



Construction Law and Insurance Recovery Experts

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

Construction & Coverage Law Seasonal Newsletter

Welcome to Brouse McDowell's inaugural Construction & Coverage Law newsletter, an initiative of our Construction Law and Insurance Recovery Group. We anticipate this newsletter to be a seasonal, weekly update to our clients and business partners coinciding with the beginning of construction season. This is a forum where our construction and insurance recovery experts will discuss legal issues and best practices to keep at the forefront of your mind as projects get into full swing. You should receive one update per week running through at least May 2016. At the end of each post, you will see an invitation to connect with us through our Lunch & Learn Seminars that will feature presentations from our Construction Law and Insurance Recovery Group attorneys. We hope you will engage with us as we kick off the beginning of a busy and productive construction season. Our first post is below.

Documenting Changes in Your Project

The contract has been signed. The work has commenced. Everything is coming together when suddenly an event threatens to bring your project to a halt. Whatever the cause, the parties affected must appropriately document and agree on the proper path forward, usually in the form of a modification to the signed contract. Time is of the essence, and what follows are some of the basic concepts project owners, contractors, and subcontractors should consider to minimize the risk that changes to some aspect of the project will delay completion, affect the parties' expectations on payment, and ultimately lead to costly and disruptive disputes.

1. Review your Contract's Changes Requirements

A well-written construction contract or subcontract will specify the method by which a change to the project must occur. The preferred method is that all changes, extras, and deviations must be documented in writing and must be signed by the appropriate person(s).

2. Review your Contract's Notice Requirements

It is not enough to understand that a written agreement is needed to change the contract. The parties must also understand 'the who, what, why, when and where' of the contract's notice requirements. If a contractor encounters a differing site condition, for example, it is typically obligated to provide notice to the owner before conditions are disturbed so the owner can investigate. And, just as typically, the contractor may waive its rights to payment for failing to provide this notice.

3. Document the Cause

If you are a contractor requesting additional compensation for work outside the original contract, be sure to document the conditions that are causing the additional or changed work to demonstrate entitlement. The contract will provide what is required.

4. Get the Approved Change and Pricing in Writing

"It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner or employer." *Foster Wheeler Enviresponse v. Franklin Cnty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 360, 1997-Ohio-202, 678 N.E.2d 519 (1997). In other words, the failure to comply with the notice requirements and obtain a signed change order before proceeding with extra work frequently means you will not be paid for this work.

5. Make Sure the Change Order Covers Everything

"Where the parties to a construction contract agree to a change order which they intend to provide complete compensation for a given change in the project, the party being compensated by the change order will be contractually foreclosed from seeking additional compensation related to that same project change." *Rabin v. Anthony Allega Cement Contractor, Inc.*, Franklin App. Nos. 00AP-1200 & 00AP-1241, 2001-Ohio-4057.





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In other words, if your negotiated changes did not make their way into the written change order, it's as if they never happened. Custom change order forms often include language directly on point.

Be sure that the change order addresses all of the cost, scope and time consequences from the event:

- a. **Changes to the project schedule.** These changes are frequently the result of other factors that may also require a change order, and can result from weather considerations, financial issues, site conditions, material availability, or alterations to the project scope.
- b. **Scope of work changes.** The owner may elect to reduce expand upon the work being performed, which may in turn affect the anticipated work of the general contractor and one or more of its subcontractors. Additions or deletions to the scope of work should be documented in writing.
- c. **Pricing.** Changes in the scope of work or construction schedule may affect pricing, as can changes in supplies, suppliers, or subcontractors. This is almost always the first issue considered when it comes to changed work, and contractors often overlook the need to add time to the schedule or to properly incorporate new designs into the scope of work.

6. Document and Enforce Who Has Authority to Speak on Your Behalf.

Often, the contract will require the project owner's authorization to effect any major change in the contract, but permit the architect or engineer to agree on minor deviations. Regardless, it is important for all parties to clearly define who may speak on their behalf, as common law agency principles can sometimes result in you being bound by an act taken by someone with the apparent authority to act on your behalf.

7. Maintain an Open and Productive Line of Communication.

It should go without saying, but a productive and open line of communication between all parties is often essential to maintaining a productive project environment. Frequent disputes and a failure to communicate will engender distrust and increase the difficulty in recognizing and effectuating what may be vital changes to the project without damaging the project schedule. It is also important to maintain a formal relationship. Often, a contractor will proceed with extra work on the verbal authorization of a trusted project participant. Where this is contrary to the contract's terms, problems will follow.

“Lunch and Learn” Opportunities. Brouse McDowell collaborates with its clients and business partners to provide unique opportunities for in-person seminars.

Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a “menu” of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique “webinar” service.

The seminar and lunch are on us! Please contact Amanda Leffler (aleffler@brouse.com) or Jim Dixon (jdixon@brouse.com) to get on the schedule or for more information.