the contractor was merely being required to correct work that failed to comply with contractual requirements). Was there a credible argument in the *Kiewit* case that when the contractor purchased the additional mitigation credits fees, it was simply doing what the contract documents required?