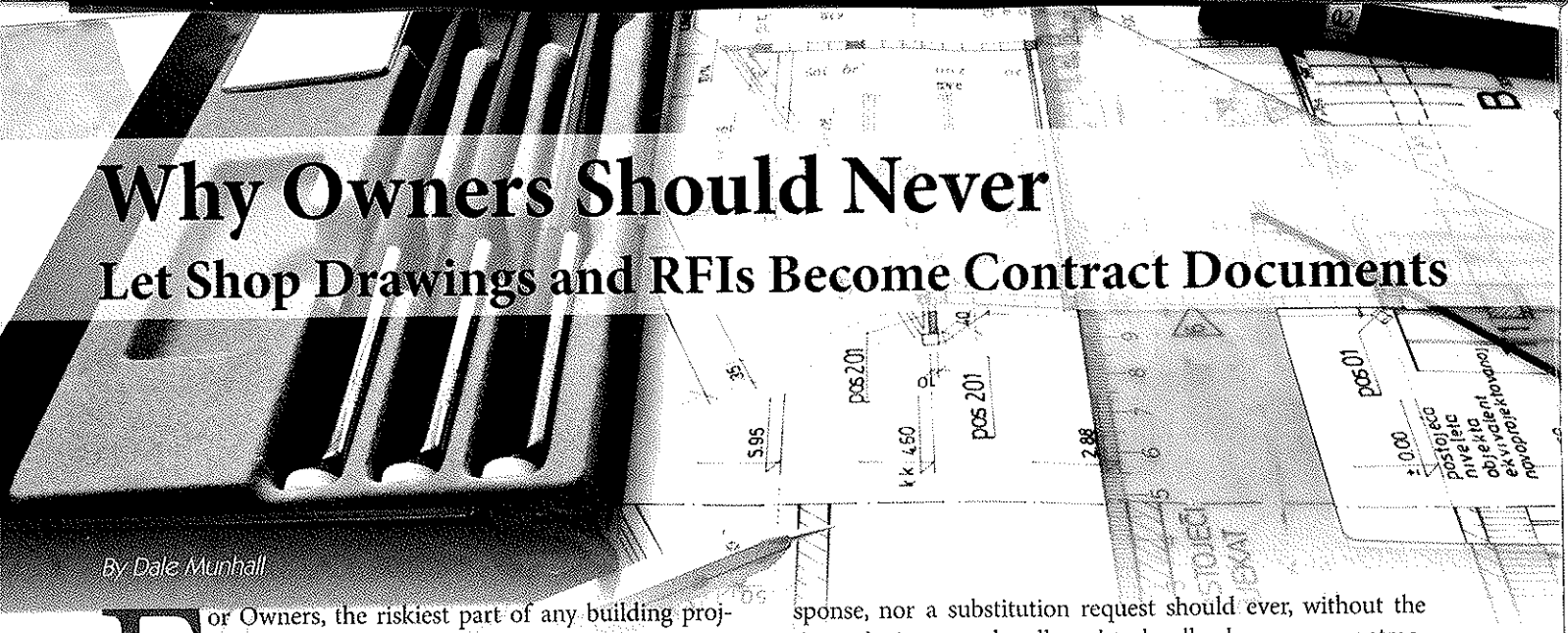

Why Owners Should Never
Let Shop Drawings and RFIs Become Contract Documents

By Dale Munhall

For Owners, the riskiest part of any building project occurs during the construction phase, and one of the least understood risks lies in the tendency for unauthorized changes and substitutions to creep into the contractor's shop drawing submittals and requests for information (RFIs). This article will show how shop drawings and RFIs can carry significant risk and why Owners should never allow them to become part of the contract documents.

There is a very good reason for limiting what is and what is not part of the contract documents: Owners are exposed to risks of increased cost and reduced quality whenever subtle changes are allowed to alter terms of the original construction contract, especially without proper Owner involvement.

Under traditional contracts of the American Institute of Architects (AIA), which have been the industry's thoroughly court-tested standard for more than a century now, the actual "Contract Documents" include only "the Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement, and Modifications issued after execution of the Contract." And, specifically (emphasis mine), "Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents...Their purpose is to demonstrate the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents."

Unfortunately, there have recently emerged some proprietary contract forms by government agencies, as well as some contractor groups' own competing non-AIA contracts, which explicitly do turn submittals into binding alterations of the construction contract, with or without Owner participation. Such shortsighted provisions essentially require an Owner to be contractually bound by every word and detail in contractors' submittals. This not only unduly favors the contractor, it also substantially increases the burden of hidden risks for technically non-expert Owners. Therefore, in this article, all references to contract provisions are based on the far more Owner-protective industry standard definitions in AIA Contract Documents (see above).

Neither a note on a shop drawing, nor an RFI request/response, nor a substitution request should ever, without the Owner's signature, be allowed to legally change any contractual requirement or alter construction cost or time. There are at least seven deadly "trigger" words that must be avoided on all non-Contract Documents (e.g., in e-mails, shop drawings, phone calls, RFIs, letters, verbal conversations, etc.). If the Owner's A/E ever uses any of the following risky words on a contractor's submittal or RFI, they are already neck-deep in unauthorized change territory: "revise," "change," "modify," "remove," "proceed," "add," or "delete." Non-compliant substitutions buried in submittals typically benefit just the contractor—seldom the Owner—letting the contractor profit at Owner expense. Moreover, the real objective behind some RFIs is to create conditions for a change order claim later.

Shop drawings and RFIs, or even formal substitution requests that propose a "savings" for the Owner, can carry hidden risks of lesser performance and reduced value. The real motivation behind many proposals for change is to increase the contractor's profit margin, so unless a specified product has recently been discontinued or is otherwise unavailable, substitutions should never be allowed to change contract requirements unless and until the Owner and his A/E both sign the change document, indicating that they have received adequate proof and are satisfied that the Owner is not receiving less value and performance than paid for under the original design.

The only binding contract change document that an A/E can unilaterally issue with just their authorized contract administrator's signature is an architect's supplemental instructions (ASI), and they can issue that only if it involves a "minor design modification that does not affect Contract Price or Time" (obviously, very few things fall into that category). For example, an ASI can only affect design issues such as dimensions, colors, or other minor aesthetic adjustments, etc., and only if the "minor modification" is strictly at no cost and causes no delay.

If an A/E exceeds their authority by giving instructions to the contractor, they are also subjecting their design firm to unnecessary, often uninsurable, risks. A high-profile example was when the contractor on Kansas City's Hyatt Regency Hotel project requested in an RFI to simplify a threaded-rod connection on a skywalk, which the A/E approved. It later resulted in a deadly collapse. Owners and their A/Es simply have to firmly but gently stop complying every time a contractor

asks them to allow modifications or asks for the A/E to "provide" or "verify" or "approve" information or substitutions on submittals. Whenever such requests are inappropriate, it is okay to just say, "No." Really.

Many Owners and contractors are also surprised to learn that the A/E's "approval stamp" on shop drawings, substitutions, and RFIs is not contractually binding. The A/E's shop drawing "stamp" is not a professional-license seal that would convey responsibility for contents as the design professional's work. It is merely the equivalent of a "date-received" stamp. Even the word "approved" does not contractually mean what most people think it does: AIA General Conditions define A/E "approval" of submittals as "limited to checking for compliance with contract requirements and design intent."

Although submittals are not contract documents, they ARE part of the contractor's sole responsibility for construction means and methods, and the A/E has no standing whatsoever in approving how the contractor achieves the specified result. The A/E can review submittals and interpret compliance with design intent but cannot control construction techniques or alter contract requirements.

Contractually, the contractor is responsible for and officially approves the work plans of their suppliers and subcontractors—the A/E merely reviews submittals to give the contractor a courtesy early warning of potential contract violations, which is preferable to later discovering and having to fix contractually non-compliant items in the field. The very purpose in specifying that the contractor must submit shop drawings in the first place is to serve as evidence of the contractor's work plans, showing how they intend to incorporate a material into the work in compliance with the contract documents (so, perhaps it would be far less confusing if we all stopped calling submittals "shop drawings" and started referring to them as what they really are: the contractor's own work plans!).

As more and more projects involve alternative delivery methods like fast-track, design-build or CM/GMP, there is a tendency to use—or, more accurately, to misuse or abuse—the RFI and/or ASI as a vehicle to accomplish various changes to the contract documents on the fly. As you now see, this can be a dangerous practice. However, no matter what label may be written at the top of a document ("RFI," "substitution application," "shop drawing," or "ASI"), as long as the Owner's signature is eventually affixed, it can become contractually binding and serve as a de facto "construction change directive" under terms defined in the contract. To be binding, any time, cost, or performance change to the construction contract documents must eventually result in a formal change order, signed by the Owner.

In the end, the key to properly making each and every change during the construction phase is getting the Owner's enlightened signature on the appropriate document, not just the A/E's or the contractor's. Otherwise, the A/E is taking on liability they didn't originally have per their design services agreement with the Owner, and they are exposing the Owner to lesser quality and/or to change order claims. These unnecessary risks can be avoided if all parties become more alert to the subtle hazards of unauthorized construction phase changes and resolve at the very beginning to treat the construction contract change process as the serious business that it truly is.

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Editorial Comment

The author identifies the risk of unintended modification of the scope of work caused by including all submittals within the definition of "Contract Documents". ConsensusDocs Form 200, Standard Agreement and General Conditions between Owner and Constructor, 2011 edition, adhere to this practice. Sections 2.4.4 and 14.1 of Form 200 define the Contract Documents. These sections specifically identify those documents, which should be in existence at the time of agreement, that are to be made part of the contract. These sections do not make general reference to submittals or other instruments created after the original agreement is entered into. The recommended practice is that the contract documents be modified only by change order, directed change, or minor change approved by the Design Professional.

In addition, Form 200 follows the recommended practice of limiting freedom to change the scope of work by mislabeling a substitution or change as a mere submittal. This language can be found at Sections 3.14.1, 3.14.3 and 3.14.5. Generally, these sections limit the extent to which a submittal affects the scope of work to that which is expressly set forth in the contract documents for the specific submittal. These sections seek to preclude any information contained in a submittal from acting as a substitution or other deviation from the contractual requirements. Before such changes can be effective they should be specifically identified as such and documented as a change order.

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