



# Are you getting Short-Changed on Change Orders?

A presentation to members of the Manitoba Heavy Construction Association  
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# Pre-contract considerations. Before bidding.

- Who is the owner? Is the owner experienced?
- Does the owner have a good track record?
- Who is the consultant? Is the consultant experienced?
- Does the consultant have a good track record?
- What type of contract is being used / proposed?
- Is it balanced with standard-form terms (such as a CCDC or CCA template)?
- Or is it heavily slanted with many non-standard terms?
- How detailed is the scope of work in the tender documents?
- How advanced is the project design development?
- How reasonable is the timeline?

# Pre-contract considerations. Before bidding.

## What is missing?

What does the contract say about changes to the work or contract time?

What does the contract say about extras without formal change orders?

# First Principles

## A contract defines the legal rights and obligations of the parties

A contract can either be verbal or in writing but preferably it should be in writing

### A contract can include (or be deemed to include):

- Drawings, surveys, reports, etc.
- Express terms (written terms)
- Implied terms (unwritten terms)
- Industry standards (may be unwritten)

*For the purposes of this presentation, we will be addressing changes in the context of fixed price contracts only.*

**A Change Order is an amendment to the contract – it changes the legal obligations of the parties**

# What are some common causes of changes on a project?

- **Change in owner preference** or requirements
- **Incomplete** project design development
- **Change in availability** of materials requiring substitution, addition or deletion
- **Change in circumstances**, such as site conditions
- **Inability to complete** project as designed
- **Change in applicable building code**, zoning regulations, etc.
- **Delays** that are not the fault of the contractor
- **Unexpected damage** or loss in the course of construction

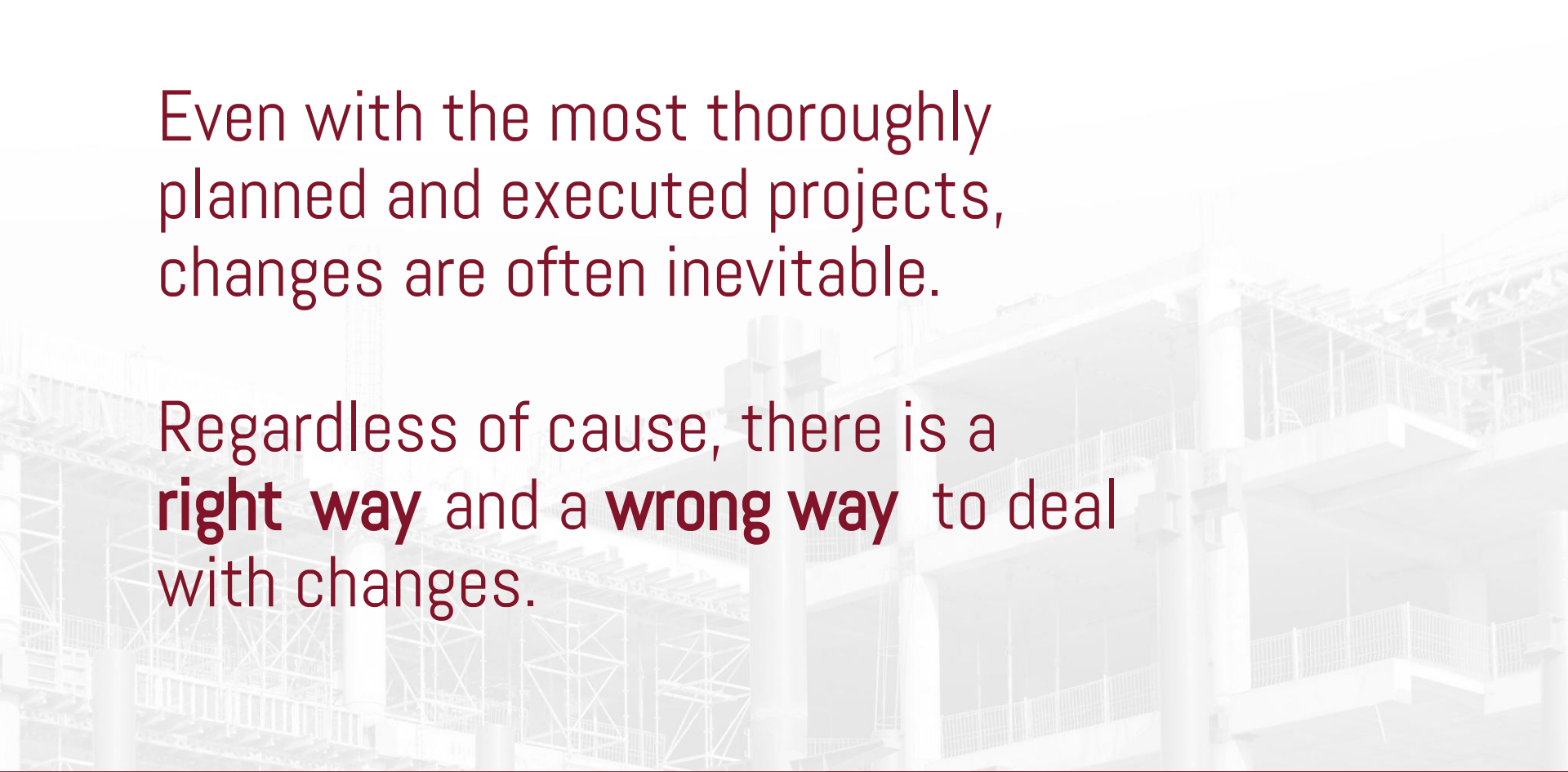


# Note:

Poorly designed, rushed and delayed projects tend to require more changes. Such project characteristics tend to have a snow-ball effect.

For example, a poorly or incompletely designed project can not only require changes in scope of work, it can also cause delays as the design professionals are trying to keep up with construction. The more a project is delayed, the greater the likelihood something else is going to change, such as availability of materials, governmental rules and regulations and site conditions.

Such project characteristics should serve as warnings to contractors and owners alike.

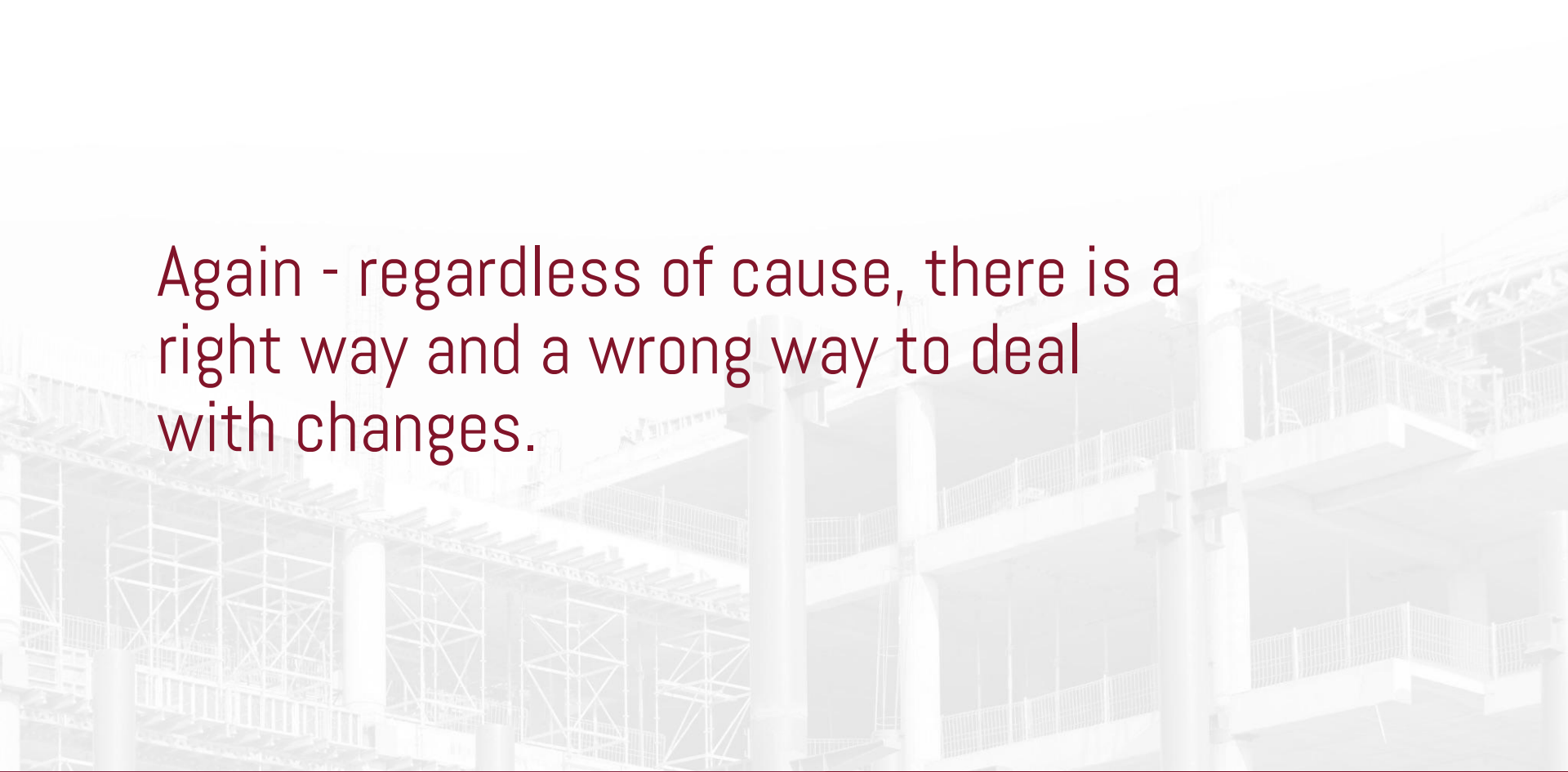


Even with the most thoroughly planned and executed projects, changes are often inevitable.

Regardless of cause, there is a **right way** and a **wrong way** to deal with changes.

# The **wrong** way to deal with changes.

- ignoring the problem
- entering into change agreements verbally
- agreeing that there is a change but also agreeing to determine the effect on price and time later
- unreasonably interpreting the scope of work in the contract
- acting in bad faith by improperly attempting to leverage the contractor to do more work without additional compensation



Again - regardless of cause, there is a right way and a wrong way to deal with changes.

# The **right** way to deal with changes.

- **Entering** into written contracts with clear and fair change management processes
- Proactively managing and addressing changes as they arise
- Consultant, owner, contractor, etc. all acting reasonably
- **Before** work commences on the changed item, enter into a written agreement to amend the contract
- If the change is genuinely so urgent that there is insufficient opportunity to negotiate an amendment to the contract prior to commencing work on the change, then the owner should pay on a cost-plus or time and materials basis
- Setting up a system or process to track proposed changes and agreed upon change orders

*Used properly, and in good faith, a change order is intended to minimize risk for everyone – to know what is expected and to minimize disputes*

# First Big Question – Is this a Change?

**Is this legitimately not already in the original contract?**

Does your pricing already include the cost to cover this work?

If the parties cannot agree on this fundamental point, then there are options (which are addressed later).

If the parties do agree that a change to the scope of work is necessary, then they should enter into a formal change order.

# What information should go on a Change Order?

All formal change orders need to address three critical things:

- Change in Scope of Work
- Change in Price (if any)
- Change in Contract Time (if any)

The change order should also:

- Be signed by both the owner and the contractor
- Be dated
- Be identified by a unique number (e.g. C.O. 001, 002, etc.)
- Identify the contract that is being amended (e.g. 2026-15 Government of Antarctica Highway Project)
- Identify the applicable contractual provision that relates to change management



# What is the Process for agreeing to and issuing Change Orders?

## A change order:

- Can be initiated by anyone
- Can be proposed by way of a proposed change notice (PCN) (or similar phrase)
- Is often prepared by the consultant

**But** look at the specific terms of the contract

**Important:** Know the notice requirements in the contract

# Generally:

- Someone (consultant, owner, contractor, etc.) identifies an issue
- Proposed change notice – estimate of cost, etc.
- Reviewed
- Negotiated
- Approved/denied
- If approved – signed Change Order
  - May have to inform others who may be impacted (timeline, etc.)

# What is a Change Directive?

Per CCDC:

**Change Directive** – written instruction prepared by the consultant and signed by the owner directing the contractor to proceed with a change in the work within the general scope of the contract documents prior to the owner and the contractor agreeing upon adjustments in the contract price and contract time

Unlike change orders, change directives do not amend the contract. Used properly, change directives provide for a mechanism to change the scope of work based upon a pre-determined process that is deemed to be fair to all parties. It is typically used in situations where there is some urgency but its usage does not necessarily have to be confined to such circumstances.

# What are some of the risks of **not** following a change order process?

- Scope of work creep
- The obvious risk – you might not get paid
- Or the owner might experience higher than expected end-of-project total costs
- Contractor default
- Contractor abandonment
- Owner default
- Greater likelihood of more disputes and larger disputes

In some instances, if you don't follow the proper process, the contract may have language to the effect that you're deemed to agree that it's not a change. Again – know the notice provisions in the contract

# Change management abuses

**All parties, whether they are owners, prime contractors, subcontractors, suppliers or consultants, have been known to 'game' the change management system.**

Owners may attempt to increase the scope of work for the contractor without reasonable compensation

Contractors may attempt to push unneeded extras to 'milk' a project

Design professionals who also act as the project consultants may improperly attempt to conceal poor design by unreasonably insisting that out-of-scope work is in fact implied in the contract (conflict of interest)

Contractors may strategically underbid contracts with the intention of asserting as many (real or imagined) extras as possible

Project consultants may refuse to approve legitimate change orders in an effort to impress owners and/or to achieve performance bonuses



# What if the parties don't agree on a proposed Change Order?

**What to do in this scenario very much depends on circumstances.**

**Potential options include:**

- Resequencing the work while the parties attempt to resolve the issue
- Engaging the dispute resolution process (if the contract contains an expedited process)
- Proceed by way of change directive
- Proceed with the change in work under express written protest and advise that all rights are reserved
- Engaging the dispute resolution process at the end of the contract
- Suspend the work
- Abandon the contract
- Terminate contract for cause



# Note:

Each of these options carry potential risks and benefits. Some options, such as abandoning the contract carry significant risks. However, if the changes to the work are too large and/or too numerous, proceeding to do them (even under protest and while reserving rights) could also carry significant risks.

Depending on the magnitude of the problem, you may need to consult with an experienced construction lawyer

# What if the parties don't agree on a proposed Change Order?

What happens if you've already done work without obtaining a change order and it's disputed whether it was a change or was included in your original contract?

**Are you S.O.L.?**

**No, not necessarily.**

If the work done is a legitimate extra to the contract, you may be entitled to compensation for the value of the work even though you did not get express agreement from the owner or consultant.

# What happens if you've already done work outside of scope

**There's no change order and your pricing is now disputed?**

If no price is fixed for the performance of a genuine extra – the court will imply a promise to pay a reasonable amount on a quantum meruit basis

No one is expected to work for free.

What is quantum meruit? "Quantum meruit" is a fancy Latin phrase lawyers use meaning "as much as one deserves."

# What happens if you've done work outside of your scope.

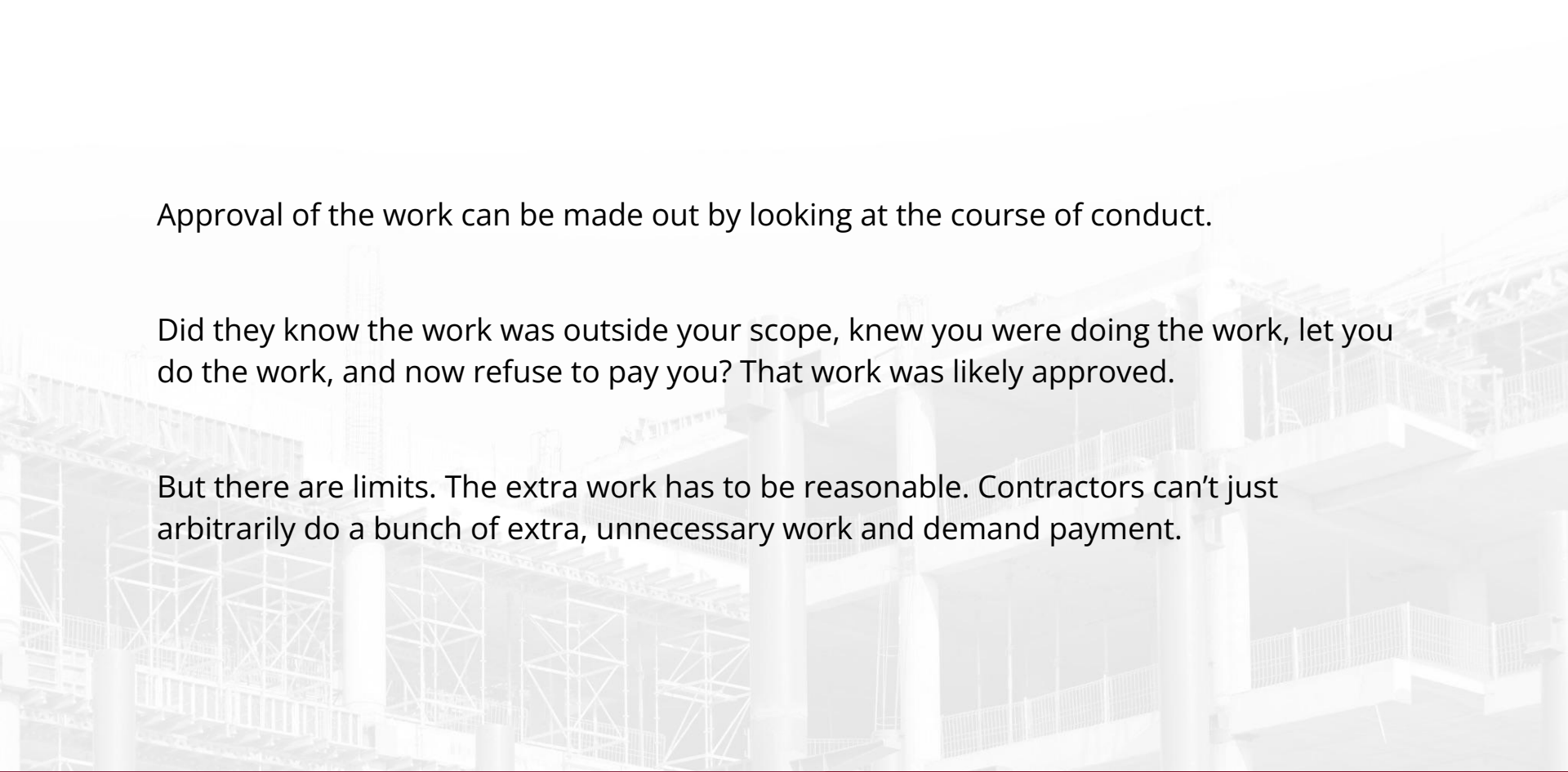
There's no change order, and it's disputed whether the work was approved or not?

If the additional work was necessary, you will likely be entitled to compensation

If the work was implicitly or tacitly approved (consultant/owner was aware and did not stop you), you will likely be entitled to compensation

**It does not have to be the owner who approves the work**

An agent of the owner can approve the work



Approval of the work can be made out by looking at the course of conduct.

Did they know the work was outside your scope, knew you were doing the work, let you do the work, and now refuse to pay you? That work was likely approved.

But there are limits. The extra work has to be reasonable. Contractors can't just arbitrarily do a bunch of extra, unnecessary work and demand payment.

# What happens if...

What happens if you do extra work without a change order but fail to make a claim in accordance with the notice provisions of the contract?

**You may still be in luck.**

Where a contractor has a clear and sympathetic claim for extra compensation, courts are often loathe to dismiss a contractor's claim for mere technical reasons.

In various circumstances, courts have used principles of “deemed knowledge” of a claim; interpreting ambiguous contractual terms against the party who wrote the contract; improper conduct on the part of the party attempting to rely on technical defences; and determining whether prejudice has been caused by failing to provide proper notice.

Where a party has been prejudiced by a failure to advance a claim in accordance with the technical contractual provisions, a court may very well dismiss an otherwise meritorious claim.

Best practice is always to follow the technical provisions of the contract. However, real world circumstances do not always permit best practice. Where the real world collides with best practice, you may still have a good claim.

# What happens if...

You have done extra work, everything is disputed, you missed all the notice deadlines and you failed to provide notice of claim in accordance with the contract?

**Basically, you completely #%\*@ up!**

Yes, even then, you may still have a meritorious claim for extra compensation.

# When Things Go South - You're in a dispute

## What are your dispute resolution options?

- Consultant
- Appeal Mechanism
- Negotiation, Mediation, Arbitration
- Prompt Payment and Adjudication
- Lien Claim
- Labour and Material Payment Bond claim (if, one for subcontractors and suppliers)
- Litigation or Arbitration



# Document Everything

One of the best things you can do to protect yourself and minimize your risks is to **document everything**

- Did you write that down?
- Document, track, record, photograph everything.
- If there's a verbal agreement – put it in an email right away and ask for a reply.
- Keep a project diary.



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