NO CHANGE ORDER JOBS: IMPOSSIBLE SELL OR WAVE OF THE FUTURE?

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The dreaded two words in the construction industry: change order(s) ("CO" or "COs"). Industry professionals, ranging from architects/engineers, owners, contractors, subcontractors, construction lawyers, carriers, lenders and sureties, each have experienced a project if not multiple projects turned sideways due to COs, or, better yet, disputed COs. A CO is a modification to the parties' construction contract, which can be additive or deductive, and can relate to scope of work and/or cost and/or time. Those project participants also likely sought and relied upon some form of dispute resolution to resolve their disputed COs, and most forms of dispute resolution beyond the principals ironing things out between themselves are extremely expensive, and almost always reduce profits. Project delivery methods have evolved over the years, and some are gaining more steam as of late, in an effort to alleviate some of the industry's most common pain points. These delivery methods demand or at least strongly encourage collaboration between ownership, the design teams and the construction teams, from the earliest stages of a potential project through completion, and can also further allocate risk amongst the participants to facilitate success of the whole as opposed to each individual participant; a welcome dynamic given the inherently adversarial nature of the construction industry. However, today, the standard delivery methods still remain most commonly used (design-bid-build, or to a lesser extent, design-build), by an overwhelming margin, and disputed COs remain at the heart of a significant amount of disputes. Why, then, has the industry offered little resistance, including efforts to sidestep COs completely? Why do most industry contract forms still allow for a scenario where an owner can direct that the disputed CO work be performed, putting the onus on the contractor and its lower tiers to fund such work while having to strictly adhere to the claims process within the agreement?

First and foremost, ownership usually should maintain the right to add or deduct scope, and reasonable project players should be able to deal with the impacts to time and cost via an agreed upon owner-directed change order. Indeed, owner-directed change orders are rarely at the heart of construction disputes, unless the parties failed to adequately deal with the repercussions of same, e.g., the time impacts of added or removed work. Not only do owners usually prefer to maintain that flexibility, but most (or at least those with prior development experience), expect at least some change orders from the construction team, and factor that reality into the financial outlook for a project. With that backdrop in mind, consider the following delivery method: a no contractor-directed change order job. If the project players, from the onset, know and understand that change orders will not be generated from the contractor or subcontractors, more due diligence will have to be performed during the bidding, pricing, and contract negotiation stages for the construction team to feel adequately protected and inevitably, an additional markup to the contract price should serve as consideration for such an offering and to further shift/mitigate risk. Such a conceptual approach may well be desirable not only to ownership, but to the design and construction teams. It is hard to put a price on certainty, even more so when considering the additional time, expense, and headache associated with disputed change orders, and particularly where non-payment claims over disputed change orders surface and poison a project. Likewise, aside from the impacts to the early stages before construction, imagine the potential differences

during construction, from attention and care, collaboration, creativity, to responsiveness, the moment a potential CO becomes apparent on a no CO job.

Other possible CO-themed delivery methods can involve a contingency for owner-directed or contractor-directed COs, or a cap on the potential total CO cost or time adjustments over the lifespan of a project. Regardless, given the enormous market share that disputed COs still hold, it remains ever apparent that greater attention, collaboration, and outside-the-box thinking is necessary to alleviate the largest, if not one of the largest, pain points in the construction industry, and in 2021, we've somehow barely scratched the surface

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