REICHSTEIN LAW

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Federal Procurement Changes Clause (unpublished)

Changes

Introduction

The changes clause found in almost every construction contract serves the essential purpose of allowing the owner to alter the work during the performance phase of the contract to incorporate technological improvements, or newly determined aesthetic and functional desires. In government contracting, the Changes clause was one of the first disputes litigated in the Court of Claims. *McCord v. United States*, 9 Ct. Cl. 155 (1873).

In addition to this primary purpose, the changes clause also serves as a mechanism for the contractor to suggest and implement better or more efficient methods to perform the work. The clause also provides a means to draw a distinction between work which is part of the original contract compared with work which is beyond the scope of the original bargain. The difference can be significant. In government contracting, changes which are considered part of the original bargain can be incorporated into the same procurement. Beyond scope changes require either new formal advertising for bids or at the minimum, competitive re-negotiation procedures. Public funds which have been earmarked for the acquisition can also be used for ordinary changes, while beyond scope changes may not be paid for out of current funding.

The changes clause is also the primary contract justification for contractor claims for additional compensation. The particular nature of construction, perhaps more than any other form of contracting, involves changes which must be incorporated immediately during the course of performance, and dovetailed into trade scheduling, material fabrication and delivery. As a practical consequence, some changes are written and priced, some are written and not priced, and still other changes, which are to be the focus of this chapter, are neither written nor priced. Contractor claims for additional compensation may creep into the scheduling by reason of cumulative delays or disruption. In such cases, it is said that the owner has "constructively" changed the cost of performance.

In federal government construction contracting, changes are defined under Standard 52.243, (formerly Standard Form 23A, re-written in 1968), re-codified 1987:

52.243-4 – Changes.

As prescribed in 43.205(d), insert the following clause: The 30-day period may be varied according to agency procedures.

Changes (Aug 1987)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change

order, make changes in the work within the general scope of the contract, including changes --

(1) In the specifications (including drawings and designs);
(2) In the method or manner of performance of the work;
(3) In the Government-furnished facilities, equipment, materials, services, or site; or
(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this 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.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after

(1) receipt of a written change order under paragraph (a) of this clause or

(2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of Clause)

Note that the government contract changes clause parallels almost every civilian construction contract in that notice to the owner (or contracting officer, as the case may be) is always an essential precondition for payment.

It is universally understood that when an owner or above-tier contractor orders a change to the work, the performance of that change entitles the contractor to an equitable adjustment in the contract price. This situation gives rise to an inherent tension is that when a unilateral change order is issued, the issuer is bound to pay for the costs incurred without limitation as to what those costs might be. Hence it is often in the owner's interest to negotiate in advance the cost of change orders. By the same token, it is generally accepted that when an owner asks for cost and pricing data, engineering change proposals or like data, and then decides not to proceed with the change, the contractor is not entitled to compensation for the cost of responding to the request. In such a case, the relationship between the owner and contractor is exactly the same as in the pre-contract stage of the principle contract where there is merely offer and acceptance. Absent a contract clause to the contractor, a contractor could probably refuse to respond to the pricing request since it was not obligated to make an offer in the first place.

Changes in Writing

Typically, contraction contracts provide that changes are to be in writing. The Federal Acquisition Regulation on Changes (above), requires the Contracting Officer to provide a written order designated to be a change, further stating that no other procedure will result in an equitable adjustment of the contract. AIA Document A201, General Conditions of the Contract for Construction, identifies a Change Order as a written instrument prepared by the Architect and signed by the owner, architect and contractor. (See paragraph 7.2.1 of Article 7, Changes In The Work). A Construction Directive is also identified as a written document, except in the case of a Directive, the contractor has not acquiesced to the payment amount or the method of computing the additional pricing.

Obviously at the point in time when an owner desires a change to the work, it may be impractical or impossible to price the change. Frequently such changes are performed during the construction phase and priced later. Yet the absence of cost and pricing data is frequently cites as a reason that written changes were not forthcoming, not withstanding that the modification to the agreement was fully performed.

Notwithstanding that the construction contract calls for changes to be in writing, the owner may be precluded from denying payment on that grounds alone. If by words or actions the owner—or above-tier contractor—orders changes, the effect is merely an oral

modification to a written agreement. In *A.W. Wendell & Sons, Inc. v. Qazi*[1] a home owner contracted with Wendell and sons to build a single family home in an exclusive area of Oak Brook, Illinois known as the Midwest Club. The contract price of the home was $881,967. When the Qazis prepared to move into the home in August of 1999, they discovered that portions of the marble floor were cracked. Qazi went to court seeking a declarative judgment that he was not obligated to make any further progress payments until the cracked floor was fixed. He also refused to sign any more change orders. At trial Wendell was awarded $152,158 for extras, the court reasoning that the contractor met its burden of proving by "clear and convincing evidence" that the contracted items were for extra work; that the owner ordered them, agreed to pay for them, and waived the necessity of a written change order.

> Section 21.1 of the construction contract requires the owner to authorize all changes to the original contract by signing a written "change order". Mr. Wendell admitted that change orders 12 through 15, which increased the contract sum by $50,174.82, were not signed or approved in writing by the Qazis. However, Mr. Wendell testified that Dr. Qazi refused to sign any change orders after discovering the marble flooring had cracked.

Under Illinois law, a written contract may be modified for oral agreement even though the terms of the contract forbid verbal modification. The court in *Wendell* observed:

> Evidence concerning any prior written or oral agreement concerning the content of the written contract is inadmissible. (Magnus v. Lutheran General Health Care System (1992), 235 Ill. App.3d 173, 182.) However, under Illinois law, parties to a written contract may alter or modify its terms by a subsequent oral agreement, even though the terms of the contract preclude oral modification. (Berg & Associates, 221 Ill. App.3d at 535; Falcon, Ltd. v. Corr's Natural Beverages, Inc. (1987), 165 Ill. App.3d 815, 821, later proceeding (1988), 173 Ill. App.3d 291; Estate of Kern v. Handelsman (1983), 115 Ill. App.3d 789, appeal after remand sub nom. In re Estate of Kern (1986), 142 Ill. App.3d 506,

A result similar to the *Wendell* case was reached in *R&R Construction Co. v. Junior College District No. 529.*[2]

The Scope of the Contract

In order for a change to be obligatory on the part of the contractor, it must meet a two part test: first, the change must be within the general scope of the contract, and second, it must be one of the types of changes described in the clause.

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[1] 254 Ill. App. 3d 97 (1993)
[2] 55 Ill. App. 3d 115 (1977)

The phrase "within the general scope of the contract" has become something of a term of art, and as a consequence, different courts have interpreted it differently. Consider two extreme examples: first, a specification that requires 12 ceiling light fixtures in each room. The owner changes the requirement to 14 fixtures. Practically any court would view such a change as within the general scope of the contract. But compare a four story building that is to be changed into a five story building. Such a change might well fall outside the scope of the agreement, and thus be non-obligatory on the part of the contractor. The contractor could refuse to perform such a change order. There are limits to how drastically an owner may modify the agreement with a builder. The addition of separate buildings is not permitted.[3] The deletion of individual buildings is also outside the scope of the contract. *General Contracting & Construction v. United States.*[4]

In the *Cleveland Wrecking*[5] case the court held that minor changes by the owner must be accepted as modifications, but a change that constitutes a radical or substantial departure from the original contract goes beyond the definition of a "modification." In *Cleveland*, even though the AIA form contract terms and conditions were included by reference, the changed demolition work constituted a radical change to the scope of work that justified the contractor's refusal to proceed without a written change order.

> Although case law does support the proposition that minor changes by the owner may be accepted as modifications, it also states that for a modification there can be no material change so as to constitute a radical or substantial departure from the original contract. (See *Bulley & Andrews, Inc. v. Symons Corp.* (1975), 25 Ill. App.3d 696, 701, 323 N.E.2d 806, 810.) In the case at bar, C&E contends that Cleveland's contract was not substantially changed by the decision at issue and in fact argues at one point that Cleveland's work was actually decreased because it had less to demolish. This reasoning is inaccurate.

Other cases have held that defective specifications can rise to the level of a cardinal change. A cardinal change is a remedy for breach of contract. When the fundamental agreement between the parties at the time of contract formation is so drastically altered by major changes or cumulative changes that taken together amount to drastic consequences, the contract is said to have been breached by the party who was responsible for providing the specifications.

In *Edward R. Marden Corp. v. United States*[6], the Navy awarded Marden a contract to build an aircraft hanger. The hanger was to be constructed with 12 precast concrete

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[3] 15 Comp. Gen. 573 (1935)
[4] 84 Ct. Cl. 570 (1937)
[5] 216 Ill. App. 3d, 279 (1991)
[6] 194 Ct. Cl. 799, 442 F.2d 364 (1971)

arches. During assembly of the fourth arch, the structure collapsed, killing two workers and injuring others. Marden alleged that the specifications were defective in that they failed to instruct the contractor to install tie rods before releasing the arches to the buttresses. The government ordered Marden to rebuild the fallen hanger at a cost of almost twice the original contract amount. Both the contracting officer and the Armed Service Board of Contract Appeals denied Martin's claim for cost re-imbursement, after, which, Marden brought suit claiming breach of contract. The court agreed, saying that by any standard, the events which followed materially altered the nature of the contractor's undertaking.

> The cardinal change doctrine is not a rigid one. Its purpose is to provide a breach remedy for contractors who are directed by the Government to perform work which is not within the general scope of the contract. In other words, a cardinal change is one which, because it fundamentally alters the contractual undertaking of the contractor, is not comprehended by the normal Changes clause.

It is interesting to note that the court sided with Marden, and affirmed that a cardinal change had taken place which placed the government in breach of contract. Yet the aircraft hanger, when completed, was exactly the same building as was called for in the original specifications.

> Admittedly this case differs from the usual cardinal change case in at least one important respect. In the present case the reconstructed hangar was, presumably, the identical hangar called for in the original specifications. In other words, in directing reconstruction of the hangar, the Government did not alter the design or other physical characteristics of the structure. We do not view this as a crucial difference, however. Where a cardinal change is concerned, it is the entire undertaking of the contractor, rather than the product, to which we look.

A determination of whether changes go beyond the general scope of the contract can usually be made by comparing the total work performed to that which was called for in the original contract. If the work performed was fairly within the contemplation of the parties at the beginning of the contract, then the changes clause will usually control. By another method, if the function of the work is generally the same as that called for in the original contract, it will also fall within the general scope. Each case needs to be decided on its individual merits, giving consideration to the magnitude of the changes and also the quantity of changes to determine the cumulative effect upon the project. As said in *Marden*, there is no easy or automatic formula for determining when a change is beyond the scope of the contract.

No discussion of the cardinal change rule would be complete without contemplating the tragic disappearance of the Navy nuclear submarine *Thresher*. *General Dynamics v. United States*.[7]

> In April 1963 the *U.S.S. Thresher,* a Class 593 submarine, was lost at sea with its entire crew. Immediate naval inquiry into the possible causes of the catastrophe prompted accelerated comprehensive safety changes in specifications for all four submarines, as well as for several others in progress at Groton.

In 1960 the Navy awarded General Dynamics a contract for the construction of three nuclear attack submarines. Two similar contracts were awarded to Bethlehem Steel. General Dynamics purchased Bethlehem and thus took over the work for all the submarines. During this time period, the first submarine, the *Thresher*, was lost at sea and the Navy began a formidable and complete review of the designs for these ships. The review resulted in a half a million change orders and a three year delay in construction of the follow-on ships. General Dynamics opined that the cumulative effect of the change orders was a cardinal change to the contract and thus a breach of the contract by the Navy.

> The *Thresher* loss presented the contracting officer with a national calamity, urgently demanding a rigorous search for all possible submarine defects and immediate measures for their correction. That the reasonable and anticipated use of the changes article includes this kind of response to this kind of crisis, is established by ancient and venerable authority.

The court searched back to a Civil War case, *McCord v. United States* (1873) which concerned construction of the Monitor, one of the first armored ships.

> The submarines here involved, like the monitors, carried the technology of their time to its outer limits; they were when they worked formidable implements of war; and submarines, like monitors have been often also dangerous to their own crews, producing traumatic disasters and crash programs of correction. The very survival of the nation might have been thought to be involved in the prompt correction of known design defects.

A cardinal change is a breach. It occurs when change orders so dramatically impact construction of the project that the contractor is required to perform duties materially different from those originally bargained for. The case of the *Thresher* is consistent with this definition because those who contact for nuclear submarines must take into consideration events which are likely to occur in complex weapons systems. Both sides understand that the work is intended to push the envelope beyond the current state of technology.

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[7] 585 F.2d 457 (1978)

Analysis of case law provides little in the way of a bright line test. A cardinal change is by definition a change, or a cumulative series of changes, which places the work beyond the scope of the contract. One good analysis is offered at *Allied Materials v. United States*[8] where the court said:

> Under established case law, a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Remarkably, the court in *Allied Materials* extended the measure of damages for a cardinal change to include loss of profits. The opinion is remarkable because in the ordinary course of government contracting, recovery for loss of profits is never sanctioned. Neither the termination for convenience clause nor the termination for default clause remotely permits recovery for loss of profits on work which was in fact not accomplished. Here, however, the court opinied that in a breach of contract action (cardinal change), the contractor was not limited to recovery within the limits of the contract terms and conditions.

> In *Marden, supra,* we specifically stated that the purpose of the cardinal change doctrine is "to provide a breach remedy for contractors who are directed by the government to perform work which is not within the general scope of the contract." We have certainly never intimated, however, that the contractor is limited to a suit for extra costs incurred in performing duties fundamentally outside of the scope of the contract, and we have never held that the applicability of this doctrine is in any way dependent on the nature of damages sought by the contractor. Although the typical case, thus far, has featured a plaintiff who undertook to perform despite the alteration of contractual obligations, this does not preclude a suit by a contractor who, for one reason or another, has not completed the contract. Undoubtedly, the cautious contractor might often proceed under the revised contract because of doubt whether he could invoke the cardinal change doctrine. But if he has been prevented from performing, as in any breach case, the award of anticipatory profits is an appropriate remedy. *See Carchia v. United States,* 486 F.2d 622, 625, 202 Ct.Cl. 723, 729 (1973); *General Builders Supply Co. v. United States,* 409 F.2d 246, 251, 187 Ct.Cl. 477, 485-86 (1969); *J.D. Hedin Construction Co. v. United States,* 408 F.2d 424, 431-32, 187 Ct.Cl. 45, 58-59 (1969).
> ...

[8] 569 F.2d 562 (1978)

> The existence of a cardinal change is principally a question of fact, requiring that each case be analyzed individually in light of the totality of circumstances.

In a private construction project, *State Farm v. Hyman*[9], a group of subcontractors alleged that the owner and its general contractor committed a series of faults including failure to co-ordinate the work, failing to respond to adverse site conditions, interfering with scheduling and staffing, making unreasonable demands, failing to give time extensions, etc. Some of the subcontractors sought reformation of the contract on the grounds that the collective impact of the grievances rose to the level of a cardinal change, thereby eliminating the contract. Because the appeal was decided on other grounds, the court never reached the question of cardinal change doctrine.

Change order doctrine flows from the willingness on the part of the owner and contractor to enter into an agreement. By contract, a cardinal change is outside the scope of the contract. The essential difference that when a builder asserts that a cardinal change has occurred, the he is asserting that the proper remedy falls outside the language contained in the contract; that the contract does not provide the remedy for which relief is sought.

Elements For Recovery on Change

It is well settled in Illinois that in order for a contractor to recover additional monies for a change order ("extras"), certain elements must be met: (i) the work must be beyond the original scope of the contract, (ii) the extras were ordered by the owner, (iii) the owner agreed to pay for the changes, (iv) the contractor did not gratuitously offer the extras, (v) the extras were not a result of the fault of the contractor. A discussion of this point appears in *Wilmette Partners v. Hamel*[10] :

> In *Watson Lumber Co. v. Guennewig* (1967), 79 Ill. App.2d 377, **390,** 226 N.E.2d 270, 276, this court reviewed Illinois law on the matter of extras and established the prerequisites for their recovery. To recover compensation on the ground that he performed extras, a contractor must make the following showings by clear and convincing evidence: (1) the work was outside the scope of his contract promises; (2) the extra work items were ordered by the owner; (3) the owner agreed to pay extra, either by his words or conduct; (4) the contractor did not furnish the extras as his voluntary act; and (5) the extra items were not rendered necessary by any fault of the contractor. Cases subsequent to *Guennewig* have followed its approach. *Wingler v. Niblack* (1978), 58 Ill. App.3d 287, 374 N.E.2d 252; *R & R Construction Co. v. Junior College District No. 529* (1977), 55 Ill. App.3d 115, 370 N.E.2d 599; *Watson Lumber Co. v. Mouser* (1975), 30 Ill. App.3d 100, 110, 333 N.E.2d 19; *Bulley & Andrews, Inc. v. Symons Corp.* (1975), 25 Ill. App.3d 696, 323 N.E.2d 806.

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[9] 306 Ill. App. 3d 874 (1999)
[10] 230 Ill. App. 3d, 248 (1992)

Another good discussion the elements necessary to prove a change order can be found in the case of *Berg & Assoc. v. Nelsen Steel and Wire Co.*[11] Berg entered into a verbal agreement to provide construction management serves to Nelsen on a development of condominiums on Hilton Head Island. Berg was not paid, and the lawsuit followed. One gets a clear notion of settled law in Illinois when multiple courts cite the same case presidents, as here, where both *Wilmette Partners* and *Berg* cite *R&R Construction v. Junior College* as authority for the elements to plead and prove a change order. The court in Berg observed:

> Nelsen claims that under Illinois law, in order to recover for extra work not provided for in the original agreement, Berg must prove that: "(a) the work was outside the scope of the contract premises; (b) the work was ordered by Nelsen; (c) Nelsen agreed to pay for the work by his words or conduct; (d) the work was not furnished by Berg as a voluntary act; and (e) the work was not rendered necessary by any default of Berg."
>
> Nelsen's statement is a correct statement of Illinois law on the question of extra work under a construction contract. The following are the essential elements a contractor must prove in order to recover additional compensation from an owner for extra work: (a) the work was outside the scope of his contract promises; (b) the extra items were ordered by the owner; (c) the owner agreed to pay extra, either by his words or conduct; (d) the extras were not furnished by the contractor as his voluntary act; and (e) the extra items were not rendered necessary by any fault of the contractor. (*R & R Construction Co. v. Junior College District No. 529* (1977), 55 Ill. App.3d 115, 118, 370 N.E.2d 599, 602; *Mayer Paving & Asphalt Co. v. Carl A. Morse, Inc.* (1977), 48 Ill. App.3d 73, 77, 365 N.E.2d 360, 363.) "The proof that the items are extra, that the defendant ordered it as such, agreed to pay for it, and waived the necessity of a written stipulation, must be by clear and convincing evidence." (*R & R Construction Co. v. Junior College District No. 529,* 55 Ill. App.3d at 118, 370 N.E.2d at 602.) A party sustains this burden whereby he shows that the extra work was requested and there is no evidence indicating that the work was necessitated by the party's fault or that the work was performed voluntarily. (*Delta Construction, Inc. v. Dressler* (1978), 64 Ill. App.3d 867, 381 N.E.2d 1023.) Further, even if a building contract provides for written modification only, an owner may be estopped to raise such issue or waive such provision if such a provision has been waived by

[11] 221 Ill. App. 3d, 526 (1991)

the actions or words of the parties. *Delta Construction, Inc. v. Dressler* (1978), 64 Ill. App.3d 867, 381 N.E.2d 1023; *Capital*

Delay is a Compensable Change

Perhaps no area of human endeavor is more closely dependant upon time than building construction. Construction is dependant upon scheduling, so much so, that when an owner, general contractor or subcontractor fails to perform within the scheduled time frame, a compensable delay occurs. An excellent discussion of the importance of scheduling appears in *Amp-Rite v. Wheaton Sanitary District*[12], where the contractor (Amp-Rite) alleged that the Sanitary District breached the contract in a number ways. First, that the lands upon which the work was to performed were not made available on the date promised; that the owner failed to keep the buildings in a state of forwardness such that the work could be performed; that the building flooded by direct or indirect negligence on the part of the owner; and finally , that the owner filed to co-ordinate the work of the other two prime contractors so as to keep the work progressing according to schedule.

First, it is imperative to see that Amp-Rite relied upon the construction schedule that was provided by the owner. Based on that schedule, the contractor knew that it had 14 months in which to perform the work effort. Installing the electrical conduit required that certain of the concrete be poured first, and equally important, that the project be built from west to east. Initially delays were encountered in pouring the concrete, framing walls, and installation of the sewer pipe. Early in the project, Amp-Rite estimated that it was already eight weeks behind schedule. When the contractor requested a schedule extension, the District replied that Amp-Rite's concerns were premature. Amp-Rite began working in numerous areas of the construction site, following along behind the concrete contractor, returning to the same portion to correct damages from construction traffic, and generally proceeding in the least efficient sequence. In spite of the inefficiencies, Amp-Rite kept workers on the site because there was always some work that could be accomplished.

The court clearly enunciated the standard of care and delineation of responsibility to organize the work saying:

> 1 In Illinois, it is settled that, in the absence of contractual provisions to the contrary, a construction contractor has the right to recover increased-cost-of-performance damages resulting from delay caused by default of the contractee. (*Tobey v. Price* (1874), 75 Ill. 645; *Consumers Construction Co. v. County of Cook* (1971), 1 Ill. App.3d 1087; *W.H. Stubbings Co. v. World's Columbian Exposition Co.* (1903), 110 Ill. App. 210.) Such

[12] 220 Ill. App. 3d, 130 (1991)

> defaults of the contractee include a failure to have buildings ready so work could proceed within the time contemplated by the contract (*W.H. Stubbings Co.*, 110 Ill. App. 210; see also *Nelson v. Pickwick Associated Co.* (1889), 30 Ill. App. 333 (failure to have building in such a state of forwardness as would enable work to be performed within time limit)), and a failure to arrange to have the work of other contractors on the building performed so as to allow the contractor claiming damages for delay to complete its work within the reasonable time implied by the contract (*Michigan Avenue Methodist Episcopal Church v. Hearson* (1891), 41 Ill. App. 89). The right to direct the general progress of the work implies an obligation on the part of the contractee to keep the work in such a state of forwardness as to enable the contractor to perform within the required time, and responsibility for delay rests solely with the contractee. *J.J. Brown Co. v. J.L. Simmons Co.* (1954), 2 Ill. App.2d 132, 140.

Amp-Rite continued with the cogent observation that only the owner has the power to co-ordinate the work effort of multiple prime contractors on the jobsite. While interpretations may differ, there is always some duty on the part of the owner or general contractor to co-ordinate the work sequence and otherwise take reasonable steps to ensure that the original construction schedule can be met.

> The essence of the general contractor's claim against the State was that it had a duty to coordinate the work of the prime contractors and that it failed to perform that duty. Although some delays were to be anticipated under the multiple prime contractor arrangement, the court noted: "[T]he State had a duty to regulate and coordinate with reasonable diligence the activities of the several prime contractors for the simple reason, if no other, *that no one else had the authority to so act.*" (Emphasis added.) 57 Misc.2d at ___, 292 N.Y.S.2d at 316.

There is an implied obligation on the part of the owner to avoid lengthy delays for the which multiple prime contractors have no responsibility. The implied obligation springs from the realistic observation that only the owner can use its power under the terms of the contract to enforce coordination of the contractors.