

## **ANSWER TO QUESTION OF THE MONTH: WHAT IS A CONSTRUCTIVE CHANGE ORDER?**

Changes typically fall into two categories: “directed” and “constructive.” A directed change is self-explanatory. It is a directive by the Owner, or his authorized agent, to make a change to the contract. This is commonly done with a work change directive, a change order, or a letter. A constructive change, however, is more obscure and not so well understood in the industry. A constructive change occurs when an action or inaction of the Owner, or its authorized agent, effectively changes the requirements of the contract. The effect is the same as if a directive was issued, but it was not. Examples of constructive changes include: failure to inspect; failure to give direction as required by the contract-especially when the project cannot be constructed as indicated in the plans, due to defects in the design; overzealous inspection; and erroneous interpretation of the contract, which results in increased work, cost, or time.

With a constructive change, it is very important for the Contractor to notify the Owner that he considers that a change has taken place. This gives the Owner the opportunity to address or mitigate the situation. The changes clause of the Federal Government is one of the few specifications that specifically address the constructive change concept. Nevertheless, the constructive change is generally accepted by the industry and courts as a part of a Changes

Clause, whether stated or not. The concept is further supported by the implied contract obligations of the Owner not to delay, hinder or interfere with the Contractors performance. The pertinent language of the Federal Government’s Changes Clause which addresses constructive changes is as follows:

### 52.243-4 Changes

“(b) Any other written or oral order (which, as used in the paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided*, that the Contractor gives the Contracting Officer written notice stating (1) The date, circumstances, and source of the order and (2) That the contractor regards the order as a change order.” “(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment....”