
CONSTRUCTION *Claims Topics*

Meglan, Meglan & Company, Limited

Construction Changes Are Not Always in Writing, Nor Are They Always Obvious

If you've been in the construction profession for a while, you've probably seen more than one "horror story." In fact, the following two examples of construction changes, based on *real* construction projects, were actually experienced by clients of **Meglan, Meglan & Company, Limited**.

Example 1

The owner and/or its agent on the construction project causes the contractor to be delayed, orders the contractor to perform changes in the work for which it grants *money only*, and actively interferes with the contractor's method of performance on a portion of the work. Despite these interferences or obstacles, no extension of completion time is granted by the owner.

Without a time extension, the contractor is required to complete the project on time or be subject to damages — *actual* damages if the contract does not specify *liquidated* damages — paid to the owner. The contractor proceeds to accelerate performance and completes on time.

If the contractor notified the owner and/or its agent on the project's acceleration to complete on time, the cost of the acceleration effort is due and payable to the contractor by the owner. However, quantifying the cost is the contractor's responsibility.

Example 2

The owner hires a design firm to design its project, prepare the construction plans, specifications, and

contract, and then administer the bidding and awarding of the construction contract and performance of the actual construction as the owner's agent on the project.

During the bidding and award of the contract, the design professional let the project on time, but then failed to award the contract to the successful contractor until 100 days beyond the time stated for award in the bidding instructions. The contractor accepts the award but attaches a written 100-day delay notice in letter form to the signed contract.

The design professional rejects the delay notification amid the objections of the contractor and issues a notice to proceed 60 additional days after the contractor submitted its signed contract and delay notice and then orders the contractor to commence work on the project. The contractor sends another notice of delay letter to the design professional, claiming the original 100-day delay and an additional 60 days. The contractor begins work on the notice to proceed date.

Within a few days after the NTP date, the contractor discovers numerous and serious plan errors, omissions, and conflicts between the specifications and the plans. Each E&O, ambiguity, or conflict is questioned, in writing by the contractor and sent to the design professional as a request for information.

The design professional, after considerable lapses of time, responds in writing, either correcting the E&O

or clarifying the conflict or ambiguity. In some instances, the design professional orders an “engineering hold” on a portion of the contractor’s work, pending its written, later decision(s). Interpretations and decisions — when finally issued by the design professional — are always in favor of the owner, not the contractor. Consequently, the contractor protests in writing each decision delay, engineering hold, and owner-biased decision.

Frustrated with the contractor’s barrage of written protests and notices, the design professional orders its project inspectors to “tighten up” on the contractor. They do, resulting in many portions of the contractor’s work being rejected, ordered removed, or changed by the design professional through its inspectors.

The design professional’s inspectors, equally frustrated with further contractor written protests of “over inspection,” try to help move the project along by di-

recting the contractor’s personnel in their work so that it will “pass” inspection. The contractor issues more protests in writing.

The project is completed a year late, costing the contractor 40 percent more than its bid. The design professional recommends that the owner assess 365 days worth of liquidated damages against the contractor for “late completion.” The owner assesses the damages and withholds them from the contractor’s payment(s).

Every described event in this example is a “construction change” for which the contractor is entitled to both time and money. Detailing the causes, the time due, and the money owed is the contractor’s responsibility on an event-by-event basis.

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***Construction Claims Topics* serve as guidance documents only and are written for the expressed purpose of helping construction industry executives and supervisors learn better ways of identifying the sources and causes of construction claims and preventing disputes.**

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