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## Streamlining Government Change Order Processes – Can It Be Done?<sup>1</sup>

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### Introduction

Change is the norm on construction projects. Change is, at times, beneficial for both owners and contractors. Owners can modify the project after contract award, if needed, while contractors can increase their scope of work and project profitability without needing to compete for additional work. At the same time, change, can be and often is, detrimental to both owners and contractors. Change often causes projects to complete later than planned by owners and over their planned budget. And, owner change order processes are often lengthy and cumbersome, detrimentally impacting contractor cash flows. As a result --

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<sup>2</sup> The Navigant Construction Forum™ is "The industry's resource for thought leadership and best practices on avoidance and resolution of project disputes globally", located in Boulder, CO.



“Contractors universally agree that slow processing of change order requests by public project owners coupled with slow payment for extra and changed work are major problems threatening project success and contractor viability.”<sup>3</sup>

As a result of this belief, efforts have been initiated by legislatures and various governmental entities across the nation to “streamline” or speed up change order processes. There is little doubt that typical governmental change order processes should be streamlined. The impact of lengthy and convoluted change management processes drive up project costs, strain contractors’ cash flow, and jeopardize contractors’ financial situations. As one article noted:

“The Los Angeles Metropolitan Transit Authority reported in 2013 that ‘...risks associated with change order resolution and related delays in payment have a significant impact on construction costs on Metro projects. These risks fall disproportionately on small and disadvantaged businesses that rely on uninterrupted cash flows to meet payrolls and sustain their businesses.’”<sup>4</sup>

The purpose of this paper is to explore current efforts to streamline change order processes. The paper also discusses the difficulties in speeding up such processes and why, in the opinion of the author, such efforts are quite often doomed to fail – due mainly to a disagreement over when does a change actually start and when does the change order process commence?

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<sup>3</sup> Daniel F. McLennon, *California Needs Legislation Requiring Timely Processing of Change Orders on Public Construction Projects*, [Engineering News-Record Law Today](#), May 30 - June 6, 2016.

<sup>4</sup> Los Angeles County Metropolitan Transportation Authority Revised Memorandum re: Construction Change Order Initiative. November 6, 2014. Cited in Daniel F. McLennon’s article cited above.



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## What is a Change Order?

The term “change order” is a generic term. For the purposes of this paper the change order nomenclature includes claim settlements (on the project), contract amendments, contract modifications, requests for equitable adjustment, work change directives, and variations. One general definition of a change order is set forth below.

“Direction by the Employer or authorized representative directing the Contractor to construct some portion of project in manner different from that described in plans & specifications for which the Contractor or Employer may be entitled to an adjustment in contract price and/or time.”<sup>5</sup>

A more robust definition of change order is found in the U.S. Postal Service’s Contract Administration Manual and is set forth below.

*“Change Order.* A written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause permits the contracting officer to order without the contractor’s consent. Change orders are another type of unilateral modification. They can be issued for several reasons, including a change in the needs of the requesting office, defects or ambiguities in the specifications, and factors (such as weather conditions) beyond the control of either party. A change order is a contract modification in the making.

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<sup>5</sup> Irv Richter and Roy Mitchell, Handbook of Construction Law and Claims, Reston Publishing Company, Inc., Reston, VA, 1982.



*Contract Modification.* Any written alteration in the specification, delivery point, rate of delivery, contract period, price, quantity, or other contract provision of an existing contract.”<sup>6</sup>

Different contract documents, of course, have somewhat different definitions. Notwithstanding these different definitions, the term change order is an owner directive to perform some work differently or perform different work than the original contract called for and provides for an equitable adjustment for either the owner or the contractor as a result of the change.

## Why Do We Need a Changes Clause?

One of the premier texts concerning change orders, *Government Contract Changes*<sup>7</sup>, summarizes the four principle purposes of a Changes clause in a construction contract in the following manner.

1. To assure that project owners have “...a wide degree of flexibility...” during the performance of the project work to make changes;
2. To facilitate suggested changes to the work of the contract by the contractor;
3. **To provide the owner the authority to order additional or changed work, within the general scope of the contract, without the need to for a new procurement; and,**
4. To be “...the major vehicle for contractor claims...” against the owner.

From the perspective of this paper, the third item above, is the key. Absent a Changes clause in a contract, the owner has *no right* to order a change! Thus, the critical need for a Changes clause.

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<sup>6</sup> Cited by James J. O’Brien, Construction Change Orders: Impact, Avoidance, Documentation, McGraw Hill, New York, 1998.

<sup>7</sup> Ralph C. Nash, Federal Publications, Inc., Washington, D.C., 1975.



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## Different Types of Changes

In the most general terms, there are three types of changes – *directed* and *constructive* changes and *claims* (also known as *requests for equitable adjustments*).

- ***Directed Changes*** – Directed changes are those change orders issued by the owner that the contractor is obligated to perform.<sup>8</sup> Under the heading of a directed change are two types.
  - ***Bilateral Changes*** – A bilateral change order is one where there is total agreement between the owner and the contractor as to the scope, time and cost of the change and is executed by both parties. Typically bilateral changes are executed on a lump sum basis.
  - ***Unilateral Changes*** – A unilateral change order is one which is executed by the owner that contains a scope of work but there is no agreement on the time and cost of the work to be performed. The contractor is obligated to follow such a change directive and typically performs such work on a time and material, force account or cost reimbursable basis.
- ***Constructive Changes*** – “A constructive change order has been defined as an oral or written act or omission by the Contracting Officer or other authorized Government official, which is of such a nature that it has the same effect as a formal written change order under the Changes clause.”<sup>9</sup> The author typically defines constructive changes as accidental or unintended changes in that the owner directs the contractor to perform some work which they, the owner,

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<sup>8</sup> While it is beyond the scope of this paper to discuss, the one exception to the rule that the contractor is “obligated” to follow owner directives is the rule concerning “cardinal change”. This term is defined as: “A change that is beyond the scope of the contract and, thus, cannot be ordered by the contracting officer under the contract’s Changes clause.” [www.americanbar.org/.../ls\\_lamp\\_cle\\_nov12\\_contract\\_changes](http://www.americanbar.org/.../ls_lamp_cle_nov12_contract_changes)

<sup>9</sup> [www.dap.dau.mil](http://www.dap.dau.mil) > Home > Contracting.

believes is in the contract's scope of work but the contractor disagrees. Generally, constructive changes arise from the following issues:

- Contract interpretation or misinterpretation;
  - Defective plans and/or specifications;
  - Owner interference or failure to cooperate;
  - Failure to disclose information that would have made a difference to the way the contractor bid or prosecuted the work (known as Superior Knowledge); and
  - Constructive acceleration.<sup>10</sup>
- **Claims** – A “claim” (or Request for Equitable Adjustment in government parlance) is a written demand or assertion by one of contracting parties, seeking, as matter of legal right the payment of additional money, the adjustment of the time of performance, or some other change to the terms and conditions of the contract documents arising under or related to contract. At the outset, a claim is a *request* for a change order to resolve the time, cost and impact of an issue or event that arose on the contract for which the contractor is entitled to recover damages pursuant to the terms of the contract. Where claims and change orders come together, so to speak, is when owners and contractors settle claims on the project. The only contract vehicle available in this situation is a change order.

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<sup>10</sup> While it is beyond the scope of this paper to explore the issue, constructive acceleration generally occurs when a contractor encounters an excusable delay, and is entitled to an extension of the contract schedule. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period. The elements of constructive acceleration are: (1) The existence of one or more excusable delays; (2) notice by the contractor to the government of such delay, and a request for an extension of time; (3) failure or refusal by the government to grant the extension request; (4) an express or implied order by the government to accelerate; and (5) an actual acceleration resulting in increased costs. *Fru-Con Constr. Corp. v. United States*, 43 Fed. Cl. 306 (1999); *Atlantic Dry Dock Corp.*, ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; *Trepte Constr. Co.*, ASBCA No. 28555, 90-1 BCA ¶ 22,595. [https://www.loc.gov/rr/frd/Military\\_Law/.../CAD\\_2014\\_Ch21.pdf](https://www.loc.gov/rr/frd/Military_Law/.../CAD_2014_Ch21.pdf).



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## Elements of a Typical Change Order

What is included in a typical change order? There are three elements in most change orders as follows.

- **Scope** – This is, generally, a narrative description of the work the owner wants changed, modified, added or deleted from the current scope of work. It may be accompanied by sketches, drawings or other visual depictions of the changed work and may also be accompanied by technical specifications.
- **Cost** – This is, on prospectively priced changes, the agreed upon price for the changed work including direct, indirect, delay and impact costs plus overhead, profit and bond costs. On unilateral changes, which are retrospectively priced, this may represent the owner’s estimate of the changed work; may be a “not to exceed” cost<sup>11</sup>; or may be filled in with the words “To Be Determined” or “TBD” which will be ultimately based on actual costs of the changed work tracked on a time and material basis and associated delay costs, if any.
- **Time** – This is the number of days of delay resulting from the changed work as agreed to by the owner and the contractor based upon a prospective time impact analysis (“TIA”)<sup>12</sup> or time impact evaluation (“TIE”). Time may be expressed in

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<sup>11</sup> While unilateral changes may contain a “not to exceed” cost this does not mean that the contractor is required to accomplish the changed work for this costs. What “not to exceed” means, from a practical point of view, is that the contractor is to proceed with the changed work but may *not* spend more than the specified amount. Should the contractor reach the “not to exceed” amount prior to completing the changed work, the contractor should notify the owner, stop working on the changed work, and await further direction from the owner.

<sup>12</sup> “Time Impact Analysis (TIA) is a scheduling technique used to assess and quantify the effects of an unplanned event, namely a change which increases the work scope, but can be used in other ways. A TIA can also be used to evaluate potential impacts to the schedule for acceleration or delay.” Anthony Woodrich, *Time Impact Analysis: Extra Work and the Effect on the Finish Date*, July 1, 2014.



calendar or working days (depending upon how the Time of Performance clause in the contract is stated). In the event the owner issues a unilateral change order, this portion of the change order will likely have TBD.

- *Anything Else?* – Yes. It is *not* uncommon for a change order to have either a disclaimer clause or reservation of rights language.
  - *Disclaimer Clause* – Many prospectively priced change orders will contain some form of disclaimer clause indicating that the terms and conditions of the change order constitute “full and final settlement” of all time and all costs of the change order.
  - *Reservation of Rights Language* – In the alternative, if the owner and contractor cannot come to terms on the time and cost of the changed work, it is *not* at all uncommon for contractor to include a “reservation of rights” clause either on the face of the change order or by attaching a letter to the proposed change order reserving their rights to some or all aspects of the change – typically the cost, the time, and the impact of the change on unchanged work.

## What Causes Delay in the Change Order Process?

As noted earlier there are many complaints concerning lengthy change order processes which substantially impact the finances of contractors. One recent article has this to say concerning such lengthy processes.

“Contractors are required by contract to perform extra work and maintain the project’s schedule before the owner entity processes a change order

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<http://www.mpug.com/articles/time-impact-analysis-extra-work-effect-finish-date>. The definition of a time impact evaluation is the same but with a different name.





request for that work. Until the change order is processed, there is no contract amount for the contractor to bill against. Thus, trade contractors end up financing often significant parts of the public entity's construction project for extended periods of time.

For example, average change order processing in New York City in 2008 took more than 300 days. A local law firm reported an estimated \$600 to \$800 million in unprocessed change orders in 2008 for the New York City Public School Authority alone. The carrying cost to trade contractors for such amounts is enormous. Of course, this problem is not restricted to New York and is reported across the country.

Furthermore, stories abound in the construction industry about multi-year projects where processing of change order requests has been put off until project completion. By that time, contractors desperate for payment may fall prey to predatory owner practices of overstated back charges and liquidated damages to leverage discount payments for earlier performed extra and changed work.”<sup>13</sup>

While various articles, such as this one, allege and complain about lengthy change order processes, they *rarely* discuss the cause of such delayed processing. The author offers a number possible explanations for such lengthy change order processes. While most owners assert that most of the delays are caused by contractors, the author's experience indicates that delay is caused by *both* contractors and owners – some justified, some *not*. In the author's experience, the following is a general list of the drivers of lengthy change order settlements. These factors are rarely identified or discussed in articles

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<sup>13</sup> Daniel F. McLennon, *California Needs Legislation Requiring Timely Processing of Change Orders on Public Construction Projects*, op. cit., citing Office of the Mayor Press Release, PR-291-08, July 28, 2008 and Goldberg and Connolly, *New York City – School Construction Authority: Why Haven't Subcontractors Enjoyed the Benefit of "Allowance" Change Order Procedures?*, February, 2010.



concerning the need for streamlining government change order process but are commonly known on project sites globally.

- *Lack of Owner Decisions Concerning the Details of a Change Order* – It is not uncommon for owners to request time and cost proposals on changed work *before* they have reached a final decision on the full scope of work. All too often, the initial change order proposal requests received from the owner lack the detail necessary to properly plan and price a change order. When contractors receive such requests and start asking questions to help them understand exactly what the owner wants changed and how, owners frequently take their time reaching their conclusions and responding to the contractor. Such lack of detail and lack of prompt decision making causes delay to the finalization of a change order.
- *Insufficient Time to Prepare and Submit Cost Quotations* – All too many contracts specify that contractors *shall* submit change order cost quotations within a very short timeframe – 14 to 30 days. This is, in many cases, insufficient time to prepare a detailed cost and time estimate for proposed changes. As a result, contractors prepare order of magnitude estimates and reserve their rights to impact costs and time. Owners and contractors, in situations such as this, often find they cannot negotiate and prospectively settle the change order. This type of situation frequently results in time and material change orders, further delaying the final resolution of the change.
- *Need to Obtain Cost Quotations from Lower Tiers* – As so much work on projects today is subcontracted, when a proposed change order is large and complex the general contractor must obtain cost quotations from multiple subcontractors, sub-subcontractors and vendors. In turn, the general has to coordinate all such quotes to make certain the full scope of the proposed change order work is included and then has to add their own proposed costs. Additionally, if the work scope is *not* sufficiently detailed, subcontractors and



suppliers will raise questions to the general contractor, who must pass them to the owner and await the owner's response.

- ***Need to Estimate the Time Impact*** – In addition to preparing a cost estimate, most contract documents demand preparation and submittal of an estimate of potential delay likely to result from the changed work. This time estimate typically requires preparation of a TIA or TIE. What many owners fail to realize is that a TIA or TIE requires a detailed plan for the performance of the changed work, which in turn requires that a detailed scope of work has been agreed to between the owner and the contractor. The failure to reach agreement on a detailed work scope prevents or, at least, slows down preparation of a TIA or TIE.
- ***Need to Estimate Impact Costs*** – If the owner is hoping to execute a prospectively priced, firm fixed price change order (one that includes full agreement on scope, time and cost) then the contractor must also estimate the potential impact costs of the changed work. This includes, but may not be limited to, delay costs, impacts on unchanged work, lost productivity, potential idle equipment costs, etc. As these costs are somewhat speculative. It is often difficult for owners to negotiate settlement of such costs since they are based on assumption and “soft costs”.
- ***Inability of Owner and Contractor to Negotiate an Agreement*** – Given all of the above, it is difficult for owners and contractors to reach a quick resolution of all change order impacts. This difficulty results in multiple negotiation sessions, thus lengthening the change order process. Even on projects with good working relationships between the owner and the contractor, negotiating full settlement of complex change orders is often difficult, complicated and time consuming. In the author's experience such negotiations are complicated by the fact that each side in the negotiation approaches the issue from a different point of view. Owners often believe that they have accomplished the difficult part of the



change. That is, they have decided what needs to be changed and how; they have planned and designed the change; and all the contractor needs to do is “follow the instructions”. Contractors, on the other hand, have to figure out how to accomplish the changed work while mitigating the impact of the change on the remainder of the base scope work.

- *Contractor Reluctance to Commit to a Firm Fixed Price Change Order* – Contractors are, typically, somewhat to very reluctant to commit to a firm fixed price prospectively priced change order with waiver of claim language as such change orders place all risk (time and cost) squarely on the contractor. It is ironic, in a way that contractors who frequently gamble hundreds of millions of dollars on hard dollar bids in a very competitive market are hesitant when it comes to negotiating and executing prospectively priced changes. However, contractors understand that prospective estimates of delay due to change orders and impact costs are nothing more than a “scientific wild a...d guess carried out to the second decimal point” more commonly known as a SWAG.
- *Owner Reluctance to Negotiate Time and Impact Costs* – On the other hand, while owners are willing to negotiate the hard dollars costs (labor, material, equipment and subcontractor costs) of change orders, all too many owners shy away from settling potential delay and impact costs in advance. Simply put, owners most often consider prospectively estimated delay and impact costs as speculative at best and a “total rip off” at worst. Frequently, owners take the position “What if I give them a compensable time extension and some impact costs now but they end up completing the project on time? Haven’t I given away time and money when none is needed or proven?”

These eight factors are common on most the project sites the author has been on. Each individually, and the synergistic effect of all eight factors, contribute to significant delays to any change order process.



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## When Does a “Change” Start & When Does the “Change Order Process” Start?

One issue that common to *all* efforts to streamline change order processes is the total failure to *define* when the change order process actually starts? Some examples follow.

“The new Metro policy and adopted procedures sets a goal of 60 days for the timely processing of all construction change orders to minimize costs and risks to contractors and subcontractors.”<sup>14</sup>

“The bill would require a public entity ... upon receipt of a claim sent by registered or certified mail, to review it and, within 45 days, provide a written statement identifying the disputed and undisputed portions of the claim ... The bill would require any payment due on an undisputed portion of the claim to be processed within 60 days ... The bill would provide that unpaid claim amounts accrue interest at 7% per annum.”<sup>15</sup>

“The City is streamlining its procedures to reduce change order processing time by 50 percent – to 150 days or less – for changes caused by unforeseen field conditions, and will institute measures to hold agencies accountable for failing to meet this target.”<sup>16</sup>

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<sup>14</sup> [Vendor/Contract Management Insider](http://media.metro.net/eblast/enewsletter_vendorinsider.htm), Los Angeles County Metropolitan Transportation Authority, January/February 2015. [http://media.metro.net/eblast/enewsletter\\_vendorinsider.htm](http://media.metro.net/eblast/enewsletter_vendorinsider.htm).

<sup>15</sup> California Legislative Counsel’s Digest, Assembly Bill (“AB”) 1347, *An act to add and repeal Section 9204 of the Public Contract Code*, February 27, 2015. The California Legislature passed AB 1347 to promote change order reform in 2015 but the act was vetoed by the Governor.

<sup>16</sup> Office of the Mayor Press Release, PR-291-08, July 28, 2008, *Mayor Bloomberg Announces Reforms to Make City Capital Construction Projects More Affordable and Efficient – Strategies to Encourage More Bidders on City Construction Projects and Reverse Perception that City is Difficult Client, In Order to Drive Down Costs*.



“(h)(1) With respect to a proposed change to a contract entered into by a non-Department Federal entity with which the Secretary has entered into an agreement under subsection (e) that is estimated at a value of less than \$250,000, the non-Department Federal entity shall issue a final decision regarding such change not later than 30 days after the date on which the change is proposed.

(2) With respect to a proposed change to such contract that is estimated at a value of \$250,000 or more – ...

(B) during the 30 day period beginning on the date on which the entity furnishes to the Secretary information regarding such change, the Secretary may issue the final decision regarding such change; and

(C) If the Secretary does not issue a final decision under subparagraph (B), during the 30 day period following the period described in such paragraph, the entity shall issue a final decision regarding such change no later than 90 days from when the entity furnished information regarding such a change to the Secretary.”<sup>17</sup>

As noted above the common factor of all these attempts to streamline a change order process is the failure to actually define *when* the change order process actually starts. If the owner decides to issue a change order, drafts the change order scope of work and issues it to the contractor with a request for a change order time and cost proposal, then it can be fairly said that the change order process started on the day the owner provided the change order to the contractor.

<sup>17</sup> 114<sup>th</sup> Congress, 2d Session, House Resolution (“H.R.”) 3106, Construction Reform Act of 2016, *An act to amend title 38, United States Code, to make certain improvements in the administration of Department medical facility construction projects*, 2016.



While the starting date of a change order in this situation is well defined and documented, half or less of the change order disputes the author has been involved in have started with the issuance of a formal change order proposal request from an owner. The author is cognizant that change order impact and the starting date of the change order process are two different dates.

The change order process normally starts when the owner *agrees* or *acknowledges* that their action or lack of action actually caused or brought about an impact for which the contractor is entitled to recover damages. For example, if a submittal response results in a change to the scope of work but it takes the owner six months to acknowledge this fact, the contractual change order process does *not* start until this point. The disconnect in most efforts is the failure to recognize and acknowledge the difference between the beginning of a change impact and the initiation of the change order process. Contractors focus on the beginning of the impact while owners center on the beginning of the process. The difference between these two dates is discussed further below.

- ***Directed Changes*** – As noted above, an owner directed change starts when the owner issues the proposed change order to the contractor with a request for a time and cost proposal. The starting date of both the change itself and the change order process in this situation are clearly known.
- ***Unilateral Changes (aka, Time & Material, Cost Reimbursable or Force Account Changes)*** – Most owners take the position that the starting date of a unilateral change is the date the owner directs the contractor to proceed with the changed work. This may be true *if* the owner issues such a change directive with *no* prior discussion with the contractor. Then, the start date of the change order process is clearly identifiable. While the time, cost and other impacts commence with directive to proceed with the change, the change order process starts when the directed work is completed and the contractor submits their time and material costs to the owner with a request for change order.





However, in the author's experience, owners do *not* issue unilateral changes right off the bat. It is more likely that the owner requests and receives a time and cost proposal from the contractor. Subsequently, the owner participates in unsuccessful time and cost negotiations with the contractor. The owner then decides to proceed with the change and directs the contractor to proceed with the scope of work on a time and material basis. In the alternative, the owner and the contractor may have reached agreement on the hard dollar costs, but *not* the time and the impact costs; or may have reached agreement on all time and costs but the contractor refuses to sign the change order with a waiver of change clause and insists upon reserving their rights. In this case, many owners insist that the contractor perform the changed work without a signed change order and direct the contractor to proceed with the change on a cost reimbursable basis. In such situations the change order impact starts with the request for a change order time and costs proposal but the change order process does *not* start until the time and material costs are submitted for payment.

- ***Constructive Changes*** – As noted earlier a constructive change is an accidental or unintended change in that the owner directs the contractor to perform some work which they, the owner, believes is in the contract scope of work but the contractor disagrees.
  - ***Request for Information ("RFI") or Request for Clarification ("RFC")*** – RFIs and RFCs are standard communications processes utilized on construction projects globally. The underlying concept is that the contractor reviews the requirements of the contract documents and does *not* understand something. Thus, the contractor submits an RFI or RFC to clarify the issue. Since most contracts do *not* have a specified duration for responding to RFIs<sup>18</sup> each RFI gives rise to a *potential* delay. If the owner provides a response that the contractor believes constitutes added or changed work, contractors are

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<sup>18</sup> See Nigel Hughes, Christopher L. Nutter, Megan Wells and James G. Zack, Jr., Impact & Control of RFIs on Construction Projects, Navigant Construction Forum™, Boulder, CO, April 2013.





typically required to provide a notice of change. If the owner insists on their interpretation of the contract requirements and directs the contractor to proceed in accordance with their response, despite the contractor's objection, this is the starting point of a constructive change claim and its impact. Later the owner will likely take the position that the impact of the directive started when they directed the contractor to proceed while the contractor is most likely to assert that the impact began when the RFI was submitted. But the change order process actually does *not* start until the time and cost proposal is submitted after the disputed work was completed. Many owners, on the other hand, take the position that the change order process actually did *not* start until they acknowledge that their directive was actually a change to the scope of work.

In the alternative some time may be expended arguing over the requirements of the contract. If the owner concludes that their response actually was a change to the scope of work they will advise the contractor that a change order will be issued. Most contractors will likely take the position that the change order process started when the RFI was submitted. The author agrees that while the impact of the change started when the RFI was submitted the change order process did *not* start until the proposed change is submitted to the contractor.

- *Submittal Responses* – The scenario is nearly identical to the one above except that argument over when the change order impact began when the owner's response was received, unless the owner failed to respond within the contract's specified timeframe. Then it will start earlier. If the owner insists upon their interpretation and the contractor performs the changed work, contractor's believe the change order process starts when the time and cost submittal concerning the changed work is provided to the owner. Owners, on the other hand, generally assert that the change order process does *not* start until they acknowledge the change.



- *Delays* – Virtually all contracts require that contractors file notice of potential delay within a specified number of days after “... the contractor knew or should have known ...” of the delay.<sup>19</sup> So the question arises, when does the change impact start and when does the change order process start? The delay impact can be established through the contractor’s forensic schedule analysis. Schedule delay analysis will demonstrate that a project delay has or will occur and that the owner, or someone for whom they are responsible, is the proximate cause of the delay. Contractors are likely to contend that that the change order process started when they submitted all of the above information and requested either an excusable or a compensable time extension. Again, owners typically assert the change order process did *not* start until they agree that the delay was owner caused.
- *Directed and Constructive Suspensions of Work* – Directed suspensions of work (“SOW”) or Stop Work Orders are fairly straight forward. Almost all contracts require that owners issue such directives in writing. The author’s experience is that a majority of such directives are, in fact, issued in this manner. In the event that the owner gives a verbal directive, contractors generally seek and received confirmation the same day. In either event, the impact of the SOW starts the day the directive is given. However, the change order process does not start until the SOW directive is lifted and the contractor submits their cost and time extension request. This is true no matter how long the SOW directive is in effect. In *Redland* the SOW order stayed in effect for nearly four years<sup>20</sup> but the change order process did *not* begin until the compensable time extension arising from the SOW directive request was filed.

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<sup>19</sup> Of course, a well recognized exception to this rule is when a contractor encounters a “defective specification”. In this case, courts have ruled that the defect existed from the outset of the contract and the “... file written notice of delay within ten days ...” requirement is set aside.

<sup>20</sup> *The Redland Company, Inc. v US*, 2011 Ct. Fed. Cl No. 08-606C, 2011 WL 13381188 Fed. Cl., April 7, 2011.



A constructive suspension of work is generally thought of as an act or omission of one party on a construction project which has the effect of unreasonably delaying the contractor's work. Examples include the owner's failure to respond to submittals or RFIs in a timely manner or late release of change orders. While the impact of such an event starts much earlier the change order process does *not* start until the constructive suspension is completed and the contractor complies and submits their time and cost request. Owners, of course, believe the change order process did *not* start until they acknowledge the delay.

- ***Constructive Acceleration*** – “Constructive acceleration occurs in the absence of an owner directed acceleration, such as where the owner has refused a valid request for time extensions or threatened other action which requires the contractor to accelerate its work to avoid liquidated damages or other loss or risk of loss. The classic case is when a request for a time extension for excusable delay is denied and the contract provides liquidated damages for late completion. The law construes this as an order by the owner to complete performance within the originally specified completion date, a shorter period at higher cost than provided for in the contract. The constructive acceleration doctrine allows recovery for the additional expenses the contractor can establish.”<sup>21</sup> The impact of constructive acceleration starts when the contractor files the notice of constructive acceleration and the owner ignores the notice. Contractors generally believe that the change order process starts when the contractor's acceleration efforts are completed and the cost and time impacts are submitted to the owner in the form of a request for equitable adjustment. Again though, owners feel the change order process does *not* kick off until they acknowledge that the contractor is entitled to a time extension.
- ***Differing Site Conditions*** – A differing site condition (“DSC”) is generally defined as a latent site condition at the site unknown to the contractor at the time

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<sup>21</sup> <http://corporate.findlaw.com/litigation-disputes/constructive-acceleration.html>



of bidding. The impact of the DSC obviously starts when the condition is encountered and contractors often believe that the change order process commences when the contractor overcomes the DSC, compiles the time and cost incurred, and submits a request for change order to the owner. However, owners typically believe the change order process commences only when they acknowledge the condition encountered was actually a materially different condition.

- **Loss of Productivity** – Pinning down the start date of productivity loss is more difficult to ascertain than the issues discussed above. Often, productivity loss has started weeks or even months before the contractor identifies the loss. Nevertheless, the impact starts much earlier than the change order process, which does *not* commence until the contractor submits their claim to the owner and the owner accepts responsibility for the act or event which was the proximate cause of the productivity loss.

The point of this discussion is that in each situation, there are three dates that *must* be clearly established –

1. The date of the action, lack of action or event which started the cost and/or time impact the contractor is seeking recovery for;
2. The date the contractor submits their request for change order or request for equitable adjustment (claim) to the owner; and
3. The date the owner acknowledges liability for the event or action which caused the claimed damages.

*None* of the articles reviewed on streamlining change order processes and *none* of the legislative efforts to date have acknowledged or dealt with the issue of the date on which the change order process starts. Rather they all seem to set some sort of arbitrary number of days even in the absence of defining when this time starts to run.



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## Legislative Efforts to Streamline Change Order Processes

The *Washington State Department of Transportation* (“WSDOT”) issued a statewide survey and then convened a three day workshop in 2015 to “... identify potential improvements to the change order process.”<sup>22</sup> Among other changes made, WSDOT increased the execution authority level for Regions to \$500,000; provided that Regions may delegate some of all of their authority to the project level; raised the limit for “minor changes”; and made two other changes as follows.

“If endorsement by the contractor is not received within the required 14 days, WSDOT may process the change unilaterally and it is binding on the contractor. This 14 day response time is only enforceable if the terms of the change order have been previously agreed to in writing by the contractor.”

and

“A commitment on WSDOT’s behalf is to apply a 1% simple interest rate on any owed but unpaid balance due beyond 30 days of when the contract provides for payment of the completed, acceptable, change order work.”

WSDOT’s modification to their change order process is something of an improvement with respect to the increase in the signatory authority to the Regions and their ability to subdelegate some or all of their authority. The 14 day timeframe for acceptance of a “... previously agreed to...” change order, while it sounds good, is *limited* by the caveat that the terms must have been agreed to “... in writing by the Contractor.” The 1% interest on late payments “... on any owed but unpaid balances(s)...” again sounds

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<sup>22</sup> Washington State Department of Transportation, Construction Bulletin #2015-01R – Modification to Change Order Process, Updated August 18, 2015.



good. However, this is a statutory requirement in Washington so this Construction Bulletin is more of a reminder to the WSDOT staff.

The *City of San Diego* Office of the Independent Budget Analyst produced a report in 2012 recommending approval of a proposal to change the authority for City agencies and department to approve change orders from \$200,000 to \$500,000. This concept apparently was adopted by City Council. Increased approval authority delegated to public agencies and department will help streamline the change order process as, under the previous policy any change order above the \$200,000 limit had to receive City Council approval prior to approval of the change order, likely a much lengthier process.

The *Maryland Legislature* passed Maryland House Bill 403, the *State Procurement Change Order Fairness Act* in 2016. This legislation was signed into law by the Governor on May 29, 2016. This Act was incorporated into Chapter 581 of Maryland statutes and provides for the following.

**“15–112. CHANGE ORDERS.**

(a) (1) (i) except as provided in subparagraph (ii) of this paragraph, this section applies to State procurement contracts for construction.

...

(b) (1) Except as provided in paragraphs (2) and (3) of this subsection, a unit may not require a prime contractor and a prime contractor may not require a subcontractor to begin change order work under a contract until the procurement officer for the unit issues a written change order that specifies whether the work is to proceed in compliance with the terms of the contract, on:

(i) An agreed to price which may include a pre-established catalog or unit prices based on local prevailing wage rates and equipment



and material costs for each task required for the change order as included in the bid documents at the time of bid;

- (ii) A force account;
- (iii) A construction change directive; or
- (iv) A time and materials basis.

(2) If a procurement officer and a prime contractor do not agree that work is included within the original scope and terms of a contract, nothing in this section:

- (i) Prohibits a procurement officer from issuing an order to a prime contractor to perform work or to furnish labor or materials determined by the procurement officer to be required by a contract between a unit and the prime contractor;
- (ii) Authorizes a refusal to perform work or to furnish labor or materials that a procurement officer has ordered the prime contractor to perform or to furnish because the procurement officer has determined that the work or labor is or the materials are required by a contract between a unit and the prime contractor; or
- (iii) Prejudices or impairs the right of a prime contractor to submit a claim or dispute to a procurement officer, in accordance with applicable law and the contract, seeking additional compensation for complying with an order of the procurement officer to perform work or to furnish labor or materials determined by the procurement officer to be required by a contract between the prime contractor and a unit.

(3) (i) If a unit is to pay for a contract or a part of a contract using a unit price methodology, a change order may not be required for work to continue and be completed beyond the estimated quantities in the contract.

- (ii) After work is completed, a unit shall:





1. Determine the actual quantity used to complete the contract; and
2. If necessary, issue a final adjustment change order to the contractor.

(c) If the amount to be paid under an approved change order does not exceed \$50,000, a unit shall pay an invoice for work performed and accepted under the change order as provided for in the contract within 30 days after the unit receives the invoice and in accordance with § 15-103 of this subtitle.

(d) Within 5 days after receipt of a written change order, a prime contractor shall provide a subcontractor with a copy of the approved change order and the amount to be paid to the subcontractor based on the portion of the change order work to be completed by the subcontractor.

(e) Before January 1, 2017, the Board shall propose regulations that provide for an expedited change order process for change orders valued at more than \$50,000.

(f) (1) On or before December 31, 2016, each unit shall issue guidelines for the unit's change order process.

(2) The guidelines issued under paragraph (1) of this subsection shall be updated and reissued when any changes are made to the unit's change order process. ..."

While this legislation modified previous statutory requirements concerning change orders, there is little here that actually streamlines the change order processes for State construction projects.

The *U.S. House of Representatives* passed House Resolution ("H.R.") 3016, *The Construction Reform Act of 2016*, on February 9, 2016. The U.S. Senate received this bill





on February 10, 2016 and referred it to the Committee on Veterans' Affairs where it remains today. This proposed legislation is specifically aimed at the Department of Veterans' Affairs ("VA"). The essence of this legislative reform is set forth below.

"(h)(1) With respect to a proposed change to a contract entered into by a non-Department Federal entity with which the Secretary has entered into an agreement under subsection (e) that is estimated at a value of less than \$250,000, the non-Department Federal entity shall issue a final decision regarding such change not later than 30 days after the date on which the change is proposed.

(2) With respect to a proposed change to such contract that is estimated at a value of \$250,000 or more –

(A) The Secretary may provide to the entity the recommendations of the Secretary regarding such change;

(B) during the 30 day period beginning on the date on which the entity furnishes to the Secretary information regarding such change, the Secretary may issue the final decision regarding such change; and

(C) If the Secretary does not issue a final decision under subparagraph (B), during the 30 day period following the period described in such paragraph, the entity shall issue a final decision regarding such change no later than 90 days from when the entity furnished information regarding such a change to the Secretary."<sup>23</sup>

<sup>23</sup> 114<sup>th</sup> Congress, 2d Session, House Resolution ("H.R.") 3106, Construction Reform Act of 2016, *An act to amend title 38, United States Code, to make certain improvements in the administration of Department medical facility construction projects*, 2016.



This proposed legislation is somewhat convoluted. While the legislation is specifically directed at the VA, it requires that the VA enter into an agreement with a "... non-Departmental Federal entity..." to oversee "... construction of medical facilities." Under this proposed reform legislation, for change orders less than \$250,000 this non-Departmental Federal entity is required to render a "final decision" within 30 days after the "change is proposed". What remains unclear under this legislation is whether the non-Departmental Federal entity has to issue this final decision on the entitlement to the claim (i.e., whether the request is a legitimate change order or not) and/or the amount of the change order, including both time and costs. For changes in excess of \$250,000 the non-Departmental Federal entity "... shall issue a final decision..." on the proposed change order. What makes this proposed legislation different from other legislative efforts to streamline the change order process is that the 30 day and the 90 day timeframes start from when the contractor provides their information on the proposed change. The author believe these timeframes are unrealistic when applied to a large or complex change order or one that involves a potential or alleged substantial delay.

The *City of New York* determined to cut the typical change order process

"The current average time to process a change order – an agreement to alter a contract – on a City project is over 300 days. Contractors either proceed at their own risk or wait for as much as a year for approval – at a time when the cost of doing the work has increased due to construction cost escalation. This uncertainty drives up the City's costs by reducing the number of contractors willing to bid on City work. This is true even for change orders where the need for the change is straightforward, such as unforeseen field conditions like poor soil quality or where building systems to be repaired have degraded beyond expectations. The City is streamlining its procedures to reduce change order processing time by 50 percent – to 150 days or less – for changes caused by unforeseen field



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conditions, and will institute measures to hold agencies accountable for failing to meet this target.”<sup>24</sup>

Nothing, however, in this press release provided any details on how this goal was to be accomplished. In an attempt to ascertain whether the City of New York has made progress in their effort to cut the change order processing time in half the author reached out to a senior member of a New York City department. The author was advised that there was a study conducted and this Department has been able to reduce registration beyond the Department from 120 days to 90 days. The author was also advised the report found that the largest delay in executing change orders is at the project level. Project teams are lax in “initiating” change orders; designers are slow in designing solutions; and construction manager and contractor negotiations are a long and drawn out process. At this Department most change orders are performed at risk by the contractors.

The *Los Angeles County Metropolitan Transportation Authority* (“Metro”) adopted a new change order policy as part of their Construction Change Order Streamlining Initiative in 2014. The memorandum recommending these change stated the following.

“The overall goal is to have change orders completed within 60 days of a fully defined scope of work by the contractor. The full and complete definition of a scope of work is critical to the success in any change order process. ... The change order initiative requires Metro staff to apply discipline to the process by holding contractors accountable for providing timely and proper scope of work definition, and not moving to the initial change order steps without that definition.

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<sup>24</sup> Office of the Mayor Press Release PR-291-08, July 28, 2008 – *Mayor Bloomberg Announces Reforms to Make City Capital Construction Project More Affordable and Efficient – Strategies to Encourage More Bidders on City Construction Projects and Reverse Perception that City is Difficult Client in Order to Drive Down Costs.*



Another feature of the new process is that if a change order is not fully negotiated within 60 days, Metro will issue a unilateral change order, as allowed by the contract, based on Metro's ICE.<sup>25</sup> This feature has three important effects; it places a reasonable goal that is defined in procedure, it reduces the size of any dispute, and lastly it provides important cash flow to the contractor and its subcontractors, including DBEs and SBEs. This aspect of the change order process will attempt to improve the time necessary for disputes of unmerited changes to go to issues to be moving quickly to address."<sup>26</sup>

While the goal of cutting the change order process from 90+ days to 60 days is laudable, the revised policy still requires that the owner and the contractor reach an agreement on "... the full and complete definition of a scope of work ..." *before* the change order process even starts. The 60 day timeframe is, according to Metro's Change Control – Construction/Procurement Contracts<sup>27</sup>, does *not* commence until there is agreement between the owner and the contractor that the request is a legitimate change and there is agreement on the proposed scope of work and/or the claim submitted is merit. The 60 day timeframe breaks down to 30 days for the contractor to submit the proposed cost and time estimate while, at the same time, the owner is preparing their independent cost and time estimate. Days 31 through 60 are committed to "Fact Finding & Negotiation". The procedure also sets forth a dispute resolution process whose goal is to resolve all such disputes between day 61 and day 90. According to a discussion the author had recently with a member of the Metro staff indicated that some of currently active projects *are* meeting the procedure's timeframe but others are still running between 100 and nearly 300 days. It appears that this streamlining effort is showing some success in moving toward the established goal.

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<sup>25</sup> ICE is Metro's Independent Cost Estimate.

<sup>26</sup> Los Angeles County Metropolitan Transportation Authority Revised Memorandum re: Construction Change Order Initiative. November 6, 2014.

<sup>27</sup> Change Control: Construction/Procurement Contracts, Procedure #CF 14, Rev. 4, dated April 7, 2015.



The *Los Angeles Unified School District* (“LAUSD”) Office of the Inspector General – Internal Audit issued an audit report concerning the Change Order Process on March 1, 2012. This audit report noted the following.

“Although the processing time for change orders has decreased in recent years, the average processing time is still over 120 days.

The *14.17 Change Order Procedures* states, in part, that: “The Owner Authorized Representative (“OAR”) is responsible for complying with the following policies when administering the change order process:

Change Orders shall be processed for approval within 45 days from receipt of a valid Change Order Proposal (COP) establishing entitlement for the change and no later than 30 days after Substantial Completion.”<sup>28</sup> Recently, FSD’s Project Execution Branch developed metrics for monitoring the change order processing time from the date of the Change Order Proposal to the date of the Change Order Board Approval. The goal is 60 days.”<sup>29</sup>

This audit report also contained the process by which LAUSD intended to reach the 60 day goal for change orders. A copy of this flow chart is set forth below.

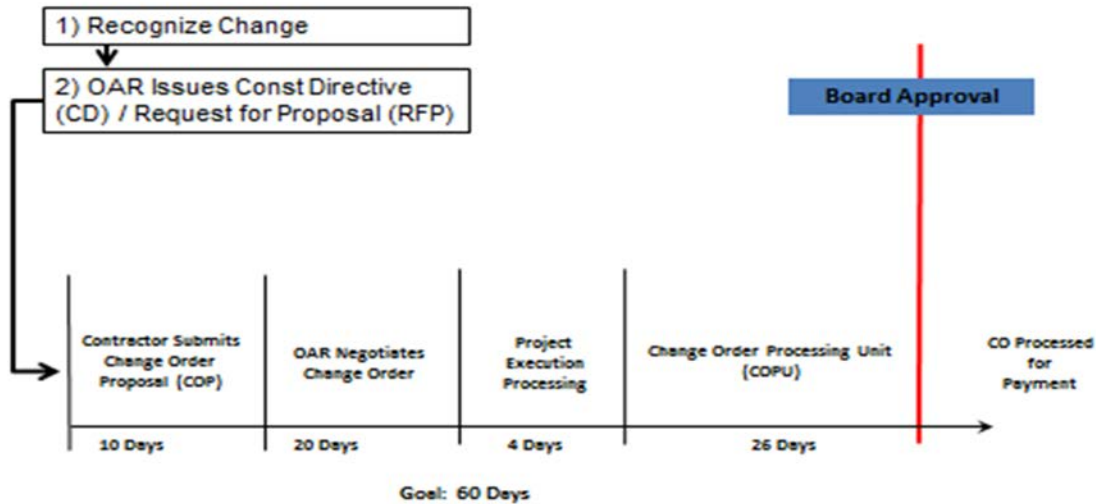
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<sup>28</sup> Los Angeles Unified School District’s Facilities Services Division, *14.17 Change Order Procedures*, dated October 10, 2007 and Current Revision dated March 31, 2011.

<sup>29</sup> Los Angeles Unified School District, Office of the Inspector General – Internal Audit, *Audit Report – Change Order Process*, OA 12-477, March 1, 2012.



### Metrics - Change Order Process



While the goal is commendable, the starting point of the above process requires that the owner *acknowledge* that a change order is owed to the contractor. The process gives the prime contractor only 10 days to prepare a change order proposal. As discussed above, this is entirely unrealistic for most change orders. The process allows 20 days for negotiation of the scope of work, the cost of the work, the cost of all impacts and the time impact of the change. Again, this is an unreasonable timeframe.

The California Legislature passed AB-1347 in February 2015 to streamline change order processes for any “public entity” -- defined as virtually any public agency in California – at all levels.

“(d) (1) (A) Upon receipt of a claim pursuant to this section, the public entity to which the claim applies shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the claimant a written statement identifying what portion of the claim is disputed and what portion is undisputed. ...



(B) The claimant shall furnish reasonable documentation to support the claim.

...

(D) Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. If the public entity fails to issue a written statement, paragraph (3) shall apply.

(2) (A) If the claimant disputes the public entity's written response, or if the public entity fails to respond to a claim issued pursuant to this section within the time prescribed, the claimant may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the public entity shall schedule a meet and confer conference within 30 days for settlement of the dispute.

(B) Within 10 business days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the public entity shall provide the claimant a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. Any disputed portion of the claim, as identified by the contractor in writing, shall be submitted to nonbinding mediation, with the public entity and the claimant sharing the associated costs equally. The public entity and claimant shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its



respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section.”<sup>30</sup>

This attempted legislative streamlining effort was probably the most sophisticated of all the efforts identified. It contained reasonable timeframes and a well thought out change order process including what action can be taken in the event that settlement negotiations fail. The process commits both the owner and the contractor to a procedure that should result in settlement of most changes. Unfortunately, this legislative effort was vetoed by the Governor of California who requested “... instead that State agencies cooperate with the industry to fix the problem.”<sup>31</sup>

What is missing, to date anyway, is any empirical data concerning the success or lack of success of any of these streamlining effort.

### **Can Change Order Processes be Streamlined?**

It is the author’s belief that change order processes can and should be streamlined. Having said this, the people involved in such a streamlining effort must understand that some delays in these processes are caused by contractors, while others by owners. From the legislative view it seems that most streamlining efforts start with the assumption that all delay in owner change order processes are caused by an unresponsive bureaucracy. Most contractors arguing for streamlining assume all delay in the change order process is brought about by owners. Neither acknowledges that existence of some delays to the change order process brought ab out by contractors.

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<sup>30</sup> California Assembly Bill No. 1347, Public Contract Claims, *An act to add and repeal Section 9204 of the Public Contract Code, relating to public contracts*, February 27, 2015.

<sup>31</sup> Daniel F. McLennon, *California Needs Legislation Requiring Timely Processing of Change Orders on Public Construction Projects*, Engineering News-Record Law Today, May 30/June 6, 2016.





It is the author's experience that owners and their staff are generally conservative individuals, trying to do everything right from the owner's perspective; quite often overburdened with administrative policies and procedures; and always subject to multiple layers of "oversight" by individuals or groups *not* involved with the construction project. All too often, owner staff do *not* understand what contractors have to do to understand a proposed scope of work, estimate the time and cost of the change for their subcontractors and themselves, negotiate the change and perform the changed work. Generally, contractors fail to understand the owners' processes, procedures and what requirements they must comply with in order to get change orders approved.

## If So, How?

Those undertaking the task of streamlining a change order process must –

1. Understand what steps a change order has go through on the part of both the owner and the contractor.
2. Understand the typical causes of delay in any change order process caused by either contractor or the owner.
3. Understand the different dates discussed above including –
  - a. The date of the event or the beginning of the impact of the change event;
  - b. The date the contractor submits the change order request and/or the claim;
  - c. What action *must* take place to initiate the change order process; and
  - d. The date the owner's formal change order process actually starts.
4. Establish reasonable and achievable timeframes to be incorporated in a streamlined process.
  - a. Recognize that there may need to be multiple timeframes depending on the time and cost of the change order and whether the change order is likely to cause the need for a time extension.



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Finally, both owner and contractor staff must participate in any effort to streamline a change order process as this must be a joint effort if it is to be successful.

## **Conclusion**

There is no doubt that many change order processes need to be streamlined and sped up for the benefit of the contractor, the owner, and the project. Of this, there is little doubt in the industry. But decisions concerning how to streamline the change order process must be made by people personally experienced with the actual change order process they are trying to reform. Timeframes set in an arbitrary manner are likely to be both unrealistic and unachievable.