

# Changes Under A201

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# Changes Under A201

## I. **AIA A 201 Change Order and Construction Change Directive Article 7**

The classic distinction between these two tools is that a “change order” is a consensual means, between the three principal parties involved, to amend the original contract. This can be for extra work, extra time, or sometimes to decrease the scope with a “deductive” change order. The construction change directive on the other hand, is a unilateral direction from the Owner and Architect, (as previously agreed in the contract), which changes to the scope of the contract. The price is left to be determined later.

Often a preliminary request for extra time is a necessary prerequisite for a claim for delay or inefficiency damages. This is especially true for state contracts.

Frequently, somebody will issue an unexecuted and unilateral “change order” in an attempt to modify the contract. Whether this actually is a change order depends on large part to the jurisdiction’s common law, the template used, and the course of dealing between the parties. In Massachusetts, it will be a question of fact, as to whether there is a valid change order. The fact that there is no writing, signed by the parties,

will not necessarily be an impediment to the creation of a valid change order.

AIA A201 contemplates both Change Order and Construction Change Directives and also allows for “orders for minor change in work”.

Minor changes clause should only be used when there is no or little cost impact, and are issued unilaterally by the Architect. The form typically used is AIA G701-2017.

#### **A. Change Orders A201**

The AIA change order must be written and have a sign-off from the Owner, Architect and the Contractor. State law will typically govern what constitutes a Change Order.

Often a work ticket signed by the Owner or GC will constitute a valid change order regardless of the form specified in the contract. Certainly it comports with the Statute of Frauds, to the extent necessary. However, without at least a signed work ticket, the attorney trying to prove-up a valid change order will have an “uphill” battle if the contract is specific enough to include a provision mandating that all change orders be in writing. Nevertheless, time and quantities should be tracked and documented even if there is no written acknowledgement.

If there are overhead, delay or inefficiency costs that part of the claim is usually waived if not included in the claim. If they are not, an exception should be made on the change order notifying the parties that a claim for these will be made later.

Often the change order or the payment requisition will contain a waiver or release of these damages and must be dealt with.

#### **B. Construction Change Directives Article 7.3**

Under the AIA, A201, the change directive is an order signed by the Owner and Architect directing a change in the work. It is required that the change directive is in the general scope of work or it will constitute a “cardinal change” and give rise to a right of completely different scheme of compensation. It does not require the agreement of the contractor.

Theoretically, the contractor has agreed at the execution of the contract that it will perform any work pursuant to change directive. The value of the work is determined in one of three ways: 1) Mutual acceptance of an itemized lump sum; 2) Unit prices already contained in the contract or subsequently agreed upon; or 3) Cost is determined in a methodology previously determined by the parties. If the Contractor signs the construction change directive, it becomes effective as a change order. If there is no agreement, the Architect then may make the initial determination as the value of the change. If the Contractor is aggrieved by the Architect’s decision, it may resort to the remedies available under the contract as in Article 15 or at law.

#### **Differing Site Conditions Under A201**

While not a change order, equitable adjustments are certainly a change to the contract. A201 allows extra compensation when there is an unanticipated subsurface or

concealed physical conditions if the conditions differ materially from those found on the contract documents (sometimes referred to as Type 1) and for unknown physical conditions that differ materially from those generally recognized as inherent in the type of work being done (sometimes referred to as Type 2). See AIA A201, subparagraph 3.7.4.

Notice must be given no later than fourteen (14) days after first observing the conditions and before the conditions are disturbed.

### **Public Contracting and Equitable Adjustments**

Many states have strict notification laws and will not recognize claims made after the time limit.

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