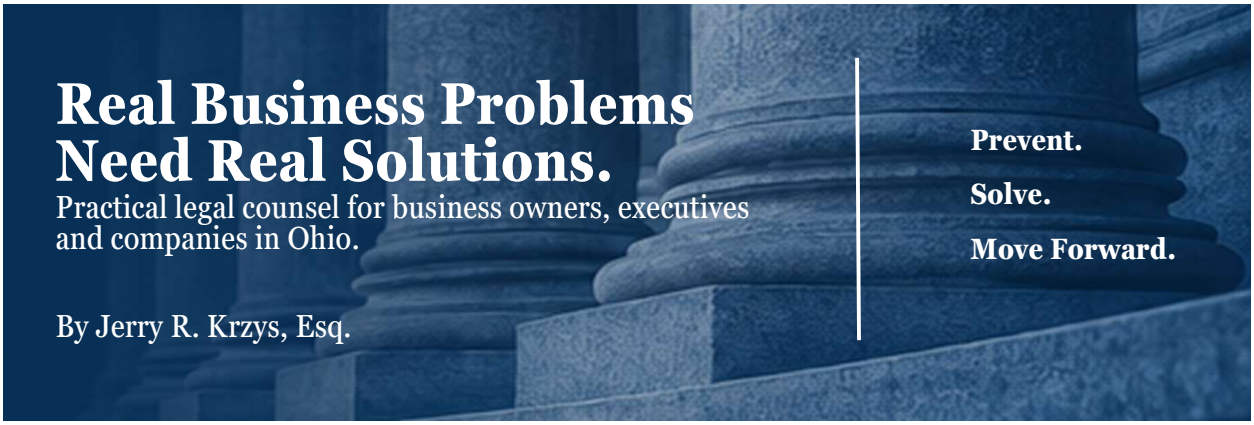
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"Just Do the Extra Work": How Change Orders Turn Profitable Construction Projects Into Payment Disputes

A construction project is moving. The schedule is tight. A condition in the field is different from the drawings, another trade needs something moved, the owner wants a revision, or the superintendent needs work completed now so the next crew can get in.

The instruction is familiar: "Just do the extra work. We'll take care of the paperwork." The contractor has a practical problem. Stop and wait for a signed change order, and the project may lose a day, a week, or more. Keep working, and the contractor may spend labor, equipment, materials, subcontractor costs, and schedule time on work that is not included in the original price. Everyone may understand in the field that the work is extra. Months later, when the pay application arrives, the response may be very different: Where is the signed change order?

That is how a profitable project can become a payment dispute.

Ohio law generally respects written change-order requirements. But construction projects are also performed by people in the field, and the parties' actual course of conduct can matter. The result is not a rule that oral directions are safe or that a contractor can ignore the contract and rely on waiver later. The better lesson is the opposite: the contractor should understand the change procedure before mobilization and create a contemporaneous record when field conditions make perfect paperwork impossible.

1. The Change-Order Clause Is Not Administrative Fine Print

Construction contracts commonly define the original scope, identify who may authorize changes, require advance written approval, prescribe the form of a change order, and state how changes to price and time must be calculated. Those provisions answer a basic commercial question: when the project changes, who has authority to commit someone else's money?

For the owner, the written process protects budget control. It gives management an opportunity to decide whether the requested work is actually necessary, whether there is a less expensive

alternative, and whether the price and schedule consequences are acceptable before the cost is incurred.

For the contractor, the same process can be the difference between performing profitable extra work and financing someone else's project. A signed change order can establish that the work is outside the original scope, identify the agreed price or pricing method, address additional time, and reduce the risk that the parties will reconstruct the conversation months later from memory.

Ohio's Supreme Court has long recognized the enforceability of written change order provisions. In a construction contract requiring extra work to be ordered in writing, the written-authorization requirement generally is valid and binding unless it has been waived. See *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 360, 678 N.E.2d 519 (1997).

2. A Recent Ohio Case Shows How the Field and the Contract Can Collide

The Eleventh District Court of Appeals confronted a recognizable version of this problem in a dispute between Menard, Inc. and a site contractor. See *Menard, Inc. v. DiPaolo Indus. Dev., L.L.C.*, 11th Dist. Trumbull No. 2022-T-0032, 2023-Ohio-1188. The written contract said that the contractor could not perform extra or additional work unless it was previously authorized in writing by an AIA change order signed by a specifically identified Menard executive. The contract went further: project managers were not authorized to approve changes.

The project did not operate that neatly. The contractor claimed that additional work was discussed and approved through project personnel. One email asked the contractor to price additional grading. Another later stated that management had given the "go ahead" on the extra work and told the contractor to start mobilizing. Evidence also indicated that management personnel discussed proposed changes internally and that the executive identified in the contract was consulted about some of them.

The appellate court did not hold that the contractor was automatically entitled to payment for every claimed change. It held that the evidence created a genuine factual issue over whether Menard had waived the contractual requirement that the authorized executive sign the change order before work began. The case was sent back for further proceedings on that issue. See Menard, Inc., 2023-Ohio-1188, ¶¶ 12-21.

3. Waiver Is a Possible Argument, Not a Change-Order Procedure

Contractors sometimes hear that a written change-order requirement can be waived and treat that as reassurance that the paperwork can be fixed later. **That is dangerous**. Waiver is usually an argument made after the project has already gone wrong. It means the contractor is asking a court, arbitrator, or opposing party to conclude from the parties' conduct that the owner gave up the right to insist on strict compliance with the written procedure. That is far less certain than obtaining the approval the contract required before the work was performed.

Ohio authority recognizes that parties can waive contractual requirements through their conduct during performance. Construction is a setting where that issue can arise because changes develop while everyone is trying to keep the project moving. See Menard, Inc., 2023-Ohio-1188, ¶¶ 14-15.

But the standard is not casual. The Supreme Court has explained that mere knowledge or acquiescence may not be enough, and the authority of the person giving the direction can matter.

Menard itself produced a divided appellate court on the waiver issue. The majority found enough evidence to require further proceedings; the dissent concluded that the contractual approval restriction should control. That disagreement is a useful warning against building a business process around the hope that waiver can be proved later.

4. The Person Giving the Direction May Not Have Authority to Change the Price

Construction projects have layers of authority. An owner may have a project manager. A general contractor has a superintendent and project manager. A subcontractor has a foreman. Architects and engineers may issue directions or interpretations. Those people can have substantial operational authority without having authority to modify the contract or commit the owner to additional compensation.

That distinction becomes critical when the instruction is: move the wall, add the conduit, excavate deeper, relocate the equipment, accelerate the work, work Saturday, or "take care of it and send us a change order."

The contractor should know what the contract says about authority. If only a named executive, owner representative, architect, construction manager, or other designated person can approve additional cost or time, a field directive from someone else creates risk even when that person appears to be running the job.

The practical response is not necessarily to stop work every time a superintendent gives an instruction. It is to escalate the instruction quickly to the person who has contractual authority and create a written record that identifies the direction, the anticipated cost and schedule effect, and the contractor's understanding that the work is outside the original scope.

5. A Good Change Record Answers Four Questions

When extra work is directed, the project file should make four things understandable to someone who was not standing on the jobsite that day:

First: What changed? Identify the original requirement and the new work with enough specificity to distinguish an actual change from work already included in the contract.

Second: Who directed or approved it? Preserve the name, role, date, communication, meeting, RFI response, field directive, drawing revision, or other source of the instruction.

Third: What did it cost? Track labor, materials, equipment, subcontractors, supervision, overhead or markups permitted by the contract, and other costs in the manner the contract requires.

Fourth: What did it do to the schedule? Additional work can affect sequencing, productivity, access, crew availability, and completion. A contractor that prices the labor but says nothing about time may later face the argument that the price adjustment resolved the entire change.

The objective is not paperwork for its own sake. It is to connect scope, authority, cost, and time while the facts are still fresh.

6. Emails and Text Messages Help Only If They Actually Say Something Useful

Modern construction projects generate enormous amounts of communication, but volume is not the same as proof. A text saying “got it” may establish almost nothing. An email saying “please proceed” may show direction but not agreement on price. A daily report may prove that extra work occurred but not who agreed to pay for it.

A useful contemporaneous communication is more explicit. It identifies the requested change, states that the contractor considers the work outside the existing scope, gives the price or explains that the work will proceed on a time-and-material basis if permitted, identifies any anticipated schedule effect, and asks the authorized person to confirm.

If the project cannot wait for final pricing, the contractor can still document the commercial reality: work is proceeding to avoid delay, pricing remains open, labor and equipment will be tracked, and the contractor is not agreeing that the work is included in the original contract sum.

That does not guarantee recovery if the contract required a different procedure. But it creates a far better record than silence followed by a large change request at the end of the project.

7. Daily Reports Can Become the Most Important Documents on the Job

When a change dispute reaches litigation, the decisive evidence may not be the formal change-order log. It may be the daily reports.

Good daily records can show when a condition was discovered, who was present, what direction was given, which crews performed the work, how many hours were spent, what equipment was used, whether another trade interfered with the work, whether access was restricted, and whether the change affected sequencing or productivity.

The records should be factual. A superintendent’s daily report is more useful when it records what happened than when it contains angry conclusions about who is responsible. Photographs should be dated and preserved. Relevant drawings, RFIs, submittals, emails, texts, meeting minutes, delivery tickets, time records, equipment logs, invoices, and subcontractor documentation should be retained with the same discipline.

By the time lawyers become involved, the project team may have moved to three other jobs. Contemporaneous records allow the project to speak for itself.

8. Do Not Let the Price Change and the Time Change Become Two Different Conversations

Change orders are often discussed as dollars. Construction changes also consume time. A seemingly modest scope revision can require remobilization, resequencing, new material lead times, additional inspections, revised drawings, work in a less efficient sequence, overtime, or interference with other trades. If the contractor signs a change order adding $25,000 but leaving the completion date untouched, the owner may later contend that the contractor accepted the extra work without additional time.

The contract should be checked for notice deadlines and requirements governing extensions, delays, acceleration, force-account work, and claims. If a change affects time, the contractor

should address that effect when the change is documented, even if the precise number of days cannot yet be calculated.

The same principle works in the other direction. An owner or general contractor considering a change should ask not only "What will this cost?" but also "What will this do to the schedule?"

9. Public Projects Can Add Statutory Rules to the Contract Rules

Public construction deserves separate caution because statutes, regulations, procurement requirements, and the public contract itself may impose formal change procedures that do not apply to an ordinary private project.

For example, Ohio law governing certain state public improvements requires owner approval of changes to plans or specifications, and a change becomes part of the original contract when it is approved, accepted in writing by the contractor, and filed. See Ohio Rev. Code § 153.10 and Ohio Rev. Code § 153.11. Ohio Department of Transportation contracts have their own statutory provisions governing written change orders and extra work. See Ohio Rev. Code § 5525.14.

A contractor should therefore resist carrying a private-project assumption into a public job. The source of the work, the identity of the public owner, and the governing contract and statutes can materially change the analysis.

10. What Should a Contractor Do When the Job Cannot Wait?

There are projects where the commercially realistic answer is that the work has to move. Concrete is scheduled. A crane is on site. The next trade cannot start until the condition is addressed. Stopping everything until a fully executed change order circulates may cost more than the change itself.

That does not require choosing between progress and documentation. Before proceeding, the contractor should determine what the contract permits. Some agreements authorize construction change directives, interim directives, time-and-material work, emergency work, or other mechanisms when the parties have not yet agreed on price. If the contract provides a path, use it.

If the field instruction does not fit the formal procedure, send written notice immediately. Identify the extra work and who directed it. State that the contractor is proceeding to avoid delay or disruption, not because it agrees the work is included in the original scope. Preserve the right to additional compensation and time to the extent permitted by the contract. Track the work separately. Submit the formal change documentation as quickly as possible.

And if the dollar amount, schedule impact, or contractual risk is substantial, elevate the issue before the cost compounds. A $2,000 field accommodation may be handled differently from a six-week redesign involving multiple subcontractors.

11. Owners and General Contractors Need Discipline Too

Change-order discipline is not only a contractor problem. Owners and general contractors create their own risk when the written contract says one thing and the project is managed another way.

If the contract says only one person may authorize extra work, project personnel should know that. If management routinely tells contractors to proceed before formal approval and later processes

the paperwork, the project record may support an argument that strict compliance was waived. If a change request is rejected, that decision should be communicated promptly rather than after the contractor performs the work.

The best system is one the field can actually use. A theoretically perfect process that requires six signatures over three weeks will predictably be bypassed on a fast-moving project. Contract administration should protect cost control without making compliance operationally unrealistic.

12. The Worst Time to Reconstruct the Change Is at Final Payment

At the end of a difficult project, the parties often discover that they are not arguing about one change order. They are arguing about twenty.

The contractor has a spreadsheet of pending extras. The owner believes some were included in base scope. The superintendent remembers approving several but cannot recall the price. Emails are scattered among individual accounts. The employee who managed the early phase of the project has left. Some daily reports are detailed; others say only "worked on site." The schedule has been revised so many times that nobody can isolate what caused the delay.

At that point, legal analysis becomes expensive because the parties are paying lawyers, experts, project personnel, or arbitrators to reconstruct a history that could have been documented while it was happening.

The better practice is a live change log. Every proposed change should have a status: requested, priced, approved, rejected, proceeding under reservation, incorporated into a pay application, paid, or disputed. The log should identify both cost and time. Management should review aging unresolved changes before they become part of the project's permanent background noise.

13. The Contract and the Field Need to Tell the Same Story

Construction projects change. The legal problem is usually not that something changed. It is that the parties changed the work without changing the documentation that determines who pays for it.

A contractor cannot safely assume that everyone's field understanding will override a written change-order clause. An owner cannot safely assume that a court will ignore a consistent course of conduct in which management authorized extra work outside the contractual procedure. Both sides are better served when the written record follows the actual project.

Before the job starts, know who can authorize changes and what the contract requires. When the work changes, document scope, authority, cost, and time. When the paperwork cannot keep pace with the field, create the best contemporaneous record the circumstances permit and complete the formal process promptly.

The profitable extra is the one the contractor performs and gets paid for. The dangerous extra is the one everyone remembers approving differently.

A Practical Change-Order Checklist

- Read the change-order clause before work begins.
- Identify exactly who has authority to approve additional cost and time.

- Train superintendents, project managers, foremen, and accounting personnel on the approval process.
- Do not assume a field directive is contractual authorization.
- Describe the original scope and the requested change.
- Document who requested or directed the work and when.
- State promptly if the contractor considers the work extra.
- Address both price and schedule impact.
- Use the contract's interim, directive, time-and-material, or emergency procedure when available.
- Track changed work separately in labor, material, equipment, and subcontractor records.
- Preserve emails, texts, RFIs, drawings, photographs, meeting minutes, and daily reports.
- Maintain a live change-order log and review unresolved changes regularly.
- Do not wait until final payment to submit a stack of undocumented extras.
- Escalate significant disputed changes before the cost and schedule impact compound.

If a construction project is already accumulating unsigned change orders, disputed extras, or conflicting field directives, addressing the documentation and contract requirements while the project is still moving can preserve options that may be much harder to recover later.

This article is for general informational purposes only and does not constitute legal advice. Construction contracts, project facts, public-project requirements, and applicable law vary. The enforceability of any change, waiver, claim, notice, or payment right depends on the governing documents and circumstances.