

# For the Client: A Contractual 'Safe Harbor' for Change Order Costs

BY RICHARD B. GARBER



An earlier "For the Client" column explored the need to manage the frequency and severity of change order claims and identified six key strategies to accomplish that objective (see *Engineering Times*, January 2004). This column addresses the use of a so-called "safe harbor" provision in the Owner-Engineer Agreement to establish a contractually acceptable threshold for construction change order costs.

Experienced project owners know that nearly all projects require change orders. After all, no set of plans can be expected to be absolutely perfect and complete. In fact, certain modes of project delivery such as "fast track," necessarily rely on change orders to alter and fine-tune the design as the work progresses, and certain types of projects, such as facility renovations, require change orders to adapt the construction effort to existing conditions that may not be exposed or otherwise knowable until the commencement of the work. And, as projects increase in complexity and duration, so does the need for change orders to respond to changing requirements as well as any imprecision, inaccuracies, ambiguities, errors, or omissions in the original design.

Many project owners set aside a contingency allowance in their construction budgets, typically in the range of 2%–5% as indicated by the project's complexity and other characteristics, to address likely change order costs. While change order costs within such a range do not automatically mean that the engineer's design and construction phase services satisfied the applicable standard of care, as a practical matter, the energy spent by an owner in attempting to recover all change order costs, including those within a reasonable contingency allowance, can be thoroughly counterproductive to the owner-engineer relationship. To avoid this problem, a safe harbor provision can be included in the Owner-Engineer Agreement by which the owner agrees not to pursue legal action

against the engineer for change order costs that fall within the agreed-to percentage of construction costs.

Since 1992, the Engineer Joint Contract Documents Committee has included a safe harbor provision as an option in its standard Owner-Engineer agreement forms. The provision is found in Exhibit I, Allocation of Risks, to Document E-500-2002, EJCDC's Standard Form of Agreement Between Owner and Engineer for Professional Services, available from the National Society of Professional Engineers at [www.nspe.org](http://www.nspe.org).

The EJCDC safe harbor provision includes the following:

- A recognition by the project owner that certain change orders may be required to be issued as the result, in whole or in part, of the imprecision, incompleteness, errors, omissions, ambiguities, or inconsistencies in the design documentation furnished by the engineer.
- An agreement by the project owner not to sue or bring a claim directly or indirectly against the engineer on the basis of professional negligence, breach of contract, or otherwise with respect to the costs of approved change orders unless the costs of such exceed a negotiated percentage of the construction cost.
- A contractual reaffirmation that any responsibility of the engineer for the costs of change orders in excess of the negotiated aggregate percentage is to be determined on the basis of applicable contractual obligations and professional liability standards and that nothing in the contract changes the professional liability standard for determining if the engineer is liable in excess of the percentage.
- The aggregate amount does not include costs that the project owner would have incurred if the work covered by the change order had been included originally.

If a safe harbor provision other than the EJCDC provision is used, be sure that

any responsibility for costs above the contingency will be determined on the basis of applicable contractual obligations and professional liability standards. Professional liability insurance is not a funding pool from which the engineer or the project owner can draw at their discretion. For professional liability insurance to respond to a contractual obligation, the legal liability of the design firm for negligence must be established. The project owner cannot simply state, as some have tried to do, that everything over the limit is the engineer's responsibility.

Also, a poorly written safe harbor provision may be construed to establish an express warranty. All express warranties and guarantees are excluded from professional liability insurance coverage. Therefore, the professional liability insurer could neither defend any claim by a project owner based on an express warranty nor pay on behalf of the insured engineer based on a breach of such a warranty.

As is often the case, if EJCDC documents are not used, for whatever reason, both parties to the agreement can benefit by comparing a proposed provision to the time-tested EJCDC provision. A well-drafted safe harbor for change order costs in the Owner-Engineer Agreement can allocate risk equitably while reducing the likelihood of counterproductive disputes during construction.

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