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CCDC 2 — A FOCUS ON 3 TOPICS USING CASE STUDIES

8:30am – 10:00am

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BUILDEX is about designing, building and managing real estate.

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Change Orders and Extras: Key Issues And Advice

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Presented by **Samantha Ip**

What Is An “Extra”?

- A change in the Work that is not included or contemplated in the *Contract Documents* which adds to the scope of *Contract Work*
- *Contract Documents* is a defined term – documents listed in Article A-3
- Article A-3 – Contract, Definitions, GC’s, Plans, Specifications, Drawings, etc...

What Is An “Extra”?

- Objective test – proper interpretation of the *Contract Documents*
- Would a **reasonable** contractor, reviewing the *Contract Documents*, realize he would be required to perform certain Work? If yes – then not an extra.
- If it can be inferred from the *Contract* description that other undescribed work will be necessary to perform the Contract, then the undescribed Work is generally not an extra

CCDC 2 Provisions – Part 6

- GC 6.1.1 – The *Owner* has a right to make changes to the *Work* and changes to the *Contract Time* by *Change Order*
- GC 6.1.2 - Contractor shall not perform a change in the *Work* without a *Change Order* or *Change Directive*

CCDC 2 Provisions – Part 6

- GC 6.2 – *Change Order*:
- For when the *Owner* and the *Contractor* agree to adjustments in the *Contract Time* and *Contract Price*, or the method to be used to determine the adjustments
- Separate agreement signed by the parties

CCDC 2 Provisions – Part 6

- GC 6.3 – *Change Directive*:
 - *Owner* compels *Contractor* to proceed with a change in the *Work*
 - No agreement on adjustment to *Contract Price* or *Contract Time*
 - CCDC2 -2008 added: “...*Work* within the general scope of *Contract Documents*.”

CCDC 2 Provisions – Part 6

- GC 6.3 – *Change Directive* (con't):
 - GC 6.3.7 – Cost of performing the work in the *Change Directive* shall be limited to the actual cost of the following....
 - New 2008: *Change Directive* covers all costs and liabilities attributable to the *Change Directive* ...(GC 6.3.8)

CCDC 2 Provisions – Part 6

- GC 6.3 – *Change Directive* (con't):
 - GC 6.3.8 excludes costs caused by *Contractor's* failure to exercise reasonable care and diligence
 - New 2008: *Contractor* required to maintain full and detailed accounts and records to “prove” the change (GC 6.3.9)

CCDC 2 Provisions – Part 6

- GC 6.3 – *Change Directive* (con't):
 - New 2008: Owner has access rights to Contractor's "pertinent documents" related to the cost of performing the work on the *Change Directive* (GC 6.3.10)

Common Causes of Changes

- Incomplete, wrong, and incompatible designs;
- Unclear or vague specifications;
- Unexpected site conditions;
- Shifting owner requirements for design, work scope or scheduling;
- Updated construction methods;
- Changes to access and sequencing of the work;
- emergencies; and
- Changes mandated by regulatory authorities.

When Is An Extra Compensable?

- When there is agreement and documentation...
 - Signed and agreed upon *Change Order*
 - An agreed upon *Change Directive*
 - No change documentation, but parties agree to an adjustment in *Contract Time* or *Contract Price*

WHAT IF THERE IS NO AGREEMENT or DOCUMENTATION?



"Oh no, a few more change orders from Mrs. Ferguson, right?"

Compensable Extra When No Agreement

- *Contractor* has done extra work, but Owner has not issued *Change Order* or *Change Directive* – will the extra work be compensable?
- CCDC 2: *Contractor* shall not perform a change in the *Work* without *Change Order* or *Change Directive* (GC 6.1.2)

Compensable Extra When No Agreement

- CCDC 2: The *Contract* supersedes all prior negotiations, representations, or agreements, either written or oral, relating ...to the *Work*...(Article A-2)
- CCDC 2: The *Contract* may be amended only as provided in the *Contract Documents*
- Is a change in the *Work* compensable as an extra when there is no supporting “paperwork”?

CASE STUDY

- Owner wants to build a motel – asks a contractor to bid on the project based on an original set of plans
- Contractor bids on the project based on those plans
- Owner then gives contractor **additional specifications** and asked contractor to include specifications in the bid
- **CCDC 2** contract signed – attaches both the original plans and the additional specifications
- There were **conflicts in the work** between original plans and additional specifications
- Some items in original plans were traded for items in additional specifications
- Contract price did not change

CASE STUDY (con't)

- **Other changes** were made before and after contract was signed – finished motel very different from original plans
- Plans, contract and price were **not amended** to reflect changes
- Contractor was given a **revised site plan** after signing the contract – owner told contractor he would pay for any extra charges
- **Multiple disputes arise** – contractor claims for unpaid contract price and extras, and owner counterclaims for delay and deficiencies – the “Classic” or “Sam’s Special”

CASE STUDY (con't)

- Owner says:
 - most of the extras are not ``extra`` to the contract as contractor knew that work was required before the contract was entered into and included in contract price
 - Owner also says if work not included in contract then not payable because no written change order
- The contract says: ``...all deviations or additions from or to the plans and specifications ...shall be approved, in advance, in writing and signed by the Owner and Contractor with agreed costs for such deviations and conditions...``

CASE STUDY (con't)

- Contract had standard change order provisions
- Defendant says:
 - Owner knew changes had to be in writing, but he did not want to spend extra money on administration
 - Owner did not want to spend money revising plans
 - Contractor asked for confirmation of changes in writing, but did not receive them, and had to carry on with work
 - He trusted the owner...

CASE STUDY (con't)

- General rule: parol evidence is inadmissible to vary written agreement if contradicts written agreement
- If parties cannot stray from the written agreement, then there should be no compensation for extras without written change order or change directive
- Any guesses on what happened?

Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn

- Our B.C. Supreme Court found in favour of the contractor
- **Key factors for decision:**
 - Both parties aware of contract terms on changes, and both chose to ignore them
 - Contractor requested written change orders and revisions to plans but owner refused to provide
 - No consultant on site to administer changes – so could not follow contract procedure
 - Owner supervised and requested changes

Kei-Ron Holdings Ltd. v. Coquihalla Motor Inn

- In these circumstances, owner cannot rely on the contract provisions that changes be in writing
- **Moral of the Kei-Ron story:**
 - 1) Reduce risk by following the contract
 - 2) Be clear on what is included in contract work
 - 3) Trust should not negate contract requirements
 - 4) Confirm changes (or any issue) in writing, even if the form of confirmation is not per contract requirements

Test For Extra Work - Compensable If...

1. Was the work performed actually extra work? (did work fall within scope of work originally contemplated by contract?)
2. If yes, did owner give instructions, either express or implied, that the work be done, or was the work otherwise authorized by the owner?
3. Was the owner informed or necessarily aware that the extra work would increase the cost?
4. Did the owner waive the provision requiring changes to be made in writing or acquiesce in ignoring these provisions?

Practical Advice On Changes

1. Ensure design is complete before tendering / bidding
2. Address any ambiguities before tendering / bidding in writing – do not assume
3. Understand site conditions
4. Owners – beware of the low bid – could result in additional changes
5. If other party refuses to confirm issue in writing, discuss agreement and confirm it in writing to the other party
6. Use the *Consultant* for determining issues (GC 2.2.7 & 2.2.8) before issues become disputes
7. Provide for quantification of changes as a supplementary condition to avoid dispute

Practical Advice On Changes

8. Use supplementary conditions to address delay scenarios not addressed in CCDC2
9. Avoid using *Change Directive* if possible – unresolved / dispute
10. Contractors should have detailed pricing with appropriate back up – prevent owner from using “improper documentation” as reason to delay approval of change
11. Be clear on communications about the impact of a change
12. Contractors do not proceed with a change until instructions to proceed confirmed in writing
13. Owners avoid verbal approval and expedite change approval to avoid delay impact on project

Practical Advice On Changes

14. If no change order or change directive, then contractors can consider:
 - Seeking an agreement in writing to suspend the dispute over the change and allow the *Contractor* to do the extra work while preserving the right to resolve the dispute later; or

Practical Advice On Change

If no change order or change directive, then contractors can consider:

- Do the Work Under Protest:
 - Section 62 of B.C.'s *Law and Equity Act*
 - If dispute arises between parties to a contract respecting the obligations of a party, the party whose obligations are disputed may, within a reasonable period of time after being informed that performance is required, provide the demanding party with notice of intention to perform the disputed requirements under protest. The right to claim payment is preserved.
 - *Act* allows contracting parties to specify rules for protest notice.

Practical Advice On Change

- CCDC 2 – GC 8.1.3: If a dispute is not resolved promptly:
 - The *Consultant* must give any instructions necessary for the proper performance of the *Work* to prevent delays pending settlement of the dispute.
 - The parties are required to follow instructions immediately but their rights to make claims are not jeopardized.
 - If it is subsequently determined that the *Consultant's* instructions were in error or at variance with the *Contract Documents*, the *Owner* must pay the *Contractor* the costs incurred in carrying out the instructions beyond what the *Contract Documents* properly required.

Practical Advice On Change

Sam's *modus operandi* for minimizing risk from changes:

- Expect
- Prepare
- Minimize
- Manage
- Resolve

THANK YOU

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

Please direct inquiries or comments to:

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