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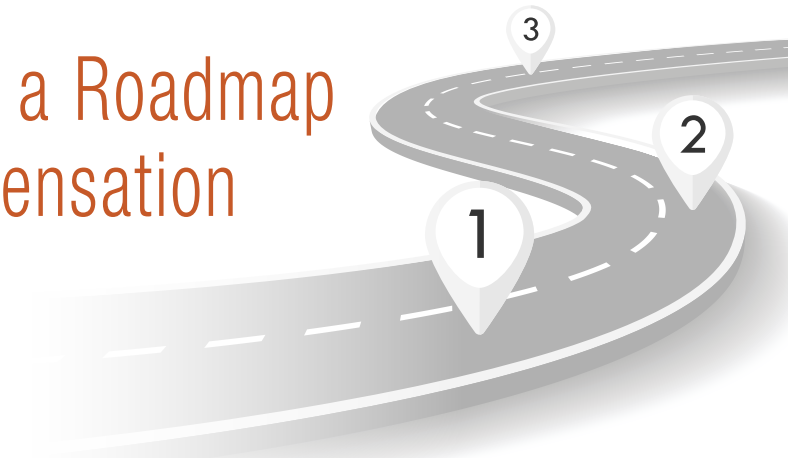
Project Changes: Creating a Roadmap to Obtain Additional Compensation and Time Extensions



By Thomas Olson

1. Project changes are inevitable

The reality is the project a contractor is *required to construct* is increasingly different than *the one it bid on*. **Project changes are inevitable.** This is true for a number of reasons, examples of which include:

- Owners are late providing site access (e.g. failure to obtain necessary permits or easements, delay in issuance of NTP);
- Late utility relocation;
- Unmarked/mismarked utilities;
- Material delivery delays;
- Differing site conditions;
- Estimated quantity errors;
- Design busts; and
- Weather.

2. Unless contractors and engineers learn about the applicable contract provisions and how to use them, the impact of changes cannot be fairly addressed

Each of these change issues can *significantly increase the cost and time of work*. Indeed, sometimes the issue can be so severe that it can affect *constructability*. The good news is that contracts may include important *rights* for contractors to receive *additional compensation and time extensions* for these issues. The bad news, based on my experience, is that contractors and engineers alike do not fully understand:

- *Whether* the contract provides such a *right;*
- If such *right* exists, what is *procedurally required to exercise this right;* and
- *How* do you calculate the *impact in time and money.*

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FL DOT – Standard Specifications for Construction, 2019: Procedure for Changes*

Changed Work

Extra Work

1. If ***Engineer requires any work*** that is not otherwise ***covered or included in the project by the existing Contract Documents***; and
2. It's of the nature of ***additional work***, ***altered work***, ***deleted work***, work due to ***differing site conditions***, or ***otherwise***, then . . .
3. The work is "**Extra Work**." (§ 1-3 Definitions)
4. If the extra work is ***authorized*** in writing by the Engineer, then . . .
5. It will be paid pursuant to **Supplemental Agreement**. (§ 4-3.2 and 4-3.2.2)
6. If Engineer and Contractor cannot agree to **Supplemental Agreement**, ***Contractor shall follow*** procedures set forth in ***5-12.2*** and ***8-7.3.2*** to preserve right to additional time and compensation for any "**Extra Work**."

Differing Site Conditions (§ 4-3.7)

1. If conditions are encountered at the site ***differing materially from those indicated in the Contract***, or ***differing materially from those ordinarily encountered***; and
2. If the conditions ***cause an increase or decrease in the cost or time*** required for the performance of any work under the Contract, then . . .
3. **STOP WORK**. Notify the other party in writing of the specific differing conditions before disturbing the condition or performing the affected work.

Significant Changes to the Work (§ 4-3.1)

1. If the Engineer determines that the ***character of the work as altered differs materially in kind or nature*** from that involved or included in the original proposed construction; or
2. If a "major item of work" is ***increased in excess of 125% or decreased below 75%*** of the original Contract quantity, then . . .
3. The Department will apply a ***price adjustment for the change in quantity*** in accordance with 4-3.2.
4. Contractor shall ***follow*** procedures set forth in **5-12.2 and 8-7.3.2** to preserve right to additional time and compensation.

Suspension of Work (§ 8-6.1)

1. If the ***Engineer suspends operations*** wholly or in part, in writing, giving in detail the reasons for the suspension, then . . .
2. **IMMEDIATELY COMPLY**. Do not resume operations until authorized to do so by the Engineer, in writing, **Failure will constitute an act of default**.
3. If Contractor and Engineer are ***unable to agree*** on additional time or compensation as a result of the suspension, ***follow*** the procedures set forth in 5-12.2 and 8-7.3.2.

Claims by Contractor § 5-12

1. Whenever the Contractor deems that ***extra time or compensation is due*** beyond that agreed by the Engineer, ***follow*** the following procedures:
   a) Submit ***timely notice of intent to file a claim*** before beginning the work on which the claim is based (§ 5-12.2);
   b) Submit ***preliminary time extension request*** within 10 calendar days after commencement of a delay (§ 8-7.3.2);
   c) Submit ***time extension request*** within 30 calendar days after the elimination of the delay (§ 8-7.3.2);
   d) Submit ***certified written claim*** together with full and complete claim documentation within 90 or 180 days after final acceptance.
2. **Failure** to provide such within the time required shall ***constitute complete, absolute, and irrevocable waiver*** by the Contractor of any right to additional compensation or a time extension for such claim.
3. Afford ***Engineer opportunity*** for keeping strict accounting of actual labor, material, equipment, and time.

Claims for Delay (§ 5-12.2.2)

1. If ***additional compensation or a time extension is due*** on account of delay, differing site conditions, breach of contract, or any other cause other than for work or materials ***not expressly provided for in the Contract*** (Extra Work) or which is by written directive of the Engineer expressly ordered by the Engineer pursuant to 4-3, then . . .
2. Submit a written ***notice of intent to the Engineer*** within 10 days after commencement of a delay to a controlling work item expressly notifying the Engineer that the Contractor intends to seek additional compensation, and if seeking a time extension, then . . .
3. Submit a ***preliminary request for time extension*** (§ 8-7.3.2) within 10 calendar days after commencement of a delay along with a ***reasonably complete description*** as to the cause and nature of the delay and the ***possible impacts*** to the work by such delay; then . . .
4. Submit a ***request for contract time extension*** (§ 8-7.3.2) within 30 calendar days after the elimination of the delay.

Content of Written Claim (§ 5-12.3)

1. Submit a ***certified written claim*** to the Department which includes the information specified in § 5-12.3.1 to 5-12.3.6.

Contract Time Extensions § 8-7.3.2

In General

1. If a ***controlling item of work is delayed*** by factors not ***reasonably anticipated or foreseeable*** at the time of bid, then . . .
2. The Department ***may grant*** an extension of Contract Time.
3. Submit ***time extension request*** to preserve right to additional time and compensation.

Weather Delays

1. If delays are caused by the ***effects of rains or other inclement weather conditions, related adverse soil conditions, or suspension of operations*** that prevent the Contractor from productively performing controlling items of work and ***result in***:
   a) The Contractor being ***unable to work at least 50% of the normal workday*** on pre-determined controlling work items; or
   b) The Contractor must make ***major repairs to work damaged by weather***, provided that the damage is not attributable to the Contractor's failure to perform or neglect, and provided that the Contractor was ***unable to work at least 50% of the normal workday*** on pre-determined controlling work items, then . . .
2. The Department ***will grant a time extension*** on a day for day basis.

Utility Delays

1. If ***utility relocation and adjustment*** delays contractor; and
2. Delays are the result of utilities ***not shown in plans*** or ***not completed on schedule***; and
3. Utility work ***actually affected progress***; and
4. Contractor took all ***reasonable measures to minimize*** the effect, then . . .
5. Submit ***time extension request*** to preserve right to additional time and compensation.

Request for Extension of Contract Time

1. Submit ***preliminary request for an extension of contract time*** within 10 days of start of delay and include the ***commencement date*** of the delay, the ***cause*** of the delay, and the ***controlling item of work*** affected by the Delay.
2. Submit a ***contract time extension request*** within 30 days after elimination of the delay and include ***all documentation*** that the Contractor wishes the Department to consider related to the delay, and the ***exact number of days*** requested to be added to Contract Time.
3. If the delay is ***compensable***, then the Contractor shall also be request to ***submit*** with the request for contract time extension a ***detailed cost analysis*** of the requested additional compensation.

Disputes Review Board

1. Review Special Provisions to determine ***whether contract specifies use of Dispute Review Board*** ("DRB").
2. If ***so***, Contractor is typically required to ***refer a dispute or claim to the DRB*** as soon as it appears that the normal dispute resolution effort is not succeeding ***and/or*** within the same time period for submittal of ***certified written claim*** to the Department (*i.e.* within 90 or 180 days after final acceptance).
3. **Special Provisions** should also ***detail*** any specific procedures for the DRB.

*NOTE: Required procedures may be modified by Supplemental Specifications or Special Provisions. Only the Engineer may approve extra work or exceptions to the above procedures (*See*, e.g., § 5-1.4.8)

NOTICE: THIS FLOWCHART DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP AND IS NOT INTENDED AS LEGAL ADVICE. CONTACT A LICENSED ATTORNEY TO UNDERSTAND YOUR RIGHTS.

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» continued from page 21

The reason for this failure is understandable. That portion of the contract documents which addresses these problems is typically set forth in the General Conditions or, in DOT Specifications, the first section. Therein lies the problem. Neither the contractor nor the engineer sufficiently knows what these conditions or specifications provide because neither prepared them, and neither has received any meaningful classroom education or training.

And what are the consequences of not knowing what the contract provides/requires for project changes?

- Contractors do not get paid/fairly paid for the related extra costs.
- Contractors pay liquidated damages for the related delay.
- Contractors and engineers' relationship suffer.

So how do you overcome this? How do you create a roadmap to obtain additional compensation and time extensions when the project requirements change?

3. Creating a roadmap to manage project changes

Insofar as the contract provisions which address project changes are set forth in the General Conditions or, in DOT Specifications, the first section, it is essential that contractors learn the *applicable provisions* and *how to use them*. I have found the most effect means to accomplish this is through *preparation of a flowchart*. The flowchart should describe:

- All of the applicable contract provisions which address project changes;
- Under what factual circumstances each provision applies;
- Whether there is a right to additional compensation or only a time extension;
- How to calculate the impact in dollars and time; and
- What are the related procedural requirements.

We have and continue to prepare contract-based flowcharts for clients which correspond to the applicable contracts (e.g. DOT, AIA, EJCDC, etc.). Set forth on the previous page is an example. This is a portion of the flowcharts for the FL DOT Standard Specifications for Construction.

How to use the flowchart

After creating the flowchart, both the contractor and engineer now have a roadmap for *how to manage project changes insofar as they affect cost, time, and constructability*. With this understanding, project changes can be timely, equitable, and cooperatively addressed. Copies of the flowchart should be kept in the home office and given to all field personnel.

When a change issue arises, both the contractor and the engineer can pull out the flowchart to quickly determine if there is a right to additional compensation and/or a time extension, what are the applicable procedural requirements, and how to calculate the impact in time and money. With a common understanding of how to proceed, change issues are properly handled at the outset.

ABOUT THE AUTHOR

Thomas Olson is the founding partner of Olson Construction Law. Tom's commitment is to provide guidance on how to resolve issues on the jobsite, not in the courtroom. Tom has worked on highway heavy projects throughout much of the United States for more than thirty years. A prolific speaker and writer as well as attorney, his expertise is in concrete and asphalt paving, utility, earthwork and bridge construction, schedule analysis, material testing, and the technical and legal obligations of both engineers and contractors.

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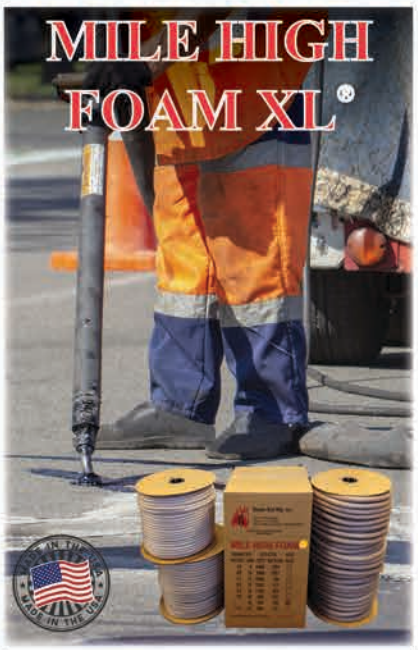

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