

Managing the Contract

**Know what you are agreeing to and avoiding
costly disputes**

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Agenda

- » Introduction
- » Contracts
- » Changes
- » Delays
- » Q&A

Introduction

Presented by *Mike Fursier*
Branch Manager,
Revay and Associates Limited, Calgary
mfursier@revay.com
Cell: 403-472-3987
Office: 403-777-4901

Disclaimer

The opinions expressed during this presentation are not, nor should they be construed as legal opinion; they are simply based on commercial experience.

Judicial outcomes will vary depending on the fact scenarios - one can not apply outcomes to seemingly similar fact scenarios.

Contracts

Clauses to look out for

- NOTICE PROVISION
- CHANGES/EXTRAS/DELAY
- DISPUTES
- WHOLE AGREEMENT
- PRIME AGREEMENT
- PAYMENT

Notice Provisions

- *“Notices in Writing will be addressed to the recipient at the address set out below...by hand, by courier, by prepaid first class mail, or by facsimile or other form of electronic communication...”* CCDC 5B, 2010
- *“Unless otherwise specifically provided, all notices and other communication to a party under this Agreement must be delivered to the address for such party shown below”* MSA (Oil & Gas Industry)

Notice Provisions

- *“Any notice, authorisation or approval pertaining to the SUBCONTRACT shall be in writing. Except as otherwise provided below, all such notices, authorisations or approvals between the PARTIES shall be deemed delivered when delivered in person or sent by telex, cable or fax, or by certified or registered mail to the appropriate address below:”*

Sub-contract (Oil & Gas Industry)

Changes

- *“If the Contractor intends to make a claim for an increase to the Contract Price, ... shall give timely Notice in Writing of intent to claim to the other party and to the Consultant”*

CCDC 2 (2008)

- *“Should the Subcontractor hold such instructions to be at variance with this subcontract or to involve changes in the work already built, fixed, ordered or on hand or to be given in error, the Subcontractor shall notify the Contractor in writing before proceeding to carry them out.”*

Alberta Standard Construction Subcontract - ACA Form A (2013)

Changes

- *“If the SUBCONTRACTOR believes that a direction, instruction, act, omission or decision by the CONTRACTOR results in a change in the WORKS under the SUBCONTRACT, the SUBCONTRACTOR shall, within five (5) Working days after the occurrence of such circumstance, submit in writing a Change Notice, with full, detailed and documented supporting particulars, explaining the basis for the request for a Change. The CONTRACTOR shall, within fifteen (15) days after receiving such Notice, either agree with the request, in whole or in part, or deny the request in writing. The SUBCONTRACTOR shall not delay any portion of the WORKS connected with and/or affected by notified event, whilst awaiting a response. If the CONTRACTOR does not reply within the period, the request shall be deemed not accepted.”*

Sub-contract (Oil & Gas Industry)

Disputes

- *If a dispute is not resolved promptly, the Consultant will give such instructions as in the Consultant's opinion are necessary for the proper performance of the Work and to prevent delays pending settlement of the dispute. The parties shall act immediately according such instructions, it being understood that by so doing neither party will jeopardize any claim the party may have."*

CCDC 2 (2008)

- *In the case of any dispute arising between the Contractor and the Subcontractor ... shall be resolved, in the first instance, by amicable negotiations, failing which either party ... give the other written notice of such dispute."*

Alberta Standard Construction Subcontract - ACA Form A (2013)

Disputes

- *“All disputes and controversies arising in connection with the performance or interpretation of this SUBCONTRACT, which cannot be settled amicably within a thirty (30) days period, shall be finally settled by arbitration ... Notwithstanding a dispute between the PARTIES is referred for resolution ... the obligation of the PARTIES under this SUBCONTRACT shall be unaffected. In particular, the SUBCONTRACTOR shall not be entitled to suspend the performance of the WORKS, pending resolution of the dispute, it being understood that by so doing neither PARTY shall jeopardize any Claims nor rights the PARTY may have against the other. All costs connected with arbitration shall be borne by the losing PARTY”*

Sub-contract (Oil & Gas Industry)

Whole Agreement

- “The Contract supersedes all prior negotiations, representations or agreements, either written or oral, relating in any manner to the Work, including the bidding documents that are not expressly listed...”

CCDC 2 (2008)

- “All the documents as set forth in Article 1A. Form part of this Subcontract and the whole shall constitute the entire contract between the parties.”

Alberta Standard Construction Subcontract - ACA Form A (2013)

Prime Agreement

- *“The Subcontractor shall ... complete the following portions ... all in a proper and workmanlike manner and in accordance with the requirements and on the terms and conditions of both the Prime Contract ... and this Subcontract...”*

Alberta Standard Construction Subcontract - ACA Form A (2013)

Payment

- Paid if Paid
- Paid when Paid
- Interest on late Payment
- Interest on Disputed Sums

Summary

I can't tell you what to accept when you sign a Contract, all I am advocating is know the risks and manage them.

***Education** is what you get when you read the fine print ...*

*...**experience** is what you get when you don't."*

Unknown Source

Changes



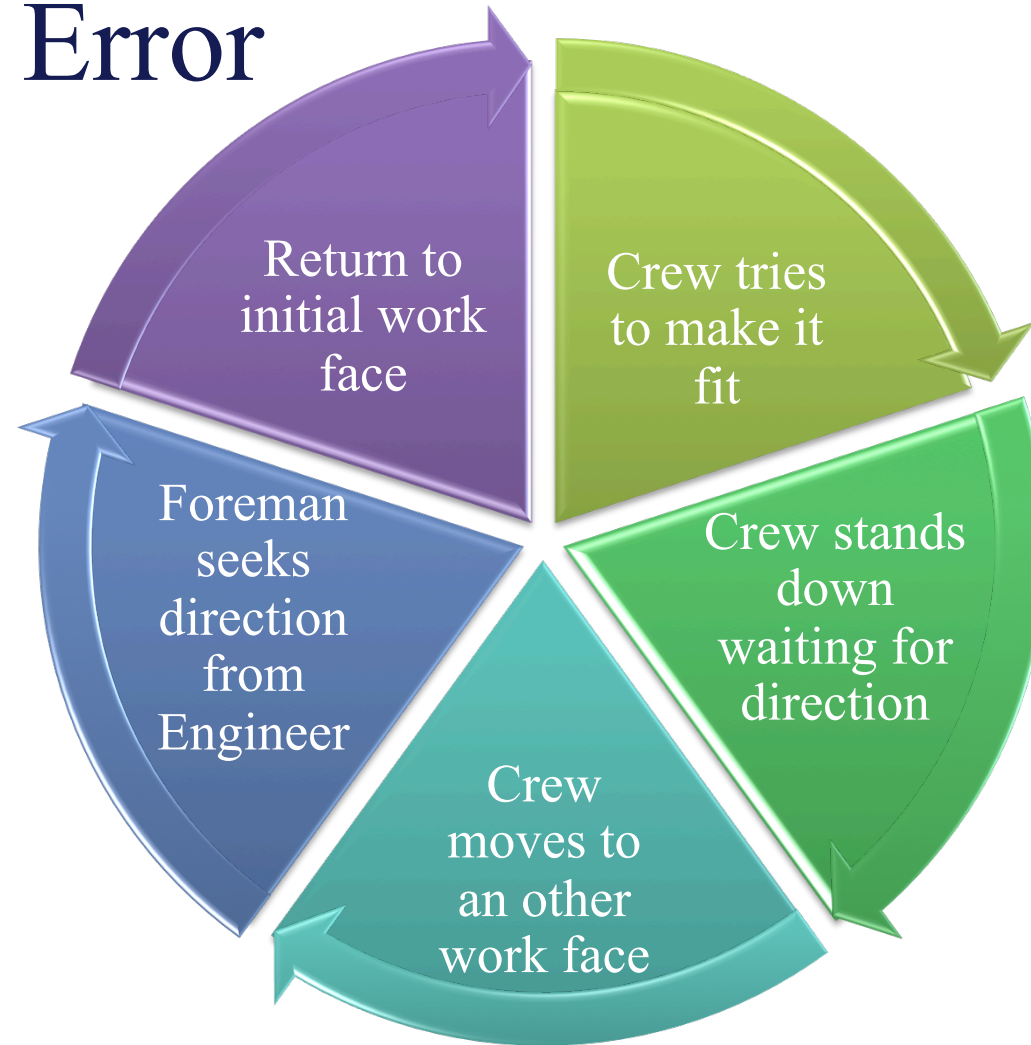
What (might) count as a Change

- » Additional documents after signing contract
- » Delay in providing access to site
- » Revisions to poor quality drawings
- » Additional scope
- » Removal of scope
- » Active interference on part of owner/contractor

FACT OR FICTION?

- (Sub)Contractors like changes
- (Sub)Contractors make \$\$\$ (gouge) on changes
- Productivity impact (?) can be quantified on each change
- (Sub)Contractors make money on the markup in change orders

Example of 'hidden impacts' - Design Error



QUALIFY YOUR CHANGE ORDER PRICE

Example 1

“This proposal is based solely on the usual cost elements such as labour, material, and normal markups, and does not include any amount for changes in the sequence of work, delays, disruptions, rescheduling, extended overhead, acceleration, and/or impact cost. The right is expressly reserved to make claim for any and all of these, and related items of cost, prior to any final settlement of this contract.”

Example 2

“The price quoted is only for the direct cost of the change. We reserve the right to seek compensation for the impact on contract work and / or the cumulative effect of changes when these costs (if any) can be quantified.”

Change Quotation

“All works included within this [Change] will be performed in strict compliance with the Contract Terms and conditions,... the price adjustment under this [Change] constitutes payment in full ... including without limitation, all direct costs; indirect costs; overheads; general and administrative expenses; profit; and all effects (direct, and consequential, including impacts, and “ripple effects”) on the work and schedule, covered by this [Change] on all contract works, whether or not changed by the [Change].”

Don't allow owner/GC to assume price of Change Order includes:

- SCHEDULE EFFECT
- IMPACT ON CONTRACT WORK
- CUMULATIVE EFFECT

Delays

Causes of Delay

- » Impeded and/or no access to site
- » Delay in supplying drawings
- » Poor quality drawings
- » Delay in supplying pre-purchased equipment/material
- » Non-disclosure of relevant information
- » Active interference on part of owner/contractor
- » Performance of other subcontractors
- » Force Majeure

Recognizing the Delay

- » Baseline schedule
 - » Define what you need and when
- » Monitoring and recording progress
 - » Accurately reflect progress on site – be honest with yourselves
- » Rules of Credit
 - » Earn value in the same manner as you planned
- » Expended effort
 - » Compare your planned effort with your actual effort
- » Identify the cause – Owner, Contractor or other Sub-contractor

Providing Notice

- » It is what the Contract REQUIRES
 - » Know the Contract before you start work
- » In the manner defined in the Contract
 - » Timing, content, details, ongoing delays
- » To the right person
- » Work with the Contractor for Owner delays

Record Keeping

- » Baseline schedule
- » Progress prior to the 'event'
- » What, if any, progress can be made during the event
 - » Consider any loss of productivity
- » Costs incurred during the event and progress made
- » Site diary, photographs, meeting minutes

What is (might be) Claimable

- » Site overheads
- » Loss of productivity
- » Schedule impacts – winter working
- » Temporary protection
- » Head office overheads
- » Profit

Seeking Settlement

- » COMMUNICATION
- » Work with the Contractor for Owner caused delays
 - » Provide Notice and ensure it is passed on
 - » Provide regular updates – to suit both Contracts
- » Be pragmatic – don't claim what you can't substantiate

Mitigating the Risks

- » Baseline Schedule
 - » Realistic
 - » Achievable
 - » Agreed in advance
 - » Clearly define what you need and when
- » Work with the Contractor and other Sub-contractors
- » Open communication at all stages
 - » Before, during and after

Questions & Discussions

Thank You!

Mike Fursier

Branch Manager,

Revay and Associates Limited, Calgary

mfursier@revay.com

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