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The Risky Business of Changing Construction Contract Documents: Seven Deadly Words That Architects Should Avoid on Shop Drawings or RFIs

The stickiest area of architects' design liability often occurs during the construction phase, and one of our least understood risks lies in the tendency for unauthorized design changes to creep into shop drawings and Requests For Information, RFIs. The key point is, the A/E and the contractor by themselves simply CANNOT alter the Contract Between Owner and Contractor, i.e., cannot change the Contract Price or the Contract Time, without the Owner's written signature. Nor can we even change our own design during construction by unilaterally altering the drawings or specs (which are, after all, part of the Contract Documents and for which we are also professionally liable) without issuing a Change Order, a CCD or a limited ASI. These formal, properly executed change instruments *do* then become Contract Documents that the contractor must adhere to.

However, a note on a shop drawing or on an RFI cannot legally change *any* contractual requirement or alter the construction cost or time. Specifically, **on all non-Contract Documents** (e.g., e-mails, shop drawings, phone calls, RFIs, letters, verbal conversations, etc.) we should avoid language that even implies we are instructing the contractor to make changes. If you ever find yourself using any of these **Seven Deadly 'trigger' Words** on a shop drawing or RFI, you are already neck-deep in unauthorized change territory: ***"revise", "change", "modify", "move", "approve", "add" or "delete".*** A subtle *substitution* in the guise of a shop drawing typically does not benefit us or the Owner. Downgrades can let contractors profit at our client's expense (the objective of some RFIs, after all, is to create a change order claim). And, if we make undocumented design revisions or make unauthorized instructions to the contractor, we are also subjecting our design firm to unnecessary, often uninsurable, risk. We simply have to firmly but gently stop complying every time a contractor asks us to allow them to change something or asks for *"the A/E to provide…or A/E to verify…"* It is Ok to just say no to inappropriate requests. Really. Just be sure that the design in question is correct.

There are right (safe) ways to change the Contract Documents, and wrong (risk laden for the A/E) ways to accidentally wander into change. This means we need to teach our staff, who in turn, needs to educate our clients and the contractors that **non-contract documents CANNOT change any part of the Contract between the Owner and the Contractor.** Only a written document with the signatures of the A/E *and* the Owner (resulting in a Change Order that also, in the end, bears the Contractor's signature) can do that.

In fact, the ONLY Contract Change Document that we can unilaterally issue with just our authorized Contract Administrator's signature is the ASI, Architect's Supplemental Instructions, and we can issue that ONLY if it involves a *"minor design modification that does not affect Contract Price or Time"*. For example, an ASI can only affect strictly no-cost design issues like dimensions, connections, aesthetics, etc.

As more and more projects involve alternative delivery methods like fast-track, Design-Build or CM/GMP, our clients sometimes insist on using (or, more accurately, misusing or abusing) the RFI and/or ASI as a vehicle to accomplish various changes to the Contract Documents on the fly. This can obviously be a dangerous practice. However, no matter what term we may write at the top *('RFI', 'Substitution Application', 'shop drawing' or 'ASI')*, as long as we get the Owner's signature on it, it can become a de facto, "Construction Change Directive". But, any format must eventually result in a signed formal "Change Order", regardless. The problem is, not enough of us or our clients are familiar with what a CCD even is, nor how it can be a preferable way to expeditiously require change by the contractor under the A201 General Conditions (remember, the GC's signature is desirable but not necessary for a CCD's 'directive' to be binding). We have work to do in educating everyone on the advantages and mechanics of that option.

Whenever we find ourselves confronted on an RFI or shop drawing by one of the Seven Deadly Words above, we need to add this phrase: *"before this response is official, it must be confirmed in an upcoming Change Document",* e.g., an ASI, CCD, Owner-approved Substitution Application and/or Change Order. Then, we must be sure to follow through with the Contract Administrator (or PM or PA when acting in the CA capacity on smaller projects), who signs and issues all Contract Document changes—but ,even then, only after he/she has evaluated the potential contractual, schedule and cost impact risks, potential interdisciplinary conflict risks, and most of all, after coordinating with the Owner and the Contractor.

In the end, the key to properly making each and every Contract Change is getting the Owner's signature on the appropriate document, not just ours or the contractor's. Otherwise, we are taking on liability we didn't originally have per contract, and we are exposing our client to lesser quality/additional costs while exposing our design firm to claims. It can all be avoided if we become more alert to the subtle hazards of unauthorized changes and resolve to treat the Contract Change process as the serious business that it truly is.