

# Contract Changes and Claims: Preparation and Presentation of Change Order Proposals



***Published by***

**American Subcontractors Association, Inc.  
Foundation of the American Subcontractors Association, Inc.**

1004 Duke Street  
Alexandria VA 22314-3588

(703) 684-3450

[ASAOffice@ASA-HQ.com](mailto:ASAOffice@ASA-HQ.com)

[www.ASAonline.com](http://www.ASAonline.com)

Copyright © 2018 by the American Subcontractors Association, Inc. and the Foundation of the American Subcontractors Association, Inc. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the American Subcontractors Association, Inc.

**Disclaimer:** This publication does not contain legal advice. The discussion is intended to provide information and guidance to individual subcontractors for their use in managing contract changes and claims. Specific circumstances vary widely, so subcontractors may need to consult their attorneys before acting on the premises described herein. Each subcontractor should decide for itself the contract terms and conditions which it believes will best protect its interests. Subcontractors should not agree among themselves as to the form of contract terms and conditions they will use. Such agreements may violate federal or state antitrust laws and could result in the imposition of civil and/or criminal penalties.

# Table of Contents

Preparation of Change Proposals and Claims	1
History	1
Causation	3
Quantum	4
General Drafting Guidelines	5
Pass Through or Liquidation Agreements	5
Presentation of Change Proposals and Claims	7
Negotiation of Change Proposals and Claims	8

# Preparation and Presentation of Change Proposals and Claims

## Preparation of Change Proposals and Claims

Despite diligent project management that has recognized and responded to any change or changed condition, some requests for equitable adjustment cannot be resolved until a more formal, detailed change order proposal or claim has been submitted to the prime contractor or owner. If a directed change order occurs (or if the owner or prime contractor treats a constructive change order as a directed change), the subcontractor should use its routine change order process. If the change order proposal clears all four obstacles to relief – entitlement, procedural compliance, causation and quantification – there is no controversy and the proposal will sell itself. However, if agreement is not reached on the change order proposal, or if a constructive change notice is rejected, a full and fair adjustment to the subcontract price or time will not be obtained unless the routine change order proposal is supplemented with additional explanations, information or documentation.

Writing a detailed change proposal or claim is a time-consuming, but necessary step to pursue recovery for additional costs of time. It should be written by someone who has personal knowledge of the facts (such as the project manager) or with that person's input and review. However, that same person must be able to eliminate any emotional involvement in the proposal.

The change proposal or claim should be in narrative form, supported by relevant correspondence and other exhibits. The approach for the change proposal or claim could be organized by claim type (e.g., additional conduit, January weather delay) or by general categories (e.g., extra work, project delays). If the subcontractor has followed the suggestions discussed in other ASA white papers regarding contract formation and project management, specifically those suggestions regarding proper documentation, a change proposal or claim will be easy to prepare and to understand.

The format for the narrative should include an explanation of:

- The *history* of the change and/or delay, including the basis of entitlement.
- The *cause and effect* relationship between the change and/or delay on performance.
- The *quantum* (amount) of additional costs or time incurred by the history and/or delay.

## History

The portion of the change proposal or claim should describe why the subcontractor is entitled to a contract adjustment. The description should contain a precise but complete chronology of events and an analysis of the contract provisions which entitle the subcontractor to a contract modification. A description of the specific issue initiating the claim and the specific events that have taken place with regard to the claim is a good starting point. Compliance with all contractual procedures also should be demonstrated.

Do not assume that the owner or prime contractor knows any of the pertinent facts. Start from square one and write persuasively to sell the change order or proposal.

The place to begin formulation of the chronology of events is the project documentation files. A review of correspondence, memos, meeting and telephone notes, diaries, etc. will provide an overview of past events and positions taken by the parties involved. From these documents relevant information regarding the types of additional work the subcontractor was directed to perform as well as information regarding when, where and how the subcontractor was delayed is available.

Opening statements outlining the general nature of the claim and the relief sought provide a good introduction. This should be followed by a review of the right of entitlement to a subcontract adjustment as well as procedural requirements. Include the following:

- If the subcontract provides for additional compensation for additional work, show why the work is additional and not included in the original contract.
- If the change order proposal requests additional time for performance due to a delay, a review of the force majeure and any no-damage-for-delay clauses would be important.
- If the subcontract requires notice, state when and how notice was provided and include any correspondence which substantiates compliance with the requirement.
- If the change order must be submitted within a certain number of days, indicate compliance with that requirement.
- If the change order proposal is for additional work directed by the owner or prime contractor, indicate where in the changes clause the subcontractor has a right to a contract modification.
- If the subcontract contains a dispute resolution clause, indicate compliance with the requirements contained therein.
- If the subcontract contains limiting or exculpatory provisions, demonstrate any reasons for nonapplicability.

This portion of the narrative should include a review of the facts or events that took place in conjunction with the contract requirements.

When preparing the historical portion of the change order proposal, it is important to anticipate the owner's or prime contractor's position. Hopefully, project documentation will include correspondence from the owner or prime contractor discussing the particular change or changed condition. The narrative should address responses previously received from the owner or prime contractor. In addition, the project correspondence may include relevant admissions by the owner or prime contractor. Any prior agreement or admission by the owner or prime contractor will be very helpful in establishing entitlement; for example, if the prime contractor agreed in earlier correspondence that the subcontractor's work had been delayed.

If applicable, this section may include a discussion of the bid that was submitted by the subcontractor (including any pre-bid letter), a review of questions regarding ambiguities that any bidder submitted before bids, and the specifications, drawings and schedule. If the change proposal or claim deals with additional work, the subcontractor will need to focus on the scope of work in the contract and what the owner or prime contractor asked the subcontractor to perform. If the request deals with differing site conditions, the subcontractor again will need to address the contract documents and the information made available to the subcontractor as well as the actual conditions encountered. If the subject matter is delay, a discussion of the planned versus actual schedule will be necessary. Be sure to include any key correspondence as exhibits.

### Causation

Once a change or a delay and entitlement has been established, the next portion of the narrative should describe how the additional work or the delay affected the subcontractor's plan for performance. While the historical portion of the narrative is somewhat general in nature, this portion should be very specific and detail what the subcontractor was required to do to perform the additional work and/or how the delay affected the performance plan.

This portion of the narrative should be based upon an analysis of all project documentation, including accounting records. If additional time is required, the project schedule also should be analyzed to demonstrate how performance was changed. The subcontractor has a great deal of flexibility and must be somewhat ingenious in developing an analysis to establish causation. The analysis often can be very effectively summarized in charts, graphs, tables and other exhibits. These are useful tools in establishing entitlement and demonstrating both the cause and the effect of changes and changed conditions.

For example, by graphs or charts, the subcontractor could show the as-planned utilization of the labor force. If the work already has been performed, a graphical comparison of the planned versus actual usage can illustrate how the change or delay actually affected manpower loading on the project. The planned versus actual manpower loading comparison can be done on a daily or weekly basis, or by project area, to determine the impact. By reviewing the bid documents and the accounting records, similar analyses can be made for material, equipment and jobsite overhead.

Change proposals or claims that ask for an extension of time must contain an analysis of the planned versus actual project schedule. Any delay that is excusable should be mentioned in this portion of the narrative. Compensable delays should be included in this section as well as in the quantum portion. Also, any claim for disruption or efficiency loss must be detailed and substantiated. If the project schedule uses the critical path method of scheduling, an analysis of any change to the critical path will be necessary. Other project documentation, such as correspondence and meeting notes, should be included. If the change proposal or claim addresses a project delay, an analysis of whether the delay was due to requests for information, shop drawings, a change to the subcontractor's scope of work or an accumulation of these changes, the change in the

sequence of work or lack of access should be analyzed in this portion of the narrative. If possible, it should be substantiated by graphical analysis.

While this may be the most difficult portion of the narrative, it provides the subcontractor with the greatest amount of flexibility and ingenuity. Ingenuity is required in analyzing if more or less labor was required, if the timing was different, if the effect on efficiency was different, or if more materials and equipment were required. The objective is to provide a persuasive description of how the change or delay required the subcontractor to incur unanticipated costs or delay by an alternate plan of performance. As before, any key documents must be included as exhibits.

### Quantum

The previous section of the change proposal or claim established entitlement to a contract modification, defined the type of cost categories, and defined excusable days of delay. The last portion of the narrative should clearly define what the additional costs are that the subcontractor seeks to recover and the number of additional days (extension of time) requested to complete the performance of work. A description of what costs are recoverable (including overhead) under the contract and what time is excusable (as well as compensable) should be presented here.

Using the contract as a basis, the subcontractor should take the cost categories from the causation portion and calculate the additional costs of labor, material and equipment. For example, if labor costs included two additional crews for five weeks, an exhibit should be prepared which includes the dates of the additional work performed, the names of the individuals performing the work, their hourly rate, and the number of additional hours worked. The number of additional hours worked should be multiplied by the hourly rate to obtain a subtotal for direct labor. It may be necessary to include a description of the union labor hourly rates or a copy of the rate table from the union book, as well as a description of the labor, unemployment and workers compensation burdens that the employer must pay. Likewise, the cost of any additional materials, equipment or other cost categories that were described in the previous section should be calculated in this portion of the narrative.

The schedule analysis developed to demonstrate causation will need to be reviewed from an excusable as well as compensable perspective. If there were delays concurrently caused by the subcontractor, the days of concurrent delay should not be included in the request for additional compensation, but the days should be included in the total number of days requested for an extension of time. In addition, it is important to review previous change orders and other outstanding claims to eliminate overlap of additional costs or days requested for additional time.

For change proposals or claims that contain numerous categories of additional costs, an effective method of presentation is a summary description supplemented by specific documentation and explanation. It is very important that the additional costs requested and the extension of time be intertwined with the history and causation portions of the change proposal.

## General Drafting Guidelines

The following are general guidelines for drafting a change order proposal or claim:

- **Be clear and concise.** Do not include any irrelevant information that is not required to make the point.
- **Be accurate.** Do not distort facts, costs or time. Be fair and reasonable, but comprehensive. In government contracts, change order proposals must include a certification that the proposal is being submitted in good faith and that the supporting data is accurate and complete.
- **Be candid.** Acknowledge and account for known problems unrelated to the claim, including the subcontractor's own inefficiencies and performance problems.
- **Anticipate audits.** Most contracts include a right by the owner or prime contractor to review documents or conduct an audit. If this right is not part of the contract, the proposal may not be negotiated by an owner or prime contractor without voluntary agreement by the subcontractor to allow an audit. Consequently, it is important to have complete and accurate supporting documentation, especially if the auditor knows nothing about construction work.
- **Establish time limits for acceptance.** If not stated in the contract, the proposal or claim should include a time limit for acceptance. If a time limit has been established in the contract, use it as precedent. Time limits obviously vary and depend upon the length and complexity of the claim.
- **Be an advocate.** Write persuasively. Claims do not sell themselves. Drafting change proposals and claims essentially is a marketing process.
- **Include language reserving the right to revise or supplement the change order proposal.** Statements such as "for negotiating purposes only" or "the subcontractor reserves the right to revise or supplement this claim at any time" are two examples. However, beware that once representations are made to support a claim, it is difficult to withdraw untrue statements. They may color the remainder of the claim and damage the reputation of the subcontractor.

## Pass Through or Liquidation Agreements

Quite frequently, a subcontractor's claim is derived from a change or changed condition for which the owner is responsible. Because the subcontractor has no direct contract with the owner, the subcontractor's change proposals or claims must be asserted through the prime contractor.

Under general legal principles, the prime contractor has an obligation to "pass through" subcontractor change proposals or claims and assert them against the owner on the subcontractor's behalf. Subcontract forms often further define the right of pass through,

stating particularly the rights and responsibilities of the prime contractor and subcontractor regarding assertion and prosecution of change proposals and claims. Frequently, a prime contractor, by contract, will limit the pass through of subcontractor change proposals or claims to the extent that the prime contractor recovers additional time and money from the owner.

However, in potential pass-through situations, the prime contractor often seeks from participating subcontractors a formal written agreement further defining the rights of the parties pursuing the change proposal or claim against the owner. Sometimes these pass through or liquidation agreements can be beneficial to subcontractors; in many cases, they can be extremely prejudicial. At one extreme, a liquidation agreement may only establish procedures for the preparation and presentation of the change proposal or claim and equitably assign the burdens, costs and benefits to the participants. At the other extreme, these agreements may unreasonably burden the subcontractor with claim costs or “liquidate” the subcontractor’s request for additional time and money only to that amount which is obtained by the prime contractor on behalf of the subcontractor. The subcontractor’s liquidated claim also releases the prime contractor from any additional liability to the subcontractor. If the prime contractor caused or contributed to the subcontractor’s cost or time overrun, the liquidation agreement could leave the subcontractor without recourse to obtain full recovery.

Thus, when offered unreasonable liquidation agreements, subcontractors should understand that they are not required to sign these agreements. Unless otherwise stated in the subcontract, the prime contractor cannot legally force the subcontractor’s acceptance of the agreement by denying cooperation or refusing to pass through a subcontractor’s claim to the owner. It may be better in some circumstances to proceed without an agreement by simply submitting the claim to the prime contractor, relying on the prime contractor’s obligation to pass through the claim, and pursuing relief from the owner.

Prior to entering into any pass-through agreement, the subcontractor should consider the following:

- As a consolidated group, a subcontractor’s compensable delay may become noncompensable because of another contractor’s unexcused delay.
- The prime contractor usually will retain the right to dictate the strategy, hire the consultants (e.g., attorneys and schedule consultants) and control the entire process, but may also expect all subcontractors to pay a share of the costs.
- If the subcontractor is willing to accept the time or money obtained from the owner and release the prime contractor from any further liability, the release should be mutual.
- The subcontractor’s claimed amount may be too small in relation to the expected costs. In that case, try to place a cap on the total expenses.



- It should require the parties to request that any settlement or award (arbitration or court) provide a specific breakdown for the subcontractor, rather than a lump sum which is divided by the prime contractor on a pro rata basis.
- It is important to retain the right to present, negotiate and settle the subcontractor's portion of the request for additional time and money.

## Presentation of Change Proposals and Claims

Change proposals or claims should be submitted on a timely basis. If the contract requires a certain time period for submission, be sure to follow that procedure. If not, submit the proposal as soon as possible after the work is completed or the delay is over. If some costs or time constraints are unknown, submit either a partial proposal and reserve the right to revise the claim when unknown and vital information can be obtained, or estimate those costs and indicate that they are estimates. Partial claim submissions allow discussion to take place regarding entitlement. Any unreasonable delay in presenting a change proposal or claim may indicate a lack of interest on the part of the subcontractor. In addition, delays may not allow the subcontractor to take advantage of any prior selling or marketing.

After the change proposal or claim has been submitted to the prime contractor or owner, request a meeting to discuss the proposal. A request for a meeting forces the other party to read the proposal and will facilitate at least an initial reaction. The meeting should take place at the earliest possible date and be attended by persons who have the authority to settle the change proposal or claim. It is important to strike while the iron is hot and the subcontractor has leverage. Once the work has been performed, the leverage diminishes because the prime contractor or owner has received what it wanted.

Meetings should be considered part of the marketing or selling process needed to obtain contract adjustment. At a meeting, the subcontractor has the owner or prime contractor's attention and the opportunity to convince them that the subcontractor is entitled to more time or money. Development and implementation of an aggressive strategy is important. The subcontractor should take advantage of this first (and perhaps only!) opportunity by being well organized and prepared. As a basis for the presentation, the subcontractor could use the change proposal or claim as an outline. The subcontractor may want to focus on areas in controversy. The subcontractor either must know or anticipate the owner's or prime contractor's objections in the contract adjustment and the presentation must address those objections.

The presentation should be made in a chronological or other logical sequence, depending upon the circumstances surrounding the change proposal or claim. No matter what the sequence, the presentation should address all four obstacles to relief—substantive entitlement, procedural compliance, causation and quantification of impact. The presentation should be made by a representative of the subcontractor who has a thorough understanding of all the information contained in the change proposal or claim. That representative must be prepared to answer any questions regarding the change

proposal or claim or any questions regarding the subcontractor's performance. In addition, either the person making the presentation or some other subcontractor representative attending the meeting should have the authority to settle the claim.

The use of diagrams, graphs, drawings, models and summaries help the subcontractor to focus on important issues. A graph which shows the planned versus actual manpower used for the project is much more effective than any verbal description. The subcontractor also could use the summaries contained in the change proposal or claim. For example, a large chart that summarizes the claimed items, the dollar amount and additional time requested would be a useful reference during the presentation. The presenter can always refer to this chart to reinforce individual points as well as to emphasize the total time and money requested.

The presentation should use appropriate themes. For example: "You made the change or caused the delay. It is only fair that we be compensated" or "We segregated all of our costs. What we are asking for are the actual and reasonable costs resulting from the change or delay. We are not asking for anything more."

Do not make any assumptions about the outcome of the meeting. It is important for subcontractors to show that they believe they are entitled to additional time or money and will pursue the change order or claim to obtain a favorable resolution.

If the meeting does not result in a settlement, it is important to set a future course of action to resolve the outstanding issues. Any meeting is beneficial if the subcontractor is able to find out what the owner or prime contractor agrees with in the change proposal and where disagreement remains. This information will be helpful in the negotiation phase.

## **Negotiation of Change Proposals and Claims**

The negotiation of change order proposals seeks an appropriate balance between an owner's right to make a change and a subcontractor's right to additional time and money as a result of that change. A change proposal or claim is nothing more than a consequence of an owner or prime contractor changing the scope of work, delaying a subcontractor's performance and increasing the subcontractor's costs.

The subcontractor must frame arguments in such a way to convince the other party that the change proposal or claim is nothing more than what was initially agreed upon in the contract by the parties for changes or changed conditions, and thus is reasonable and equitable.

Consider the role of the players on both sides. Negotiate with a balanced group of players. Generally, some of the persons negotiating have technical or factual backgrounds; others are in management positions. The types of people representing the subcontractor should match those of the owner or prime contractor. For example, if the owner or prime contractor's technical personnel are present, the subcontractor also should have technical people present. Negotiations will more than likely take place with

management personnel. Subcontractors should be aware that management personnel often use the “good guy-bad guy” negotiation strategy.

Also, be sure to conduct negotiations with persons who have the authority to settle or who must make the recommendation to settle. Be sensitive to the necessary internal procedures that must be followed to have the change proposal or claim approved by the owner or prime contractor. The person who makes the ultimate decision for the owner or prime contractor may not have all the facts. Therefore, all pertinent information should be provided in a comprehensive proposal or claim and through the presentation and negotiation process.

If at all possible, try to establish entitlement first, then the amount of time or money. If agreement is reached on entitlement and both parties are being fair and reasonable, agreement on the amount is much easier.

During negotiations, it is important to give the party the ability to settle. If the subcontractor presents appropriate documentation to substantiate the change proposal or claim, the owner or prime contractor will realize that it will take extensive work on their part to negate the proposal. Thus, it is in their best interest to settle. Also, it is important for the other side to understand what portions of the proposal are firm and what portions are open to compromise. If some element of the change proposal or claim is weak, concede that point in the spirit of compromise.

For proposals that include a large number of claims or substantial dollar amounts, more than one meeting or negotiation session may be necessary.

Negotiations on change order proposals and claims always seem to occur within an adversarial atmosphere. Depending upon the attitudes of one or more participants in the negotiations, that adversarial atmosphere may decrease or increase. Even though the atmosphere may be adversarial at first, it is important to be polite and businesslike throughout the negotiations. The subcontractor’s objective is to obtain an equitable adjustment to the contract. That objective cannot be obtained in a confrontational atmosphere.

It also is important for the subcontractor to maintain a reputation for fairness. The themes developed and used during the presentation also should be used and emphasized throughout negotiations. The subcontractor should call upon the other party’s sense of fairness and equity by explaining why responsibility lies with the owner or prime contractor, making sure that they understand the consequences of their changes or directions that occurred during the project. The owner or prime contractor also must maintain a reputation of fairness and reasonableness. If both the owner and prime contractor and the subcontractor establish fairness and reasonableness as a baseline, negotiations will proceed in a smoother manner.

During negotiations it is important to make sure that any change order address only the subject of the change proposal or claim. Watch out for broad release language. Do not

waive rights to other costs or extensions of time. Do not inadvertently waive rights to claims in progress payments, correspondence, etc. When deciding whether or not to settle a claim or pursue other methods of dispute resolution, a subcontractor must consider:

- The **delay** in receiving additional money.
- The **probability** of recovery and the possible risk of counterclaims.
- The **internal costs** of pursuing the claim.
- The **outside costs** of pursuing the claim (attorneys and consultants).

If the subcontractor is unable to settle a change proposal or claim or if the other party flatly refuses to even admit entitlement or is stalling, the subcontractor must consider further methods of dispute resolution. If the contract does not contain provisions as to how a claim would be resolved in these cases, the subcontractor should seek the advice of an attorney to discuss the best approach—mediation, arbitration or litigation.

In addition, throughout the entire process of preparing, presentation and negotiating requests for additional time or money, a subcontractor should keep an eye on the ticking clock. Contractual limitations may exist for pursuing contract rights. In addition, every state has adopted statutes of limitations which prevent the filing of suits after a specified period of time. Finally, any lien or bonds rights that a subcontractor may have require timely notice and enforcement. If any of these deadlines pass, a subcontractor's ability to obtain a full and fair adjustment for changes or changed conditions also has passed.