

It's a Matter of Time: Delay and Change

*James Duffy O'Connor**

Time is an outlaw. It's got its own rules. We can't control it. We can only abide by it; we are its mere accomplices. It doesn't reckon the meaning of words like "whoa," "stop" or "stay." It is private and primitive, forgetful and frivolous. If we entrust our fate to Time, it will make an example of us. The consequence of its havoc can spread as quickly as a rash in a Jacuzzi. By contrast, it can also pass as slowly as a kidney stone. It can be the jobsite where trades go to listen to the wind blow. When you don't need it, Time shows up looking as pale as the drool off a madman's lips. And when you do need it, it vanishes as completely as Jimmy Hoffa. In the construction industry, Time dresses itself in Delay and Change.¹

I. Delay

A. Time Not Presumed of the Essence

Back when salt was a novelty, the process of construction was considered too unmanageable to be saddled with constraints of timeliness, as opposed to other factors like quality and cost that were considered more controllable and measured with money. Over centuries of history, it was presumed that building construction should take decades to bring to completion. To this day, unless the parties expressly agree to the contrary, time to a construction contract is not of the essence of the bargain.²

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¹*Cf.*, Tom Robbins, *Fierce Invalids Home from Hot Climates* 83 (2000); Tom Robbins, *Still Life with Woodpecker* 128, 249 (1980); Tom Robbins, *Jitterbug Perfume* 84 (Bantam 1984); Tom Robbins, *Skinny Legs and All* 352 (1990).

²*Bruner & O'Connor on Construction Law* § 15:3 p. 14 and n.1 (hereinafter *Bruner & O'Connor on Construction Law*); *Merriman v. Sandeen*, 267 N.W.2d 714, 24 U.C.C. Rep. Serv. 718 (Minn. 1978); *Baker Domes, a Div. of R.M. Baker Co. v. Wolfe*, 403 N.W.2d 876 (Minn. Ct. App. 1987); *see also* *Porterco, Inc. v. Igloo Products Corp.*, 955 F.2d 1164 (8th Cir. 1992); *Kingery Const. Co. v. Scherbarth Welding, Inc.*, 186 Neb. 653, 185 N.W.2d 857 (1971); *DeSombre v. Bickel*, 18 Wis. 2d 390, 118 N.W.2d 868 (1963); *Brady v. Oliver*, 125 Tenn. 595,

B. Construction Speeds Introduce New Contracting Priorities

Steel changed everything in this country. When Andrew Carnegie introduced structural steel construction to the United States, the speeds of construction became “every bit as remarkable as the new heights” it could achieve.³

The introduction of steel as a structural component of American sky scrapers evolved from the bridgemen of the middle 19th Century. Iron was used to construct bridges across America. Not much was known about its structural abilities. In fact, much of the discovery related to that issue was obtained after the fact of a collapse; something that was all too common in that century. Iron had been used for thousands of years. The oldest type of iron is “wrought,” which found its beginnings around 1,200 B.C. It is produced as the reduction of iron ore that is heated to extreme temperatures. “Cast” iron was produced in the 14th Century. It differed from wrought iron in the amount of carbon that binds with the iron molecules during smelting. Wrought iron has little carbon while cast iron has much carbon. Wrought iron is softer, flexible and more pliable. Cast iron is hard, brittle and easily “cast” into shapes. Cast iron could sustain a great deal of weight, but under other conditions, it could buckle and break. So, while cast iron performed best under compression, e.g. columns, wrought iron performed best under tension, e.g., floor beams.

When steel was introduced in the 1870s these discoveries were just surfacing. Early steel was crucible steel, a labor intensive manufactured high-carbon version produced by, among others, Andrew Carnegie’s Keystone Bridge Co. By the time James Buchanan Eads was designing his triple arch steel bridge over the Mississippi River at St. Louis, Andrew Carnegie had discovered a new invention called the Bessemer Converter, named after the British inventor who discovered how to turn molten iron into steel. Henry Bessemer discovered that if he introduced air into the smelting process, the oxygen burned off, producing carbon 10 times faster than any previous method of steel fabrication. This new steel combined the best of both metals, the flexibility of wrought iron and the strength of cast iron. Carnegie observed that for the first time in history, a more reli-

147 S.W. 1135 (1911); *see also* Steven G.M. Stein, Construction Law ¶ 6.07[1] (1986).

³J. Rasenberger, High Steel 193 (2004). The steel frames of Manhattan’s skyscrapers, like the Singer Tower and the Metropolitan Life Building, were erected in a matter of months.

able and stronger steel could be manufactured quickly, inexpensively, and in huge quantities. And that's precisely what he planned to sell to the America that was just opening the door to the 20th Century. First the Glasgow Bridge in Missouri; then the Brooklyn Bridge across the East River; then the Home Insurance Building in Chicago—the country's first structural steel building; then the Flat Iron; the Singer Tower; the Metropolitan Life Tower; the Woolworth Building; the Chrysler Building; the Empire State Building . . . Well, you get the idea.⁴

The introduction of new construction materials and more complex and integrated construction systems followed close on the heels of Andrew Carnegie's contribution to the construction industry and resulted in a dramatic shift in the perception of the importance of time to a construction project. New specialty contractors evolved out of the opportunity to capture time on a construction job. The importance of coordination of the new trades and the integration of their systems into and around other construction systems in the building project required the contracting parties to negotiate new bargaining issues:

1. The detailed sequencing of construction activities;
2. The availability of the necessary labor, materials, and equipment;
3. Foreseeable hardships and impediments to be taken into consideration either in the pricing of the work or by the terms of the contract; and
4. An overall time schedule for completion of the work.⁵

C. Legal Excuses for Untimely Performance & the Role of Control

Together with the importance of speed came the importance of finding legal excuses for the lack of speed. The common law defenses that excused strict compliance with the parties' contract language soon developed into legal justifications for delays on a construction project: impracticability⁶ and force majeure⁷—both excused untimely performance for conditions or events beyond

⁴See J. Rasenberger, *High Steel* (2004).

⁵Bruner & O'Connor on Construction Law § 15:3 p. 16.

⁶Restatement Second, Contracts §§ 261 to 272 (1981); *see, e.g.*, *Transatlantic Financing Corp. v. U.S.*, 363 F.2d 312, 1966 A.M.C. 1717, 3 U.C.C. Rep. Serv. 401 (D.C. Cir. 1966); *see also* *Schooner, Impossibility of Performance in Public Contracts*, 16 Pub. Cont. L.J. 229 (1986); Posner and Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83 (1977); *Lovett v. Schlemmer*, 2004 WL 2418326 (Minn. Dist. Ct. 2004) (contract performance is excused when it is hindered or rendered impos-

the control of the contracting party.⁸ Key to the application of both is the concept of “control.”⁹

sible by the other party), *citing* *Wormsbecker v. Donovan Const. Co.*, 247 Minn. 32, 76 N.W.2d 643, 650 (1956); *Gulf Oil Corp. v. F. P. C.*, 563 F.2d 588 (3d Cir. 1977); *Hart v. Arnold*, 2005 PA Super 328, 884 A.2d 316 (2005); *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 60 U.C.C. Rep. Serv. 2d 331 (8th Cir. 2006); *Island Development Corp. v. District of Columbia*, 933 A.2d 340 (D.C. 2007); *Fireman’s Fund Ins. Co. v. U.S.*, 92 Fed. Cl. 598 (2010); *Maudlin v. Pacific Decision Sciences Corp.*, 137 Cal. App. 4th 1001, 40 Cal. Rptr. 3d 724 (4th Dist. 2006); *Prusky v. Reliastar Life Ins. Co.*, 474 F. Supp. 2d 695 (E.D. Pa. 2007); *J & H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Comm.*, 2013-Ohio-3827, 2013 WL 4779008 (Ohio Ct. App. 10th Dist. Franklin County 2013); *Greenwich Interiors, LLC v. Statham Woodwork, Inc.*, 2011 WL 1759094 (Conn. Super. Ct. 2011); *Record v. Kempe*, 182 Vt. 17, 2007 VT 39, 928 A.2d 1199 (2007); *American Prairie Construction Co. v. Hoich*, 594 F.3d 1015, 52 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81693 (8th Cir. 2010).

⁷*Viterbo v. Friedlander*, 120 U.S. 707, 7 S. Ct. 962, 30 L. Ed. 776 (1887); *see also* G. H. Treitel, *Frustration and Force Majeure* (1994); Litvinoff, *Force Majeure, Failure of Cause and Theorie de l’Imprevision: Louisiana Law and Beyond*. 46 La. L. Rev. 1 (1985); *Baker Domes, a Div. of R.M. Baker Co. v. Wolfe*, 403 N.W.2d 876 (Minn. Ct. App. 1987) (failure to complete home within 120 days specified in contract was justified and did not constitute breach where contractor encountered severe weather problems); *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849 (11th Cir. 2009); *General Dynamics Information Technology, Inc. v. Wireless Properties, LLC*, 714 F. Supp. 2d 211 (D. Mass. 2010); *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718 (Fla. 4th DCA 2010); *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324 (11th Cir. 2010); *VICI Racing, LLC v. T-Mobile USA, Inc.*, 921 F. Supp. 2d 317 (D. Del. 2013); *Millennium Inorganic Chemicals Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 893 F. Supp. 2d 715 (D. Md. 2012); *El Paso Field Services, L.P. v. MasTec North America, Inc.*, 389 S.W.3d 802 (Tex. 2012); *State v. Allen*, 98 So. 3d 926 (La. Ct. App. 4th Cir. 2012), writ denied, 110 So. 3d 138 (La. 2013); *Baroi v. Platinum Condominium Development, LLC*, 874 F. Supp. 2d 980 (D. Nev. 2012); *In re Cablevision Consumer Litigation*, 864 F. Supp. 2d 258 (E.D. N.Y. 2012); *Urban Archaeology Ltd. v. 207 East 57th Street LLC*, 34 Misc. 3d 1222(A), 951 N.Y.S.2d 84 (Sup 2009), order aff’d, 68 A.D.3d 562, 891 N.Y.S.2d 63 (1st Dep’t 2009).

⁸*Bruner & O’Connor On Construction Law* § 15:3 p. 15; *see, e.g.*, *Dermott v. Jones*, 69 U.S. 1, 17 L. Ed. 762, 1864 WL 6582 (1864); *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575 (Mo. Ct. App. E.D. 2000); *see also*, *Kingery Const. Co. v. Scherbarth Welding, Inc.*, 186 Neb. 653, 185 N.W.2d 857 (1971); *cf.*, *Bruner, Force Majeure and Unforeseen Ground Conditions in the New Millennium: Unifying Principles and “Tales of Iron Wars,”* 17 Int’l Construction L. Rev. 47 (2000).

⁹*East Capitol View Community Development Corp., Inc. v. Robinson*, 941 A.2d 1036, 27 I.E.R. Cas. (BNA) 1222 (D.C. 2008); *Island Development Corp. v. District of Columbia*, 933 A.2d 340 (D.C. 2007); *Nutrisoya Foods, Inc. v. Sunrich LLC*, 626 F. Supp. 2d 985, 69 U.C.C. Rep. Serv. 2d 166 (D. Minn. 2009); *Fireman’s Fund Ins. Co. v. U.S.*, 92 Fed. Cl. 598 (2010); *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 115 P.3d 262, 33 Media L. Rep. (BNA) 1993 (2005); *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718 (Fla. 4th DCA

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The importance of the concept developed over time as a moderating principle in the recurring clash between two common law maxims: *pacta sunt servanda*¹⁰ vs. *rebus sic stantibus*.¹¹ Just as historical and societal circumstances altered traditional understandings of relations between countries, the circumstance of material change between contracting parties softened the rule of law that compelled strict application of parties' compacts. Over time the jurisprudence that grew from the geography of this battle front focused on fairness,¹² control's other name. When is it "fair" to suspend a contracting party's obligation to perform? When the circumstance of material change is beyond the control of the contracting party!

The standard forms of construction contracts used in the majority of commercial projects today recognize this principle.¹³ State legislation regulating the construction contracting process sometimes restricts one's power to allocate certain risks based upon the parties' reasonable ability to control the risk. For example, the Colorado and Missouri Legislatures have invalidated "no-damage-for-delay" clauses in public construction contracting when the party seeking to enforce the clause controls the circumstance of the delay.¹⁴ The courts that construe com-

2010); *Cummins, Inc. v. Superior Court*, 36 Cal. 4th 478, 30 Cal. Rptr. 3d 823, 115 P.3d 98 (2005); *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, 791 N.W.2d 22 (N.D. 2010); *K-Con Bldg. Systems, Inc. v. U.S.*, 97 Fed. Cl. 41 (2011).

¹⁰"Agreements must be kept." See John D. Calamari & Joseph M. Perillo, *Calamari & Perillo, The Law of Contracts* § 13-19 (3d ed. 1987).

¹¹Assuming "matters so standing."

¹²See Charma, *From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts*, 18 N.Y.L. Sch. L. Rev. 95 (1999). The United Nations 1980 Convention on Contracts for the International Sale of Goods has adopted a version of *force majeure* to moderate the consequence of changed circumstances in the international sale of goods. Similarly, the International Institute for the Unification of Private Law 1994 Principles of International Commercial Contracts applies the principal to international construction contracts. See *generally* Brunner & O'Connor on Construction Law § 15:22 at pp. 68 to 70 & nn.15 to 18.

¹³See AIA A-201— 2007 ¶¶ 8.3.1-8.3.3; AGC-200 ¶ 6.3; EJCDC Doc. No. C-700 ¶ 12.03; FAR § 52.249-10(b)(1), 48 C.F.R. § 52.249(b)(1).

¹⁴See, Colo. Rev. Stat. Ann. § 24-91-103.5 (2013); Mo. Ann. Stat. § 34.058(2) (Vernon 2013); see also, N.C. Gen. Stat. Ann. § 143-134.3 (2013); Ohio Rev. Code Ann. § 4113.62(c) and (2) (2013); Va. Code Ann. § 2.2-4335 (2013); Wash. Rev. Code § 4.24.360 (2013). See *generally*, Comment: Bargaining in the Dark: Why the California Legislature Should Render "No Damage For Delay" Clauses Void As Against Public Policy In All Construction Contracts, 42 Golden Gate U. L.

mercial construction contracts today also recognize the importance of control in the allocation of construction risks.¹⁵

D. The Decisional Law & Implied Conditions

In *United States v. Brooks-Callaway Co.*,¹⁶ the United States Supreme Court affirmed a Contracting Officer's refusal to grant relief to a contractor who encountered "flooding conditions" at the project site. The contractor was hired by the government to construct levees on the Mississippi River. It finished its work 278 days after it had promised substantial completion. The government withheld contract funds as liquidated damages for the entire period of the delay and the contractor protested. The Contracting Officer acknowledged that a portion of the delay resulted from flooding conditions that were not foreseeable and reduced the amount of the withholding. On appeal to the Court of Claims, that court ruled that "floods" are *per se* unforeseeable events and ruled that the entire amount of the withholding was improper. The Supreme Court reversed, reasoning that one man's "flood" is another man's "high water." High water, it concluded, is foreseeable, and therefore a risk that the contractor may reasonably control by pricing its bid accordingly.¹⁷

*S. Leo Harmonay, Inc. v. Binks Mfg. Co.*¹⁸ is a text book example of the kinds of havoc that results from front-end delays to a project coupled with a stubborn refusal to grant time relief. Harmonay was a mechanical sub to Binks on a project for General Motors. The specific subcontract was for the construction of the mechani-

Rev. 283 (2012); Note & Comment: The Collapsing "No Damage For Delay" Clause in Florida Public Construction Contracts: A Call for Legislative Change, 15 St. Thomas L. Rev. 425 (2002); Note: Apportioning The Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate "No Damage for Delay" Clause, 46 Wm. & Mary L. Rev. 1857 (2005).

¹⁵See, e.g., *Martin Bros. Contractors, Inc. v. Virginia Military Institute*, 277 Va. 586, 675 S.E.2d 183 (2009); *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, 791 N.W.2d 22 (N.D. 2010); *Plato General Const. Corp. v. Dormitory Authority of State*, 27 Misc. 3d 1226(A), 911 N.Y.S.2d 695 (Sup 2010), appeal dismissed, 89 A.D.3d 819, 932 N.Y.S.2d 504 (2d Dep't 2011), leave to appeal denied, 19 N.Y.3d 803, 946 N.Y.S.2d 106, 969 N.E.2d 223 (2012); see also, *U.S. v. Brooks-Callaway Co.*, 318 U.S. 120, 63 S. Ct. 474, 87 L. Ed. 653 (1943); *S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F.Supp. 1014 (S.D.N.Y. 1984), aff'd, 762 F.2d 990 (2d Cir. 1985); *Hurlburt v. Northern States Power Co.*, 549 N.W.2d 919, 923-24 (Minn. 1996).

¹⁶*U.S. v. Brooks-Callaway Co.*, 318 U.S. 120, 63 S. Ct. 474, 87 L. Ed. 653 (1943).

¹⁷318 U.S. at 122-124.

¹⁸*S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F. Supp. 1014 (S.D. N.Y. 1984), judgment aff'd, 762 F.2d 990 (2d Cir. 1985).

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cal piping necessary to produce two independent metal cleaning and painting processes required to produce finished automobiles. The site was inaccessible for nearly two months after the subcontractor was ordered to begin work. Lay-out of the rough-in work was denied for months. In addition, the sub was not provided the design documentation required to fabricate the mechanical system until more than half-way through the project. As a result, it ultimately was required to remove work that it was ordered to “self-engineer” to mitigate the consequence of the delay. When the sub was presented the site to perform productive work, it was then ordered to accelerate its work, add additional crews and “make” the schedule. The sub demanded additional compensation from the general contractor resulting from the delay and acceleration of its work. The general refused, reasoning that as between the general and the sub, they both “controlled” the risk of owner-caused delay by pricing their work to account for it. The trial court rejected that position, reasoning that the owner-contractor agreement allocated that risk to the general contractor, and also required the contractor to coordinate the shop drawing and submittal process so as to avoid delays relating to the production and distribution of the construction documents. The sub, it reasoned, neither contracted for those risks, nor controlled them. The court recognized the general principle that a contractor is responsible for “building” into its bid a “certain amount of leeway for difficulties in his original bid,”¹⁹ but concluded that:

Balancing this risk factor, however is the well-established rule that a contractor is entitled to a reasonable opportunity to perform his contract without obstruction or interference, and that neither party will do anything that will hinder or delay the other party in performance of the contract. As a consequence, delay and improper performance of preparatory work not within the contemplation of the parties at the time the contract is executed will constitute a material breach of this implied obligation.²⁰

Standard industry contract forms expressly enumerate and al-

¹⁹597 F.Supp. at 1027.

²⁰597 F.Supp. at 1027-1028 (citations omitted). *See* Instrumentation Services, Inc. v. General Resource Corp., 283 N.W.2d 902 (Minn. 1979) (subcontractor was entitled to recover against contractor for breach because contractor’s acts essentially prevented subcontractor from completing subcontract). *See also* Quaker-Empire Const. Co. v. D. A. Collins Const. Co., Inc., 88 A.D.2d 1043, 452 N.Y.S.2d 692 (3d Dep’t 1982); Fehlhaver Corp. v. State, 65 A.D.2d 119, 410 N.Y.S.2d 920 (3d Dep’t 1978); *see also* J. D. Hedin Const. Co. v. U. S., 187 Ct. Cl. 45, 408 F.2d 424 (1969); Appeal of Perini, Horn, Morrison-Knudsen, 87-1 B.C.A. (CCH) 19545 (Corps Eng’rs B.C.A. Feb. 5, 1987).

locate certain risks associated with delays on a construction project to one of the contracting parties. For example, the AIA A-201 General Conditions Document lists the following as authorizing relief for the contractor:

- acts or neglect by the Owner or its Architect;
- acts or neglect of “Separate Contractors” under contract to the Owner;
- Changes ordered in the Work;
- labor disputes;
- fire;
- unusual delay in delivery of materials;
- unavoidable casualties;
- delays caused by the dispute resolution process; and
- acts or conditions deemed by the Architect to warrant relief.²¹

The decisional law that has developed in this country has also expressly enumerated and allocated certain risks associated with delay to one or the other of the contracting parties. These “implied contract” conditions are based on the legal assumption that they are “indispensable to effectuate the intention of the parties” and “arise from the language of the contract and the circumstances under which it was made.”²² Bruner & O’Connor have summarized the current state of the reported case law accordingly:

In the context of construction contracts, these numerous implied conditions include the contractor’s implied warranty of workmanship, the contractor’s implied duty to obtain . . . clarification of obvious or patent design discrepancies, the owner’s implied warranty of the adequacy of detailed design documents, the owner’s implied duty of full disclosure, the implied mutual obligations of both parties to cooperate and not hinder or delay the other’s performance and the implied duties of good faith and fair dealing.²³

Throughout the decisional law, the mantra repeats without

²¹AIA A-201—2007 ¶ 8.3.1.

²²*Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329, 47 S. Ct. 368, 71 L. Ed. 663, 1927 A.M.C. 397 (1927); *H Enterprises Intern., Inc. v. General Elec. Capital Corp.*, 833 F. Supp. 1405 (D. Minn. 1993) (Minnesota law recognizes contracts contain an implied covenant of good faith and dealing in order to prevent one party from depriving the other of the benefit of the bargain.); *Countrywide Services Corp. v. SIA Ins. Co., Ltd.*, 235 F.3d 390 (8th Cir. 2000) (extent of duty of good faith implied in contract is determined by express terms and expected benefits of contract).

²³Bruner & O’Connor on Construction Law § 15:22 at pp. 72 to 73; *see also*, *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108, 3 S. Ct. 537, 28 L. Ed. 86 (1884); *H.B. Zachry Co. v. U.S.*, 28 Fed. Cl. 77, 38 Cont. Cas. Fed. (CCH) P 76502 (1993), *aff’d*, 17 F.3d 1443 (Fed. Cir. 1994); *U.S. v. Spearin*, 54 Ct. Cl. 187, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166, 42 Cont. Cas. Fed. (CCH) P 77225 (1918);

equivocation. There is no more important precept in the context of time impact analysis than the issue of “control.” If the risk of delay is yours to control—contractually, impliedly, foreseeably or statutorily—you may not reasonably expect relief from the consequences of time.²⁴

Timing of performance of a construction contract is a two-way street. The Owner reasonably expects the Contractor to perform the scope of the Work within the time prescribed by the Contract Documents. The Contractor reasonably expects timely access to the site and the sequencing of the Work to follow a process that reasonably corresponds to how it priced the Work in its bid. The confluence of these corresponding expectations defines the “scope of the work” of the construction project. Courts are generally forgiving of a certain amount of fluidity in the performance of a construction contract. The complexity inherent in a project that comes together as a consequence of multiple trades separately performing their undertakings requires that. Indeed, a degree of delay is a foreseeable part of the undertaking. Distinguishing between acceptable and unacceptable degrees of delay is the trick of time impact analysis. It isn't science. It isn't witchcraft. It's something in between.²⁵

City of Indianapolis v. Twin Lakes Enterprises, Inc., 568 N.E.2d 1073 (Ind. Ct. App. 1991); L. L. Hall Const. Co. v. U. S., 177 Ct. Cl. 870, 379 F.2d 559 (1966).

²⁴See, e.g., Fru-Con Const. Corp. v. U.S., 44 Fed. Cl. 298 (1999); see generally, Cibinic, Jr. & Nash, Jr., Administration of Government Contracts 546 (3d Ed. 1995); Capper, Basic Choices in the Allocation and Management of Risk, 18 Int'l Construction L. Rev. 324 (2001).

²⁵Much has been written on the economic impact of delays to the construction project. See, e.g., Bruner & O'Connor on Construction Law §§ 15:120 to 15:136; Wickwire, Driscoll, Hurlbut & Hillman, Construction Scheduling: Preparation, Liability & Claims §§ 9.01-10.07 (2d ed. Aspen 2003); see also, S. Mohan and K. Al-Gahtani, Current Delay Analysis Techniques and Improvements, Cost Engineering, (September 2006); Z. Zafar, “Construction Project Delay Analysis,” Cost Engineering, Vol. 38/No.3 (March 1996); S. Alkass, M. Mazerolle & F. Harris, 14(5) Construction Delay Analysis Techniques, Construction Management Economics 375-394 (1966); D. Arditi & T. Pattanakitcharnroon, 24(2) Selecting a Delay Analysis Method in Resolving Construction Claims, International Journal Of Project Management, 145-155 (2006); G. Stumpf, Schedule Delay Analysis, Cost Engineering 32-43 (2000); J. Tieder, Methods of Delay Analysis and How They Are Viewed by the United States Legal System, Society of Construction Law International Conference, London, 6/7-Oct-2008; Fletcher and Stipanowich, Successful Forensic Schedule Analysis, 1 J. Amer. Coll. Constr. Law. 203 (Winter 2007). A current debate revolves around the so-called “Recommended Practice” for Forensic Schedule Analysis published by the Association for the Advancement of Cost Engineering (AACE). For a Point-Counter Point Discussion of the current debate, see M. D'Onofrio & K. Hoshino,

In *Blake Construction Co. v. C. J. Coakley Co.*,²⁶ the court ruled that a contractor who was deprived of reasonable access to work areas was denied the ability to perform the undertaking for which it bid. There, a subcontractor sought additional compensation from the general contractor for delays encountered on a massive hospital project for the United States Army. The sub contracted to perform the spray-on fireproofing work. The contract documents required the sub to fireproof the entire steel superstructure, roof and interstitial floors, and expressly provided for a sequencing of construction activities that ensured that the construction work that required fireproofing was completed and fireproofed before any other construction work was installed—especially work that could cover or damage work that required fireproofing. Unfortunately, the project got a late start; delays to the fabrication and erection of the structural elements and the building envelope provided a work site that was not only unsuitable for the fireproofing sub, but for all the other trades as well. When the trades mobilized to the site and discovered that the planned schedule was practically meaningless, they commenced to work on the project wherever they could. As a result, the mechanical and electrical contractors roughed-in their work well before the fireproofing contractor could get access to its work areas. The general contractor lost control of the project and could not (or would not) supervise the work of the trades who were scrambling around the project to find areas for their own productive work. In time, the trades began to war over the time of the project, and the fireproofing subcontractor was a casualty of that process.

When the sub complained, it was threatened with termination and damages. Indeed, the general refused to consider any claim for additional compensation and refused to ensure future payment to the sub. The sub ultimately walked off the job and commenced an action to recover its damages from the general. The general denied liability and sought damages from the sub for the cost to complete the unfinished work.

The trial court ruled for the sub and the general appealed. On appeal, the general argued that all construction projects are complex and rarely proceed as planned. It argued that the sub should have known that and protected itself by pricing its bid accordingly. The appellate court's rejection of the general's position is a study in the complexities of construction litigation and

AACE Recommended Practice for Forensic Schedule Analysis, (ABA Forum on the Construction Industry April 22-24, 2010).

²⁶*Blake Const. Co., Inc. v. C. J. Coakley Co., Inc.*, 431 A.2d 569 (D.C. 1981).

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the dynamics of the jurisprudence that control it. The court reasoned:

[I]t is a difficult task for a court to be able to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on a job site, became so extreme, so debilitating and so unreasonable as to constitute a breach of contract²⁷

The court recognized the well-worn principle that requires contractors to expect the unexpected. Indeed, it likened the “confusion” of a construction project to war.²⁸ The court ruled, nonetheless, that there is a legal limit to the contractor’s agony and that the facts of this case were such as to push the contractor’s capacity beyond the limit.²⁹ Specifically, the court expressed five examples of general contractor mismanagement on the job that warranted a ruling for the sub.

First, the general’s failure to make the site available to the sub when promised. Second, the general’s failure to supervise the other trades, which resulted in damages to the sub’s finished work and further complicated work site availability. Third, the general’s failure to assure the sub that it would be compensated for change order work. Fourth, the general’s failure to maintain a construction sequencing that conformed to the requirements of the specifications. Fifth, the general’s failure to provide heat where and when required to facilitate the sub’s work. The court held that “these acts collectively and individually constituted a

²⁷431 A.2d at 575.

²⁸The court remarked: “We note parenthetically and at the outset that, except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project.” Blake, 431 A.2d at 575.

²⁹The *court* observed:

It is well established that there are certain implicit duties between contracting parties, particularly the duty not to prevent performance by the other party. In the case of construction contracts, courts have construed those mutual duties in light of the prevailing practices of the trade and out of deference to the inherent uncertainties of the timing and conditions of the actual performance. However, there is a point at which a contracting party exceeds the necessary latitude of discretionary action, even in construction contracts.

Blake, 431 A.2d at 576 (citation omitted).

breach of implicit conditions for performance by [the general] under the subcontract.”³⁰

In *Marriott Corp. v. Dasta Construction Co.*,³¹ however, a contractor who was similarly denied reasonable and productive access to a worksite (for a period of five months) was not entitled to an equitable adjustment in the contract price. There, the Marriott corporation was building what was at the time its largest resort. The project was let in segments. This dispute involved the construction of the 28 story guest tower. The contractor was awarded the contract to skin the building and construct the interior drywall work. Before it submitted its bid, it visited the job site and had lengthy discussions with the owner regarding the construction schedule, including the work of the contractor who was fabricating and erecting the concrete work upon which the exterior skin would be attached. The contract documents included a construction schedule that showed a start date for the exterior wall work in July, about six weeks from the date that it had visited the project and inquired of the construction schedule. It bid the job and was awarded the contract in June, soon after its site visit. When it mobilized to the job in July, it was informed that the job was currently five months late as a consequence of delays in the work of its predecessor contractor.

The delay on the front end of the job was exacerbated by the “fast track” nature of the project delivery system. Indeed the lost time was never recovered and in the end the contractor ran out of money. The owner ultimately paid some subs directly and resolved lien claims by others after substantial completion. The owner commenced an action against the contractor to recover the monies it paid to the subs. The contractor sought its damages through a counterclaim. A jury fashioned an award that gave the contractor its damages and offset the amount that the owner had paid to the subs. The trial court, however, took the award away from the contractor and the court of appeals affirmed the grant of the JNOV.

³⁰431 A.2d at 576-77. See *Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42 (Minn. 1984); *Kaltoft v. Nielsen*, 252 Iowa 249, 106 N.W.2d 597, 602 (1960) (construction contracts contain implied terms that person for whom work will be done will not obstruct or delay contractor). See also *Southern Fireproofing Co. v. R. F. Ball Const. Co.*, 334 F.2d 122 (8th Cir. 1964); *Freeman Contractors, Inc. v. Central Sur. & Ins. Corp.*, 205 F.2d 607 (8th Cir. 1953); *Steenberg Const. Co. v. Prepakt Concrete Co.*, 381 F.2d 768 (10th Cir. 1967); *Kehm Corp. v. U.S.*, 119 Ct. Cl. 454, 93 F. Supp. 620 (1950); *Lichter v. Mellon-Stuart Co.*, 193 F. Supp. 216 (W.D. Pa. 1961), judgment aff'd, 305 F.2d 216 (3d Cir. 1962).

³¹*Marriott Corp. v. Dasta Const. Co.*, 26 F.3d 1057 (11th Cir. 1994).

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While resting its ruling on the principle that contractors must be held to account for the likelihood of delay and change in the course of a large commercial project, two facts doomed the contractor in this case. First, the contractor was at the site a matter of weeks prior to the bid and award of its contract. It “had to know” of the conditions on the job, and that the planned schedule was not reliable. Second, the contractor had never “formally” sought a time extension pursuant to the changes clause, which the contract described as a condition to the relief sought by the contractor. The court demonstrated little sympathy for the contractor:

Marriott had absolute authority to modify the construction schedule, while Dasta was obligated to abide by Marriott’s instructions. Although these terms may seem one-sided, Dasta was aware of these provisions at the time it bid the contracts, and had the opportunity to increase its proposed contract prices to account for the risks it would be assuming. Dasta failed to seize upon this opportunity, and, in hindsight, made a pair of improvident bargains from which we are powerless to grant relief. It is not the function of the courts to “rewrite a contract or interfere with freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.”³²

The recurring theme in the cases that deny relief to the contractor is one that accounts for the risk of loss resulting from delay as something the contractor could and should control in pricing its bid. It finds historical support in a 1917 U.S. Supreme Court opinion authored by Justice Oliver Wendel Holmes. In *Day v. United States*,³³ the contractor experienced an “extraordinary flood” that impacted the project site and required material additional work to prepare the site for work in light of the encroaching Columbia River. The contract did not expressly allocate the risk of such a condition. The Court ruled that the contractor’s undertaking included the hardship of performing under the conditions caused by the flooding of the river:

One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his

³²26 F.3d at 1068 (quoting *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) and *Steiner v. Physicians Protective Trust Fund*, 388 So. 2d 1064, 1066 (Fla. 3d DCA 1980)). See also *D.H. Blattner & Sons, Inc. v. Firemen’s Ins. Co. of Newark, New Jersey*, 535 N.W.2d 671, 676 (Minn. Ct. App. 1995) (where contract is silent the contractor/promisor assumes burden of additional costs for foreseeable construction risks).

³³*Day v. U.S.*, 245 U.S. 159, 38 S. Ct. 57, 62 L. Ed. 219 (1917).

undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by literal meaning of the words alone. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of obstacles to that extent.³⁴

A contractor may also modify the risk of its original undertaking by agreeing to a change in the contract that insinuates unforeseen obstacles into the original undertaking that were only foreseeable by the modification.³⁵

A contractor may increase the risk of its undertaking by allowing the owner to control timing and access to the site. For example, in *Port Chester Electric Construction Corp. v. HBE Corp.*,³⁶ a subcontractor who agreed to perform electrical work on a hospital renovation job had no recourse to seek additional compensation based on schedule delays when the contract documents expressly provided that the work “would have to be done at the convenience of the hospital.”³⁷

A delay on the front-end of a construction job can drastically “change” a contractor’s performance throughout the rest of the job. When an owner is responsible for such a delay, the contractor should be entitled to relief for the consequences of time. For example, in *Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*,³⁸ an owner who issued a Notice to Proceed to a contractor before the project site was ready for productive construction was responsible for the loss of time and additional costs of the work caused by the circumstance of the front-end delay.³⁹ Likewise, in *North Harris County Junior College District*

³⁴245 U.S. at 161. See also *West v. All State Boiler, Inc.*, 146 F.3d 1368, 42 Cont. Cas. Fed. (CCH) P 77323 (Fed. Cir. 1998); *Bilotto v. Webber*, 172 A.D.2d 639, 568 N.Y.S.2d 438 (2d Dep’t 1991). See generally Bruner & O’Connor on Construction Law §§ 15:22 to 15:29.

³⁵See e.g., *Border States Paving, Inc. v. State*, 1998 SD 21, 574 N.W.2d 898 (S.D. 1998).

³⁶*Port Chester Elec. Const. Corp. v. HBE Corp.*, 978 F.2d 820 (2d Cir. 1992).

³⁷978 F.2d at 821. See also *Zobel & Dahl Const. v. Crotty*, 356 N.W.2d 42 (Minn. 1984).

³⁸*Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*, 409 Pa. 465, 187 A.2d 157 (1963).

³⁹See also *Buchman Plumbing Co., Inc. v. Regents of the University of Minnesota*, 298 Minn. 328, 215 N.W.2d 479 (1974).

v. Fleetwood Construction Co.,⁴⁰ the court ruled that an owner was liable to the contractor for ordering a contractor to perform when a predecessor contractor's incomplete performance interfered with the follow-on contractor's productive work.⁴¹ And in *Abbett Electric Corp. v. United States*,⁴² the court ruled that a contractor was entitled to relief when an owner failed to issue timely a Notice to Proceed.

A contractor, however, will not be allowed to claim damages because it was not permitted to mobilize to a job prior to the effective date of the contract.⁴³ Similarly, in *M.A. Mortenson Co. v. United States*,⁴⁴ the contractor was not entitled to rely on the relief provided for in the parties' changes clause resulting from a delay that occurred prior to the award of the contract. There, the delay occurred while the government determined whether to relieve the low-bidder on a project from a mistake in its bid. The government sought and obtained an extension of the second-lowest-bidder's bid. By the time it was accepted and the contract awarded, months had passed. Notwithstanding, the combination of the "unconditional extension" clause in the contract and the absence of an earlier award of the contract compelled the court to conclude that the "changes" clause did not apply to the passage of time prior to award.⁴⁵

E. Performance as Waiver of Materiality of Time

Though time will almost certainly be expressly deemed "of the essence," in modern construction contracts, the parties' conduct during performance of the work can give rise to a waiver of the materiality of time.⁴⁶ Waiver is deemed an intentional relinquish-

⁴⁰North Harris County Junior College Dist. v. Fleetwood Const. Co., 604 S.W.2d 247 (Tex. Civ. App. Houston 14th Dist. 1980), writ refused n.r.e., (Dec. 10, 1980).

⁴¹See U. S. Steel Corp. v. Missouri Pac. R. Co., 668 F.2d 435 (8th Cir. 1982).

⁴²Abbett Elec. Corp. v. U.S., 142 Ct. Cl. 609, 162 F. Supp. 772 (1958).

⁴³See Pope v. U.S., 75 Ct. Cl. 436, 1932 WL 2108 (1932).

⁴⁴M.A. Mortenson Co. v. U.S., 843 F.2d 1360, 34 Cont. Cas. Fed. (CCH) P 75466 (Fed. Cir. 1988).

⁴⁵843 F.2d at 1361-62.

⁴⁶See Fields Engineering & Equipment, Inc. v. Cargill, Inc., 651 F.2d 589, 31 Fed. R. Serv. 2d 1280 (8th Cir. 1981); see also, Wisconsin Elec. Power Co. v. U.S., 90 Fed. Cl. 714, 71 Env't. Rep. Cas. (BNA) 1473 (2009); Fireman's Fund Ins. Co. v. U.S., 92 Fed. Cl. 598 (2010); 42 East, LLC v. D.R. Horton, Inc., 722 S.E.2d 1 (N.C. Ct. App. 2012); Banks Bldg. Co., LLC v. Malanga Family Real

ment of a known right.⁴⁷ Courts may find that an owner's acquiescence in the contractor's delay, coupled with instructions to continue performance, relinquishes the owner's contractual right to insist upon strict performance with the contract time.⁴⁸ The owner's failure to notify the contractor and take steps to enforce its rights relative to time under the terms of the contract may effectuate a waiver of the essence of time. The waiver can also be express, like when an owner authorizes a new construction schedule that is inconsistent with the time requirements of the original construction contract.⁴⁹ However, the owner is entitled to a reasonable period of time to determine whether to acquiesce in the delay before a waiver will be implied.⁵⁰ In addition, an express contract provision providing for a remedy for untimely performance—like a liquidated damage clause—may trump behavior

Estate Holding, LLC, 102 Conn. App. 231, 926 A.2d 1 (2007); Peden v. Gray, 886 A.2d 1278 (Del. 2005); Patterson v. Amundson, 201 Or. App. 486, 119 P.3d 264 (2005).

⁴⁷Cole v. Jersey City Medical Center, 215 N.J. 265, 72 A.3d 224, 28 A.D. Cas. (BNA) 734, 36 I.E.R. Cas. (BNA) 722, 163 Lab. Cas. (CCH) P 61381 (2013); Ibis Lakes Homeowners Ass'n, Inc. v. Ibis Isle Homeowners Association, Inc., 102 So. 3d 722 (Fla. 4th DCA 2012); Foundation Property Investments, LLC v. CTP, LLC, 286 Kan. 597, 186 P.3d 766 (2008); Plato General Const. Corp./EMCO Tech Const. Corp. v. Dormitory Authority of State, 89 A.D.3d 819, 932 N.Y.S.2d 504 (2d Dep't 2011), leave to appeal denied, 19 N.Y.3d 803, 946 N.Y.S.2d 106, 969 N.E.2d 223 (2012); Meadow Valley Contractors, Inc. v. State Dept. of Transp., 2011 UT 35, 266 P.3d 671 (Utah 2011); *see e.g.*, American Continental Life Ins. Co. v. Ranier Const. Co., Inc., 125 Ariz. 53, 607 P.2d 372, 374 (1980); St. Paul Dredging Co. v. State, 259 Minn. 398, 107 N.W.2d 717 (1961); Standard Const. Co. v. National Tea Co., 240 Minn. 422, 62 N.W.2d 201 (1953).

⁴⁸RDP Royal Palm Motel, L.P. ex rel. PADC Hospitality Corp. I v. Clark Const. Group, Inc., 168 Fed. Appx. 348 (11th Cir. 2006); Banks Bldg. Co., LLC v. Malanga Family Real Estate Holding, LLC, 102 Conn. App. 231, 926 A.2d 1 (2007); Martin Const., Inc. v. U.S., 102 Fed. Cl. 562 (2011); Swink v. Lasiter Const., Inc., 94 Ark. App. 262, 229 S.W.3d 553 (2006); R.W. Granger & Sons Inc. v. City School Dist. of Albany, 296 A.D.2d 636, 744 N.Y.S.2d 567, 166 Ed. Law Rep. 744 (3d Dep't 2002). *See also*, DeVito v. U. S., 188 Ct. Cl. 979, 413 F.2d 1147 (1969); Maryland Steel Co. of Baltimore County v. U.S., 50 Ct. Cl. 401, 235 U.S. 451, 35 S. Ct. 190, 59 L. Ed. 312 (1915); Quinn Bros., Inc. v. Whitehouse, 144 N.H. 186, 737 A.2d 1127 (1999); Dicon, Inc. v. Marben Corp., 618 F.2d 40 (8th Cir. 1980).

⁴⁹*See, e.g.*, Marathon Oil Co. v. Hollis, 167 Ga. App. 48, 305 S.E.2d 864 (1983).

⁵⁰*See e.g.*, Church v. Tentarelli, 2008 PA Super 139, 953 A.2d 804 (2008); Elkins Manor Associates v. Eleanor Concrete Works, Inc., 183 W. Va. 501, 396 S.E.2d 463, 13 U.C.C. Rep. Serv. 2d 75 (1990); Pelliccia v. U. S., 208 Ct. Cl. 278, 525 F.2d 1035 (1975).

that otherwise appears to constitute a waiver of the contract's time requirements.⁵¹

A contractor may contract with an owner to allow the owner to own time on the job such that the consequence of delay is the contractor's risk. Suspension of work clauses are one way in which an owner may manage the risk of damages caused by delays on a job. Contractors should be wary of suspension clauses in a contract. The standard construction contract forms contain suspension clauses, entitling the owner to halt construction for a specified period of time without entitling the contractor to abandon the job.⁵²

Conversely, the absence of a suspension clause may entitle a contractor to abandon the project entirely when it is staring down the barrel of a delay. In *Haney v. United States*,⁵³ the owner's multiple stop orders threw the planned construction schedule into such disarray that the trades, instead of abandoning the job, ended up working whenever and wherever they could. The resulting inefficiencies and loss of productivity were recoverable damages resulting from the owner's breach of the original construction contract.⁵⁴ Virtually every modern construction contract entitles the owner to compel the contractor to "work through

⁵¹*RLI Ins. Co. v. St. Patrick's Home For The Infirm And Aged*, 452 F. Supp. 2d 484 (S.D. N.Y. 2006). *See, e.g., St. Paul Fire & Marine Ins. Co. v. City of Green River, Wyo.*, 93 F. Supp. 2d 1170 (D. Wyo. 2000), *aff'd*, 6 Fed. Appx. 828 (10th Cir. 2001); *Alpine Const. Co. v. Water Works Bd. of City of Birmingham*, 377 So. 2d 954 (Ala. 1979).

⁵²The AIA form allows the owner to exercise its suspension rights without the risk of contract abandonment and provides a mechanism for increasing Contract Time and Contract Price when the contractor does not contribute to the reason for the suspension of the Work. AIA A-201—2007 § 14.3. *See also*, EJCDC Document C-700 ¶ 15.01 (2002); ConsensusDocs 200 ¶ 11.1.1 (2012). *Cf.* F.A.R. § 52.242.14, 48 C.F.R. § 52.242-14, which allows for compensation of certain reimbursable costs without profit, and only for that period of the suspension that is determined to be unreasonable. *See also* *Laburnum Const. Corp. v. U. S.*, 163 Ct. Cl. 339, 325 F.2d 451 (1963). *See generally*, Bruner & O'Connor on Construction Law § 15:85 at pp. 251 to 254 & nn.1 to 9. The mere existence of a suspension clause does not trump all contractor claims for unreasonable delay, especially where the suspension was caused by the concurrent acts of the owner or where the period of the suspension is deemed unreasonable. *See e.g., George Sollitt Const. Co. v. U.S.*, 64 Fed. Cl. 229 (2005); *GASA, Inc. v. U.S.*, 79 Fed. Cl. 325 (2007); *White Buffalo Const., Inc. v. U.S.*, 101 Fed. Cl. 1 (2011), *aff'd in part, vacated in part, remanded in part*, 2013 WL 5859688 (Fed. Cir. 2013).

⁵³*Haney v. U. S.*, 230 Ct. Cl. 148, 676 F.2d 584, 30 Cont. Cas. Fed. (CCH) P 70189 (1982).

⁵⁴*Haney*, 676 F.2d at 597-600. *See also*, *L. L. Hall Const. Co. v. U. S.*, 177 Ct. Cl. 870, 379 F.2d 559 (1966).

disputes.” From a practical perspective, therefore, the owner is in a position to force the contractor to finance the consequence of delay caused by suspension of work. For that reason alone, this is one of the contract clauses that should be the subject of study and discussion—especially in the context of a job that is getting a late start or one that is potentially under-financed.

F. Excusable & Inexcusable Delay

The consequence of delays caused by acts within the owner’s control are considered “excusable,” in the sense that the contractor should not be held accountable for the damages resulting from them.⁵⁵ Excusable delays, giving rise to damages may be “compensable,” depending on the parties’ written contract. When a project is delayed by an event or a condition within the owner’s control, one that is critical to the project schedule and results in increasing the cost to perform the contractor’s work, the contractor should be entitled to a time extension as well as additional compensation in an amount that covers the cost of the delay to the contractor.⁵⁶

By contrast, “inexcusable” delay is one that is caused by an

⁵⁵Bruner and O’Connor have listed the following duties that are typically assigned to the owner as being within its control, impliedly, contractually, or otherwise:

1. Efficiently managing its obligations under the contract, including the payment process, change order process, and review and approval process, so as not to hinder or delay the contractor;
2. Providing the contractor timely site access;
3. Completing preceding work necessary to allow the contractor to proceed;
4. Exercising inspection and rejection rights timely and reasonably;
5. Correcting design errors promptly;
6. Scheduling and coordinating the work of other prime contractors;
7. Providing owner information not available from other sources;
8. Delivering timely proper owner-furnished materials and equipment;
9. Granting timely and reasonable extensions of contract time;
10. Giving required direction timely;
11. Responding to shop drawing and product submittal timely;
12. Administering its duties under the contract properly; and
13. Dealing always in good faith.

Bruner & O’Connor on Construction Law § 15:50 pp. 138 to 139. When these activities and conditions cause the construction project to be delayed, resulting in critical loss of time or economic loss, or both, the contractor should be entitled to a time extension and an equitable adjustment of its compensation.

⁵⁶See, e.g., Peter Kiewit Sons’ Co. v. Summit Const. Co., 422 F.2d 242, 13 Fed. R. Serv. 2d 45 (8th Cir. 1969). Zobel & Dahl Const. v. Crotty, 356 N.W.2d 42, 45-47 (Minn. 1984); see also, CEMS, Inc. v. U.S., 59 Fed. Cl. 168 (2003);

event or a condition entirely within the control of the contractor that results in a critical adjustment to the contract time or contract price. The owner has more flexibility in managing the consequence of a contractor's inexcusable delay. The owner may order the contractor to conjure time out of space: by accelerating the work; working overtime; or adding additional laborers, all at the sole expense of the contractor. Alternatively, the owner may default the contractor, terminate and replace the breaching party, and finish the job with another contractor—in which case it may recover any additional costs of construction from the contractor. The owner may also allow the breaching contractor to finish the work and seek damages from the contractor for the delay.⁵⁷

When neither the contractor nor the owner “control” the cause or condition giving rise to a delay on a construction project, the delay is generally considered “excusable,” but not necessarily “compensable.” In that case, the contractor may be entitled to a time extension but not necessarily an adjustment in the contract price—the theory being that once the time extension is granted, the contractor can better manage the performance of the work to minimize additional costs over the period of the delay.⁵⁸

II. Change

A. Traditional Rules of Contract Formation & the Construction Industry's Need for Relaxation of Those Rules

The construction industry ushered a major shift into the jurisprudence of contract law in the United States. Traditional contract law developed out of the immutable principle that contracts must be “bi-lateral” accords in which there is (1) an offer; that is (2) accepted; and specifically for which (3) consideration is promised or exchanged. After contract formation, one party could not “change” his mind and require the other to “accept” the

Fireman's Fund Ins. Co. v. U.S., 92 Fed. Cl. 598 (2010); Wayne Knorr, Inc. v. Department of Transp., 973 A.2d 1061 (Pa. Commw. Ct. 2009); Edge Const. Co., Inc. v. U.S., 95 Fed. Cl. 407 (2010); Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc., 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590 (2d Dist. 1998), as modified, (Jan. 20, 1999); Blinderman Const. Co., Inc. v. U.S., 695 F.2d 552, 30 Cont. Cas. Fed. (CCH) P 70619 (Fed. Cir. 1982).

⁵⁷See e.g., S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014 (S.D. N.Y. 1984), judgment aff'd, 762 F.2d 990 (2d Cir. 1985).

⁵⁸See e.g., R.P. Wallace, Inc. v. U.S., 63 Fed. Cl. 402 (2004); Sunshine Const. & Engineering, Inc. v. U.S., 64 Fed. Cl. 346 (2005); Comstock Potomac Yard, L.C. v. Balfour Beatty Const., LLC, 694 F. Supp. 2d 468 (E.D. Va. 2010); see generally, Bruner & O'Connor on Construction Law § 15:42 at pp. 122 to 124.

changed deal.⁵⁹ Indeed, manifestations of discontinuity between the offer and the acceptance returned the contracting parties to square one of the negotiation. “According to the orthodox catechism, there is a precise moment when a party becomes contractually bound on a promise.”⁶⁰ At the moment that the parties jointly agree on the basis of the bargain, “there is an abrupt transition from no liability to liability based on the **promisee’s** expectation.”⁶¹ The rigidity of this rule didn’t suit the American purchaser of construction services, particularly as the process of construction became more complex and more dependent on time as an indispensable part of the construction project. Beginning in the late 19th Century the construction industry accepted the fact that construction projects did not typically proceed as they were planned. The common law precepts of bilateral offer and acceptance became unworkable throughout the industry.

B. “Changes Clause” Introduces Unilateral Bargaining

The parties to a construction project became more understanding of the necessity for change in the project, while still honoring the “general scope” of the original undertaking. Indeed, as the construction project reconstructed itself into an evolving dynamic process, the contracting parties came to understand that the degree of flexibility required to complete a complex construction project had to allow for unilateral change in the bargain. The “change” process has evolved to suit the complimentary needs of the contracting parties:

1. To jettison the bilateral common-law contract modification rules of “offer” and “acceptances” in favor of a more flexible approach under which an owner is authorized to order addi-

⁵⁹Williston on Contracts § 6:1 pp. 9 to 14 (4th ed.); *see generally*, Restatement Second, Contracts § 26, comment a. An offer is a proposal in the form of an express or implied promise to act, or exchange a behavior or thing in return for the action, promise or exchange of a behavior or thing from another who is of like mind in connection with the bargain. Like the Tango, it takes two to bind a bargain. *Interstate Industries, Inc. v. Barclay Industries, Inc.*, 540 F.2d 868, 20 U.C.C. Rep. Serv. 280 (7th Cir. 1976); *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017, 21 U.C.C. Rep. Serv. 721 (1977); *Cochran v. Norkunas*, 398 Md. 1, 919 A.2d 700 (2007); *Pacific Cascade Corp. v. Nimmer*, 25 Wash. App. 552, 608 P.2d 266 (Div. 3 1980); *Echo, Inc. v. Whitson Co., Inc.*, 121 F.3d 1099, 33 U.C.C. Rep. Serv. 2d 40 (7th Cir. 1997); *B.J. Kadrmas, Inc. v. Oxbow Energy, LLC*, 2007 ND 12, 727 N.W.2d 270 (N.D. 2007); *St. Paul Fire & Marine Ins. Co. v. Bierwerth*, 285 Minn. 310, 175 N.W.2d 136 (1969).

⁶⁰E.A. Farnsworth, *Farnsworth On Contracts* § 3.2 at p.185 (2d ed. 1998); *see generally*, Ricks, *In Defense of Mutuality of Obligation: Why “Both Should Be Bound or Neither,”* 78 Neb. L. Rev. 491 (1999).

⁶¹78 Neb. L. Rev. 491 (emphasis added).

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tions to or deletions of the work, without the consent of the contractor . . . ;

2. To control the issuance of changes by requiring them to be in writing;
3. To define and limit payment to the contractor for performing the work as changed;
4. To document changes as acceptable to and compatible with the design criteria of the architect and engineer of record;
5. To limit claims for extra work;
6. To [track] changes in constructed work from the original design documents to as-built condition; and
7. To address administratively disputes over changes and extras.⁶²

The contractual craft that voyaged out of this process is called the “changes” clause.⁶³ The clause expressly allows the owner to unilaterally order a change in the contract, which when imple-

⁶²Bruner & O'Connor on Construction Law § 4:1 at 501. The authors observed that without the flexibility of a process that permitted unilateral changes to the work and which authorized compensation beyond the original contract amount, the old common law rules would sanction a delay in the project until a new accord was reached, “thereby giving the contractor extraordinary bargaining leverage to ‘hold the project hostage’ to its demands for more time and money.” Bruner & O'Connor on Construction Law § 4:2 at 502. *See also* R.C. Nash, Jr., *Government Contract Changes* 3-2 (2d ed. 1989).

⁶³*See generally*, Crowell and Johnson, *A Primer on the Standard Form Changes Clause*, 8 Wm. & Mary L. Rev. 550 (1967). In 1818, the United States government introduced the concept to weapons procurement contracts. In purchasing 10,000 muskets, it contractually directed its supplier to “conform to the directions which may be issued from the [Government] . . . Should any [additional] alterations . . . be decreed by the [Government], the [supplier] shall be entitled to compensation for any extra expenses occasioned by such alterations.” R.C. Nash, Jr., *Government Contract Changes* 2-2 (2d ed. 1989); Bruner & O'Connor on Construction Law § 4:3 at p. 504. The Union Navy utilized changes clauses to procure the iron clad monitor class of ships required for the war effort against the Confederacy. *See Chouteau v. U.S.*, 13 Ct. Cl. 515, 95 U.S. 61, 24 L. Ed. 371, 1877 WL 18534 (1877); *cf.* Baur, *The Origin of the Changes Clause in Naval Procurement*, 8 Pub. Cont. L.J. 175 (1976). The federal government developed a general conditions document applicable to construction contracting in 1926, called Standard Form 23. This contract document included a “changes” clause as well as an “extras” clause. The contract form established a monetary limit on the authority of the contracting officer to authorize a change. It required notice from the contractor of the effect of the change within 10 days of the ordered change, and it required the contractor to work through any dispute regarding whether the contractor was entitled to additional compensation. *See Anderson, Tort and Implied Contract Liability of the Federal Government*, 30 Minn. L. Rev. 133, 139-147 (1946). For a historical discussion of the evolution of Form 23, as well as a discussion of the distinction between extras and changes,

mented constitutes more than an “agreement to agree.” Instead, it is binding on the owner, even when the owner and the contractor have not come to terms on the issue of pricing the change.

For example, in *Emulsified Asphalt, Inc. v. Transportation Commission of Wyoming*,⁶⁴ the public owner was not allowed to rescind a change order, arguing that without coming to terms on price, the change order was not binding on the State. Of course, it is just as binding on the contractor, who is obligated to perform the extra work, even when the issue of price is unresolved. In *Chamberlin v. Puckett Construction Co.*,⁶⁵ a subcontractor was held to have anticipatorily breached its subcontract with the general contractor when it refused to “promptly” perform the changed work. The sub’s refusal to perform and its insistence that the owner join in the documentation of the change, was not a permissible response to the general contractor’s ordered change.⁶⁶ The modern clause also incorporates notice and submission requirements intended to control the adjustment process, and integrates the claims resolution procedure to bring closure to the pricing issue without jeopardizing the time of substantial completion.⁶⁷

C. Cardinal Change & its Consequences

Of course, there are changes, and then there are *Changes!* The first category are changes within the “general scope” of the original undertaking and enforceable. The second category are “cardinal” changes; differences so far beyond the parameters of the original understanding that the contractor may refuse to perform, regardless that the owner is willing to pay fairly for the extra work. Defining the contours of change and cardinal change is a difficult task. The decisional law reported out of the courts

see Bruner & O’Connor On Construction Law § 4:3 at p. 506 to 508 and nn.7 to 15.

⁶⁴*Emulsified Asphalt, Inc. of Wyoming v. Transportation Com’n of Wyoming*, 970 P.2d 858, 865 (Wyo. 1998).

⁶⁵*Chamberlin v. Puckett Const.*, 277 Mont. 198, 921 P.2d 1237 (1996).

⁶⁶See also *Graham Const. & Maintenance Corp. v. Village of Gouverneur*, 229 A.D.2d 815, 646 N.Y.S.2d 720 (3d Dep’t 1996).

⁶⁷Delineating the differences between the modern form versions of the changes clause is beyond the scope of this article. Contracting parties should take particular care to understand how the changes clause implicates the risk of delay and the cost of time on a construction job and the process by which the contractor must “secure” its opportunity to manage that risk by establishing and implementing timely notice and claim submission procedures that conform to the requirements of the parties’ contract. For a general discussion of the modern construction contract standard form approaches to changes, see Bruner & O’Connor on Construction Law §§ 4:4 to 4:8 at pp. 508 to 520.

and boards in this area has not delivered bright line rules to help distinguish one from the other.⁶⁸ The importance of the facts of each case cannot be overstated. Indeed, it may be that the difference between a change and a cardinal change in a specific case is simply in the telling of the story.

A cardinal change is one that exceeds the general scope of the contract. For that reason, it is not governed by the changes clause. Nor are any of the other contractual provisions helpful in resolving the dispute. The contract is meaningless in resolving the dispute. All of its conditions and remedies are irrelevant; such that all common law damages are available to the contractor regardless of what the contract would otherwise require. Some courts will refer to the contract as having been “abandoned” when the owner introduces a cardinal change to the project.⁶⁹ The contractor’s performance surety is also discharged as a consequence of a cardinal change. Leading commentators have listed the legal consequences of cardinal change accordingly:

1. The contractor may pursue common-law damage and termination remedies for material breach;
2. The contractor is protected against its abandonment of the contract;
3. The contract procedural requirements and damage limitations are inapplicable;
4. The performance bond surety is discharged;
5. Statutory competitive statutes if applicable are violated; and

⁶⁸See, e.g., *Becho, Inc. v. U.S.*, 47 Fed. Cl. 595 (2000); *Wunderlich Contracting Co. v. U. S.*, 173 Ct. Cl. 180, 351 F.2d 956 (1965). Compare *Metcalf Const. Co., Inc. v. U.S.*, 102 Fed. Cl. 334 (2011); *City of Meridian v. Petra Inc.*, 154 Idaho 425, 299 P.3d 232 (2013); *Dave’s Excavating, Inc. v. City of New Castle*, 959 N.E.2d 369 (Ind. Ct. App. 2012), transfer denied, 969 N.E.2d 606 (Ind. 2012); *Bell/Heery v. U.S.*, 106 Fed. Cl. 300 (2012) with *Kiska Constr. Kiska Const. Corp.-U.S.A. v. Washington Metropolitan Area Transit Authority*, 736 F. Supp. 2d 171 (D.D.C. 2010), order aff’d, 443 Fed. Appx. 561 (D.C. Cir. 2011); *Overseas Lease Group, Inc. v. U.S.*, 106 Fed. Cl. 644 (2012).

⁶⁹*J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 89 P.3d 1009 (2004); *In re Boston Shipyard Corp.*, 886 F.2d 451, 35 Cont. Cas. Fed. (CCH) P 75728 (1st Cir. 1989); *Scheck Mechanical Corp. v. Borden, Inc.*, 186 F. Supp. 2d 724 (W.D. Ky. 2001); *Keeter Trading Co., Inc. v. U.S.*, 85 Fed. Cl. 613 (2009), dismissed, 333 Fed. Appx. 511 (Fed. Cir. 2009); see also *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wash. App. 86, 615 P.2d 1332 (Div. 2 1980); *Schwartz v. Shelby Const. Co.*, 338 S.W.2d 781 (Mo. 1960). Courts will utilize other similar legal fictions to describe and accomplish the same thing: “recission,” “quantum meruit,” “substantial deviation,” “nullity.” See, e.g., *ThermoCor, Inc. v. U.S.*, 35 Fed. Cl. 480, 40 Cont. Cas. Fed. (CCH) P 76955 (1996); *Randolph Const. Co. v. Kings East Corp.*, 165 Conn. 269, 334 A.2d 464 (1973).

6. The claim maybe subject to defenses such as sovereign immunity.⁷⁰

D. Practicalities of Cardinal Change

Common sense should not be abandoned in determining what set of facts crosses the line between change and cardinal change. If an owner hired a contractor to excavate the footprint of a building in Minneapolis, and later determined that the footprint should be expanded to accommodate a change in the building's shape or height, then it seems readily apparent that the change is within the general scope of the parties' original contract.⁷¹ If the owner decided to move the location of the building to Seattle, Washington, however, it's safe to conclude that the contractor could refuse to perform the work on the basis that the change in location constitutes a cardinal change. Would moving across the street result in a cardinal change? Would it matter that across the street moves the footprint of the building to within a matter of inches from the bank of the Mississippi River?

It is not change, *per se*, that crosses the line. It is the impact of the change to the contractor's reasonable expectation of performance that makes the difference. And just as the facts of each case vary, the implication of change and how it affects performance varies. The common sense questions that delineate the distinction include: (1) How is the contractor's performance made more difficult? (2) What is the practical nature of the disruption caused by the change? (3) What is the consequence to cost and time?

In *Wunderlich Contracting Co. v. United States*,⁷² the contractor agreed to construct a 500 bed hospital for the Veteran's Administration in Salt Lake City, Utah. The contract time was approximately a year and a half. The contractor was on the job for nearly a year beyond the planned contract time. The government did not assess liquidated damages against the contractor, but nor did it agree to equitably adjust the contract price to compensate the contractor for the cost of the delay. Over the course of the job, the VA issued more than 6,000 changes in the project, affecting the construction of walls, ceilings, doors and structural components of the building. The contractor complained that the many changes, in conjunction with poorly-detailed construction documents, effected a "cardinal change" to the

⁷⁰Bruner & O'Connor on Construction Law § 4:13 at pp. 527 to 528.

⁷¹See 2 Construction and Design Law ch. 15 § 14.3b.5d (Michie 1994).

⁷²*Wunderlich Contracting Co. v. U. S.*, 173 Ct. Cl. 180, 351 F.2d 956 (1965).

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underlying contract. The contractor argued it was legally entitled to a *quantum meruit* increase in the cost of the work, regardless of the conditions of the contract.

The court rejected the argument, stating that the contractor had been fairly compensated for all the changes. In addition, it reasoned that notwithstanding the number of changes, the project was not markedly dissimilar from what the contractor agreed to construct in the first place:

In this case, the changes did not materially alter the nature of the bargain . . . Plaintiff contracted to build a . . . hospital . . . and that is exactly what it built. The hospital, when it was completed, was in the same location, looked the same, had the same number of rooms and floors and the same facilities as the one shown on the original plans and specifications. Apart from the substitution of materials, it differed not at all from the building that had been contemplated when the contract was awarded.⁷³

The court of appeals reasoned that the changes, amounting to 20% of the original contract price, were not so vast as to force the conclusion that the project was abandoned. Indeed, the court questioned the contractor's calculation of the actual cost of the changes, criticizing the contractor for failing to discount the additional costs caused by acts and conditions unrelated to the passage of time. *Wunderlich* stands for the proposition that the sheer number of changes alone is not outcome determinative of the issue.

The contractor in *Wunderlich* failed to obtain relief related to the cost of time because it failed to demonstrate that the nature of the changes had effectuated a radical change in the original project.⁷⁴ Construction lawyers take note. It's the story behind the numbers that makes the difference. If the contractor cannot demonstrate that the facts paint a "profoundly,"⁷⁵ "fundamentally,"⁷⁶ "drastically"⁷⁷ or "substantially"⁷⁸ altered canvas from

⁷³351 F.2d at 966 (*quoting* *Aragona Const. Co., Inc. v. U. S.*, 165 Ct. Cl. 382, 391, 1964 WL 8634 (1964)).

⁷⁴*See also* *Airprep Technology, Inc. v. U.S.*, 30 Fed. Cl. 488, 39 Cont. Cas. Fed. (CCH) P 76634 (1994); *Bromley Contracting Co., Inc. v. U.S.*, 15 Cl. Ct. 100, 34 Cont. Cas. Fed. (CCH) P 75515, 1988 WL 62112 (1988).

⁷⁵*See* *Allied Materials & Equipment Co., Inc. v. U. S.*, 215 Ct. Cl. 406, 569 F.2d 562, 564, 24 Cont. Cas. Fed. (CCH) P 82045 (1978).

⁷⁶*See* *Air-A-Plane Corp. v. U. S.*, 187 Ct. Cl. 269, 408 F.2d 1030, 1033 (1969).

⁷⁷*See* *Luria Bros. & Co. v. U. S.*, 177 Ct. Cl. 676, 369 F.2d 701, 707 (1966).

⁷⁸*See* *Rudd v. Anderson*, 153 Ind. App. 11, 285 N.E.2d 836, 840 (1972).

that denoted in the original plans and specifications, its claim will likely fail.

In *Air-A-Plane Corp v. United States*,⁷⁹ the contractor entered into a fixed-price contract to manufacture and supply to the Army Chemical Corps over 1,100 smoke generators. After the award, the government commenced making changes to the design of the generators. Over a thousand changes were ordered by the owner, many early in the manufacturing process that hindered the production of the generators. Indeed, the owner's re-design required the contractor to stall ordering required materials, effectively suspending commencement of the contract and ultimately transforming the contract into a constructive design-build contract to make up for the failure of the government to produce required front end documents. Failing to obtain relief from the Contracting Officer, the contractor sought an equitable adjustment in the contract price from the Armed Services Board of Contract Appeals based on the numerous ordered changes.

The ASBCA confirmed that changes were numerous and caused an increase in the cost of performing the work. However, the Board denied the request for equitable relief. On appeal to the United States Court of Claims, the contractor argued, among other things, that the number and nature of the changes constituted a cardinal change from the original contract. The court accepted the record below as producing substantial support for concluding that the contractor was entitled to an equitable adjustment. However, because the contractor's amended petition seeking a finding of abandonment was not "tried" below, the court remanded the case to the trial court to rule on the issue of cardinal change. Indeed, it remanded the matter with these specific instructions:

[T]he parties should offer evidence on and the commissioner should find (so far as practicable) the number of changes, the number of parts of the smoke generator, the parts changed and those left unchanged, the effect of the changes on the unchanged parts, the character of the changes, the timing of the changes, and the extent of the engineering, research, and development plaintiff had to do.⁸⁰

A change in the conditions of the job site can alter the general scope of the undertaking. Indeed, one change—depending on the havoc it wreaks—can give rise to a permissible abandonment of the original contract. For example, in *Edward R. Marden Corp. v.*

⁷⁹ *Air-A-Plane Corp. v. U. S.*, 187 Ct. Cl. 269, 408 F.2d 1030 (1969).

⁸⁰ 408 F.2d at 1037.

United States,⁸¹ the one change was a design specification that sequenced the construction of tie-rods and shoring for buttresses prior to the erection and release of arches that rested on the buttresses. Unfortunately, the design change was made after the structure had already collapsed; that is, after it was discovered that the specifications did not account for the horizontal forces of the arches upon erection and release upon the buttresses. The contractor had installed three of the 12 arches under the watchful eye of the government's inspector. The specifications did not call for the contractor to sequence the installation of tie-rods prior to dropping the arches on the buttresses. Nor did the specifications call for shoring of the buttresses. Indeed, the designer envisioned that the arches would be installed just as the contractor had positioned the first three.

Even after the buttresses showed signs of stress after the first three arches were dropped, the government's inspector instructed the contractor to continue to proceed as it had been performing the work. During the erection of the fourth arch the entire structure collapsed, destroying all the work and killing two men. After the collapse, the specifications were changed to sequence the installation of the tie-rods prior to dropping the arches. In addition, the specifications now called out shoring of the buttresses.

After the collapse, the Contracting Officer ordered the contractor to clean up the mess and finish performing the contract. Because of the collapse, the cost of performance now doubled the original contract amount. When the contractor asked for an equitable adjustment to account for the extra costs, the Contracting Officer refused, arguing that defective construction was the cause of the collapse. The ASBCA agreed that the contractor was not entitled to relief. On appeal, the Court of Claims ruled that the defective specification and the havoc it wreaked upon the underlying project was so severe as to alter the very nature of the job.

The court reasoned that "where drastic consequences follow from defective specifications, we have held that the change was not in the contract, *i.e.*, that it was a cardinal change."⁸² Likewise, in *Luria Bros. & Co. v. United States*,⁸³ the United States Court of Claims ruled that a defective foundation specification that forced the contractor to place footings twice as deep as originally

⁸¹Edward R. Marden Corp. v. U. S., 194 Ct. Cl. 799, 442 F.2d 364 (1971).

⁸²442 F.2d at 369.

⁸³*Luria Bros. & Co. v. U. S.*, 177 Ct. Cl. 676, 369 F.2d 701 (1966).

contracted constituted a cardinal change and rendered the government in breach of the original contract.⁸⁴

III. Conclusion

Delay is the hiss of asps in the rain. When it's camouflaged with changes, the probable outcome is like bad news from the clinic. Nothing good will come from it. Contractors should, where possible, take care to protect themselves from the consequence of time dressed as delay and change. Through contract negotiation, project management, strict adherence to notice and submission requirements and prompt dispute resolution, the contractor may survive the effects of delays and changes in the construction project. By contrast, those who don't act to take control of these risks will find themselves huddled with the rest of the unprepared, nosing for nourishment from the narrow trough.

⁸⁴369 F.2d at 707. In *General Contracting & Const. Co. v. U.S.*, 84 Ct. Cl. 570, 1937 WL 3292 (1937), the court held that "deducting" one item from a contract can result in a cardinal change. There the item deducted was one out of several buildings that the contractor had agreed to construct.