When your client expects you to pay for change orders…

By Kevin H. Chamberlain, P.E.

CASE has recently updated CASE 962-D: ***A Guideline Addressing Coordination and Completeness of Structural Construction Documents***. It remains one of the most popular publications, and for a good reason. The AEC industry continues to identify the lack of quality of structural drawings as a significant issue, even as we approach 20 years since 962-D was created.

Allegations of deficiencies in documents are often associated with a change order proposed by a contractor and an Owner looking for someone to blame. Then, of course, the next shoe to drop is the Owner's expectation that the structural engineer will pay for these change orders!

Here are a few things to consider:

1) **Take a deep breath**. When confronted with a claim, do not react emotionally. If you are a project manager, loop in your firm's ownership and discuss the background for the change order. If you are an owner, talk to your partners. A fresh set of eyes and a calm second opinion is crucial.

2) **A wolf in sheep's clothing that looks like a bargain**. A claim is not always in the form of a letter from an attorney or a summons. Often, an Owner withholds payment of professional services invoices to "pay" for a change order that they allege is due to a design error or omission. Is this a demand for money or services? That's a claim in the eyes of your insurance company, which requires you to notify them promptly. However, the firm may want to cut its losses and accept the payment reduction if it is cheaper than a claim. And it never appears on your claims history. This creates a business dilemma for the firm: a) accept the payment reduction as the least costly way to get out of the situation and risk insurance coverage, or b) notify your professional liability carrier of a potential claim. Not notifying them is a no-brainer for your insurance company – you did not notify them of the claim in a timely fashion and engaged in negotiations without their input. If, later on, you need their coverage, it will be denied. Do not assume the Owner will be forever appreciative – once they realize the cash drawer has opened, they may be back to raid it again. If you're willing to pay for change orders, you've created a dangerous precedent for this client and potentially all of your other clients.

3) **An allegation is just that**. Not all claims have merit, and those with some basis still require investigation. Attorneys encourage us to word our contracts such that any indemnification provisions refer to negligence that has been "determined" (i.e., in court), not just "alleged."

4) **Yes, there are bogus change orders**. You will inevitably have a contractor submit change orders for work clearly delineated in the bid documents. It happens a lot. There is a book, *Contractor's Guide to Change Orders*, which educates contractors on how to get paid extra for work that is already in their contract. Buy the book; it's eye-opening and will prepare you to look for the warning signs.

5) **Omissions are different than errors**. If you forgot to show a relieving angle on the north side of the building, and it had to be added in the field, the Owner would have paid for it anyway, correct? Of course. If then *you* pay for it, it is as if the Owner got it for free. Attorneys will argue that their client lost the competitive edge of a bid process and paid a premium for the work. It is a negotiating point, but take a firm stance that the Owner needs to pay for their building out of their own pocket.

6) **No design is perfect**. Our work is not expected to be perfect 100% of the time, only that it meets the industry standard of care. That includes making some mistakes. Do not let your clients hold you to an unreasonable and unrealistic performance standard – and make sure you do not agree to such a standard in your contracts.

7) **Who is the favorite child?** Realize that many Owners have a better relationship with the contractor than with you. Some owners may automatically believe contractors over the engineer, feeling they have more in common with contractors. Forging a solid and lasting relationship with the Owner over several projects is the best investment you can make in having common ground instead of favoritism.

8) **When all else fails . . . put it in your contract.** One firm has taken the approach of adding a clause to their standard contract disclaiming responsibility for any change order. No, it may not survive contract negotiation, but give it a try. Such a clause could help to discourage bogus claims.

9) **The risk/reward curve**. A $10,000 back charge to a GC whose contract is $10 million is a far cry from a $10,000 demand to a structural engineer with a $20,000 fee. The person with the mouse's share of the fee should not take the lion's share of the liability. Educate your clients on that concept.

10) **Not everyone is your friend.** As engineers, we are glass half full people, and it is easy to get lulled into thinking everyone is playing on the same team. Beware of the contractor who is real chummy asking for substitutions or design changes. Is the Owner's Representative adversarial and landed the assignment mainly because they excel at "cost recovery"? They are not looking out for your interests.

11) **Take a seat at the table.** If you get the opportunity to advise the Owner on selecting the contractor or Owner's Representative – take it. Recommend against parties who have burned you before. Sharks do not change their fins.

12) **When in doubt, take a hike.** Think of it as deciding whether to hire your client, not the reverse. Is the Owner notorious for back-charging the design team on their projects? Sometimes the best project is the one you never take to begin with.▪

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