

No Change Order Agreements in Construction: Mitigating Risks to Contractors and Limiting Costs

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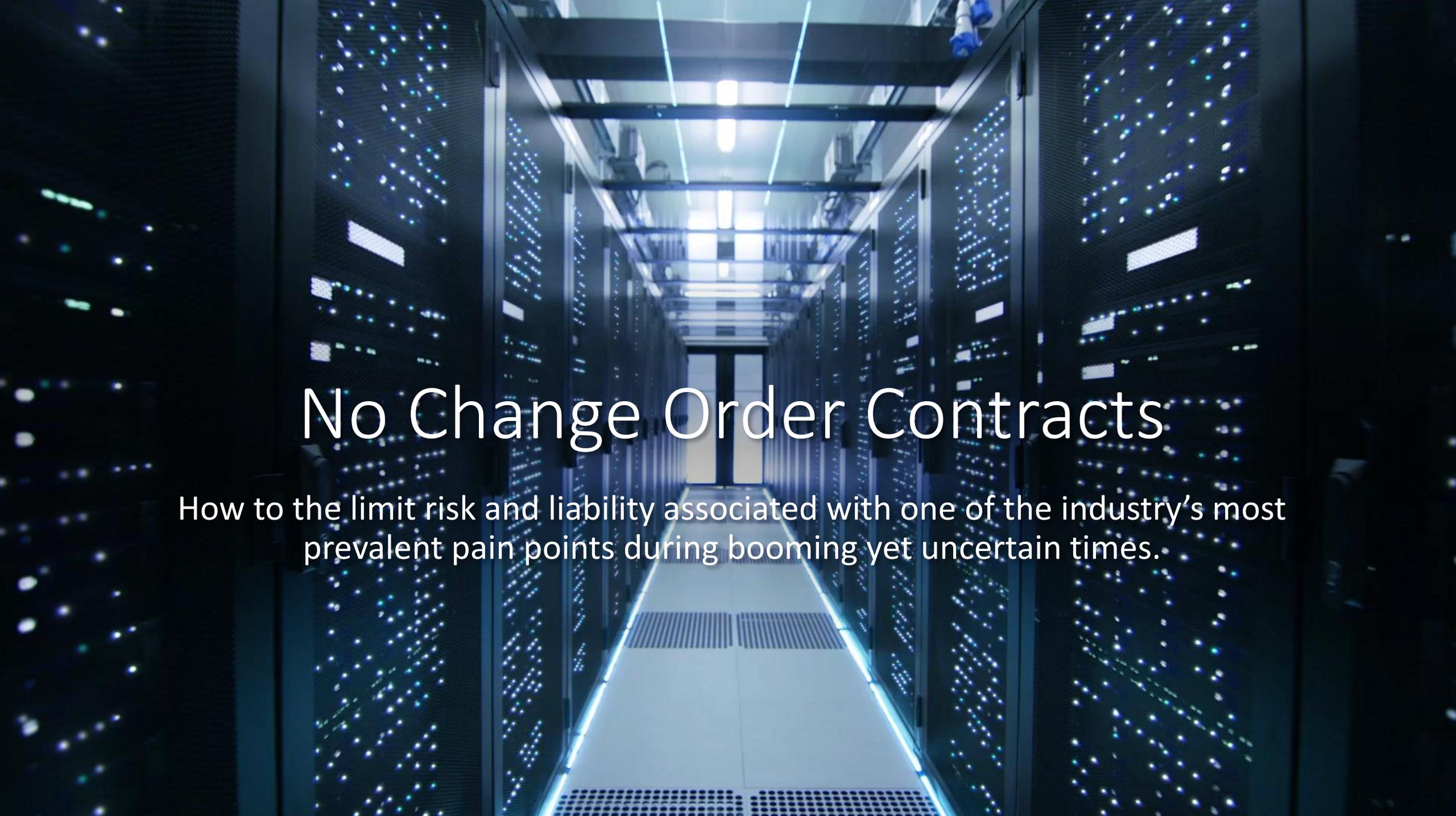
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No Change Order Contracts

How to the limit risk and liability associated with one of the industry's most prevalent pain points during booming yet uncertain times.

The Change Order ("CO")

Common means of modifying construction contracts

Can be additive or deductive.

Can relate to the scope, price, and/or time.

Inevitable?

Due to the interrelated and sequential nature of most construction, COs likely impact various other aspects of the project.

CO “Dominos”

Funding issues with COs likely flow downstream and can wreak havoc on a project.

Occupy enormous market share of disputes.

Expensive when affecting the critical path.

Excessive COs cause concern for lenders and sureties alike.

Who issues COs?

Customarily reserved for Owner?

A contractor, any trade or design professional can request a CO.

Usually related to unforeseen conditions, increased material/labor costs, directive change, design constructability, incomplete design, or delay/acceleration.

Owner Directed CO

- The Owner can issue an Owner Directed CO at any time (compare to Construction Change Directives (“CCD”))
- Usually not a source of disagreement, but CCD can be utilized in the event of a dispute.
- Should adequately account for any increased project cost and schedule impacts.

Project Flexibility

- No COs means no changes whether Owner or Contractor-driven (as opposed to No Contractor-driven COs...)
- Experienced Developers expect some changes in every project, and industry has indeed grown accustomed...
- Prefer to maintain some flexibility/control over the Project/minimize risk of unknowns.

Trade Requested CO

- Ideally, the ownership team, which may include an Owner's Representative and the Architect, should collaborate with the General Contractor to limit the number of potential COs on a project.
- Excessive COs are usually a sign of:
 - **Poor** project management.
 - **Poor** schedule
 - **Poor** bidding or estimation.
 - **Poor** design constructability or inadequate design details.
 - **Poor/Untimely** Communication

CO Disputes

Parties will not always agree that a CO is justified or necessary.

Each party usually has a contractual obligation to continue performance despite the existence of a CO dispute.

However, CO disputes lead to friction on a project, can impact performance, and cause delays.

Failure to resolve CO disputes can expose the Owner, the Architect, or the General Contractor to potential claims, and may also result in property liens or bond claims.

Issues that Trigger a CO

- Poorly defined scope
- Defective Specifications
- Poorly planned schedule
- Unforeseen Conditions
- Failure to Disclose Information
- Material Availability
- Labor Availability
- Submittal Review comment
- Request for Information
- Substitution request
- Utility conflict
- Weather
- Local Building Department request
- Code Violation

Potential Solutions/Responses

- Owners and their Counsel, along with industry General Counsel are negotiating agreements with specific change order bars, limitations, or at a minimum, established parameters.
- Avoid complications/delays, mitigate risks, keep costs down.
- Counsel and industry players alike have the obligation to learn and be better with each next project.

Change Order Management

- 1. Negotiate and Educate on CO procedures before construction begins**
- 2. Develop a potential change order (PCO) log and filing system**
- 3. Distribute a PCO log at each progress meeting**
- 4. Evaluate each PCO before making a recommendation**
- 5. Evaluate and resolve each PCO as fast as possible**

Alternative Contract Models (From Highest Co Potential to Lowest)

- Design-Bid-Builds
 - Cost Plus a Fee
 - Guaranteed Maximum Price (“GMP”)
- Turn-Key a/k/a Design-Builds
- Integrated Project Delivery (“IPD”)

NO CHANGE ORDER CONTRACT PROVISION

NOTE!!! CONCEALED CONDITIONS

Occasionally, Biscayne's cleaning technique or while working on the project, an unforeseen condition necessitating additional labor and/or materials. The contractor must either re-negotiate his contract or assume responsibility to properly correct the condition.

AIA Forms – Contractor Representations/Timing Considerations/Waiver

- Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated Contractor's observations with requirements of the Contract Documents. Prior to execution of the Agreement, the Contractor and each Subcontractor have evaluated and satisfied themselves as to the conditions and limitations under which the Work is to be performed, including, without limitation, (i) the location, condition, layout, and nature of the Project site and surrounding areas, (ii) generally prevailing climatic conditions, (iii) anticipated labor supply and costs, (iv) availability and cost of materials, tools, and equipment, and (v) other similar issues. The Owner assumes no responsibility or liability for the physical condition or safety of the Project site or any improvements located on the Project site. Except as set forth in Section 10.3, the Contractor shall be solely responsible for providing a safe place for the performance of the Work. The Owner shall not be required to make any adjustment in either the Contract Sum or the Contract Time in connection with any failure by the Contractor or any Subcontractor to have complied with the requirements of this Section 3.2.1.
- Can also include design review/confirmation of design completion/constructability
- Strong clause to limit potential Contractor-driven COs
- Can also create timing/notice requirements in connection w/potential COs, along with waiver of the time or cost claim for failure to strictly comply with CO process as set forth in contract documents.

Alternative Contract Provisions

- Cost saving profit incentive
- Liquidated damages
- Contingency or cap on total COs
- No COs, or only Owner-Driven COs (Contractor Considerations?)

Risk Mitigation

- Contractors and Subcontractors:
 - More due diligence during bidding, pricing, and negotiations.
 - Additional mark-up.
 - Greater attention to care, collaboration, creativity, and responsiveness.

Risk Mitigation

- Architects and Engineers:
 - Greater Oversight/Construction Administration.
 - Additional Mark up.
 - Peer review of designs by Owner's representative.
 - Preconstruction submittal reviews.
 - Complete design.

Best Practices



ENSURE CONTRACTORS AND DESIGN PROFESSIONAL ARE EXPERIENCED IN THE SPECIFIC KIND OF PROJECT.



RETAIN A THIRD-PARTY OWNER'S REPRESENTATIVE TO MANAGE PROJECT MODALITIES AND MAINTAIN SCHEDULE.



RIGOROUS PRECONSTRUCTION, DESIGN REVIEW/COMPLETION, BID PROCESS.



UTILIZE PERFORMANCE/PAYMENT BONDS FOR ADDITIONAL SECURITY.



CONTRACT NEGOTIATION/PRICING/SPECIFIC CO CLAUSES



TIMELY COMMUNICATION/RESOLUTION

