

The Dotted Line: Avoid These Change Order Snafus, *ConstructionDive*, ft. Elizabeth Marchionni

Elizabeth Marchionni, partner with Kaufman Dolowich & Voluck in Woodbury, was quoted in a ConstructionDive article based on her interview with Kim Slowey on June 23, 2020.

It is always important for construction firms to track changes to their construction agreements so that they can bill their customers appropriately. It might be even more important now, however, as many general contractors and subcontractors get back to work after extended COVID-19 shutdowns.

Contractors cannot afford to leave any money on the table right now, which means they should pay even more attention to issues that could affect their bottom lines.

Here are other issues to consider in the current environment:

Contract omissions. If a particular item of work is left out of the contract, said attorney Elizabeth Marchionni, partner at Kaufman Dolowich Voluck LLP in New York, it might not be clear whether it is extra work or if it is something necessary to advance the work covered in the contractor's original scope.

Where some contractors slip up, she said, is in not asking for clarification through a Request for Information to the general contractor, owner or architect, whichever party is appropriate.

"If you think that there is an omission that calls for you to do extra work, then it's better to get them ... to either agree or disagree with you that it's extra and to know going into it whether or not this will be a dispute or a claim rather than just barreling ahead with the work and saying, 'Oh no, that was outside my scope.'"

Inconsistencies in scope of work. Unlike a change order that flows from the owner to the general contractor and then to subcontractors, Marchionni said, sometimes the general contractor will ask a subcontractor to perform extra work that is not actually extra as far as the general contract goes.

For example, she said, perhaps the subcontractor is required to perform one round of a particular test. However, the general contractor might be obligated to perform multiple rounds of that test.

Subcontractors need to regularly check their contracts to make sure the work they're being asked to perform is part of their scope and not something that warrants a change order.

When not to use a change order

Sometimes, Marchionni said, contractors think that the cost of extra general conditions such as site supervision or bond costs associated with a delay warrants a change order, but that is not always correct. Those additional costs might be part of the delay claim, which is separate from a change order claim.

“There could be delay claims or damages that you incur as the result of an extended duration,” she said, “which we shorthand as a delay.”

The bottom line, Marchionni said, is everything relates back to the contract and how well contractors abide by its requirements.

“I can't stress enough how important it is to know what your obligations are under the contract terms,” she said, “to properly notice, properly document and properly present your claims, whether they be for extra work or for other costs and damages that you incur as a result of any number of things that can go on in the job, including doing extra work.”