

Legal Scope

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Scope Changes: A Common Cause for Disputes

Construction projects rarely proceed as originally anticipated—changes always occur. Some changes are relatively minor and can be quickly addressed on the project. But other changes are significant, due to either time or materials of the change itself, or the impact of the change on other work. While each change order is unique, there are standard points for all parties to address when a change order arises.

1. Always use the processes outlined in the contract. Most contracts include terms for the change order process. It is important to use the contractual process not only for proper documentation and authorization of the specific change order, but also to ensure that there is not a precedent being set on the project that change orders will be performed or authorized ad hoc. Once the parties begin to use ad hoc approvals of change orders, it opens the door to the possibility that ad hoc undocumented changes, *that are large ticket-items*, may also be deemed approved. Best to follow the contract process every time for sake of consistency. This is for the benefit of all parties to the change order. Also make sure that the change order is in writing and signed by all the appropriate parties. While courts may choose to enforce oral changes, it is a much stronger case when there is written documentation that proves the changes in dispute.

2. Make sure the change order scope and pricing is accurate and clear. Sometimes change orders are documented in writing, but it is unclear what, specifically, they mean. The change order should clarify if it is extra work that was outside the original scope, or if it was a change/substitute for the original design. If appropriate, the change order should clarify the deduction for the deletion of the prior cost, as part of the calculation. If it is a lump sum or guaranteed maximum price contract, the change order should clarify whether it is a modified cost within the GMP cap (or lump sum), or whether it is an amount that will increase the GMP. The change order should also clarify whether it is the full amount for the changed work, or whether indirect costs such as management, delays, overtime, or other acceleration costs will be invoiced separately.

3. The change order should clarify whether it is an absolute agreement, or whether any rights are preserved. Sometimes, a change order is actually a construction change directive, wherein the constructor is being ordered to complete the changed work and pricing is to be determined at a later point. Other times, the change order work is disputed or under protest either as to pricing or some other term. Whatever specific terms, conditions, preservation of rights, or other unique aspects of the change order exist, make sure that they are documented on the written change order itself. Also, if the contract allows for a variety of change order processes (e.g. extra work; changed work; directives; disputed changes; etc.), then best to identify in the change order which paragraphs and processes of the contract cover the change or dispute at issue.

Changes to scope are common on projects and are often done without issue. But it is also a frequent cause of dispute. When changes arise, best to ensure that it is well documented, and it is advisable to seek attorney advice early and often.

The Numbers:

4.3%

- Through first 9 months of 2017, total construction spending is 4.3% above the 2016 mark.
- Total private construction spending is 7.1% above last year's mark.
- Total public construction spending is decreased, compared to last year.

Source(s): Monthly Construction Spending, September 2017, U.S. Census Bureau (Nov. 1, 2017).



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Legal Scope is written by Jeffrey Bright, an attorney licensed in Pennsylvania and Maryland. For more information, contact Bright Law Firm. This newsletter is not legal advice. Unlike this newsletter, legal advice is specifically tailored to the facts, law and objectives unique to each circumstance. **To join or remove yourself from this subscription list, email jbright@bright-lawfirm.com.**