
Coates' Canons Blog: Change orders: How much change is too much?

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As anyone who has been involved in a construction project knows, construction almost always involves unexpected costs. The North Carolina General Statutes give local governments the flexibility to address these costs through change orders. G.S. 143-129(e)(4) says that the bidding laws do not apply to work undertaken “during the progress of” a construction project that was originally bid either formally (under G.S. 143-129) or informally (under G.S. 143-131). In other words, if a local government bids out a construction or repair project, and then, in the course of the project, discovers an unanticipated problem that will require additional work (and increased cost), the local government does not have to bid out that additional work. But what are the limits of this exception? When does the cost or scope of the change order take it outside of this exception? Is a \$1 million change order too much? Or \$500,000 (the formal bidding limit for construction projects)? Is 50% of the original contract cost too much? 25%? 10%?

I get questions like this a lot because many people assume that there must be a specific percentage of the original contract cost that dictates when the change order exception can be used. In fact, the North Carolina General Statutes don't limit the scope of the exception to a certain percentage of the original contract cost, and there is no case law in North Carolina to provide guidance on this issue, either.

Does that mean that this exception can be applied to any change order? No. But it does mean that determining when to apply the exception is a little more complicated than multiplying the original contract cost by a specific percentage.

To maintain the integrity of the bidding process, the change order exception must only be used when (1) the change order work fits within the scope of the original project and (2) the reason for the change is something that was unanticipated or unforeseen at the time the original contract was awarded. Why? Because it's unfair to the other bidders on the original contract to allow a change order that, had it been included in the original specifications, might have changed the order of the bids. Also, a significant change in overall approach or design might even change the universe of potential bidders.

In other words, change orders can be used for a minor redesign of a project if the redesign is required because of an unforeseeable problem with the original design. Change orders cannot be used for fundamental redesign of a project and cannot be used to “fix” problems in the project specifications if the local government was aware of the problems before awarding the contract. (If your specifications have problems, it's better to issue an addendum—if the problems were discovered before bids are due—or to re-bid the contract.) Change orders also cannot be used to take advantage of a good deal on a construction project—in other words, if you've awarded a contract for 500 linear feet of street paving work, you can't then use a change order to double the number of linear feet included in the contract just because the successful bidder gave you a really great price on the original contract.

For additional reading on change orders, take a look at pages 69-71 of Fleming Bell's *Construction Contracts with North Carolina Local Governments*, which you can order [here](#).

Links

- en.wikipedia.org/wiki/Change_order
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-129.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-131.html
- www.sog.unc.edu/publications/books/construction-contracts-nc-local-governments