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Construction Newsletter

[Presented by the Law Offices of Ashley A. Baron]

Legal News for Construction Industry

Are Written Change Orders Needed to Collect for Extra Work?

Construction contracts universally contain a requirement that any change order or extra work order be in writing and signed prior to the work being performed. Generally, when project directives are issued that change the scope of work but no formal written change order is issued or amount for the change agreed to, it leads to a constructive change. Such constructive changes have long been the subject of much dispute in the construction industry.

However, the California Appellate Court for the first district in *Ted Jacob Engineering Group, Inc. v. The Radcliff Architects* (2010) 187 Cal. App.4th 945, 114 Cal.Rptr.3rd 644 held that when the parties agree to a sum for a certain scope of work and the work changes during the course of the project that even though no written agreement was signed by both parties for the change in scope and the cost thereof, it is understood that the contractor may either stop work or proceed and subsequently pursue fair and reasonable compensation for such work.

The Court stated that: "[t]o hold otherwise would compel a contractor to walk off the job in the face of what it believes to be major changes in the scope of work required of it with significant consequences if its judgment is later proven wrong, or alternatively forfeit any right to seek compensation for that work, regardless of the extent of the additional burdens imposed." *Id.* at 966

The Court also found that, even though there was a requirement that all changes in scope of the work and compensation therefore be put into writing prior to the work being performed, the oral direction to make the changes coupled with the contractor performing the work constituted a waiver of the requirement of a change order in writing.

The Court did indicate that such a determination would only be applied where there was an absence of a contrary contractual provision. Thus, owners and general contractors should be modifying their contracts to contain a provision that specifically requires not only that all change orders be made in writing with an agreed price prior to any change but something to prevent the contractor from unilaterally claiming changes made at the end of the project.

Perhaps a provision should be included requiring that if the contractor believes it is being required to make a material change in the scope of the work and it is entitled to compensation for such extra work it must make a written claim detailing what the change is, why the change is material, what it claims as the cost for the extra work, and do so prior to performing the work. The contract might also require that no work be performed until the owner or contractor in writing agrees to allow the contractor to do the work for the price indicated, disagrees with the characterization that the work is a material change but allows the work to be performed and agrees to dispute the claim after the completion of the project or agrees the change is material but disputes the cost for the change and agrees to dispute the amount after the completion or disagrees that the change is material or that the cost is appropriate and has the work performed by another contractor with the understanding that it will back charge the original contractor for the amount of the work and dispute it after the completion of the project. This will allow the owner or general contractor to determine if it wants the contractor to go forward with the work at the price stated or take some other position without a claim they waived their right to do so.

Construction contracts should be reviewed and revised by a competent attorney prior to each project so that changes can be incorporated to fit the ever changing laws.

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No Pay for Contractor Starting a Job Unlicensed

The Court in *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656 found that a homeowner was allowed to sue to recover all monies paid to a contractor who began performance of work while unlicensed, even though the contractor obtained its license during the performance of the work.

The landscape contractor had previously done work for the client and contended that the client knew it was unlicensed. The contractor contended that it may not be able to recover for work done while it was unlicensed but should be able to obtain payment for work done after it obtained its license. The contractor also contended that even though it may not be permitted to recover for the labor it supplied it should be paid for materials supplied.

The appellate court disagreed with all the contentions by the contractor.

The homeowner sought reimbursement for $57,500 under *Business & Professions Code* § 7031(b) because the contractor was unlicensed when it began the work. The lower court granted summary judgment against the contractor and awarded the homeowner the full amount he had paid the contractor plus interest totaling $66,762.25.

The Appellate Court held that even if the hiring party had actual knowledge of the contractor's unlicensed status it could nonetheless recover all of the moneys paid to an unlicensed contractor. The Court also held that the contractor must be licensed at all times or qualify under the substantial compliance provision of the code or it can not be paid any part of the cost of the work even if it obtained its license during the work of improvement.

Finally, the Court ruled that "all" means all and that the contractor must repay all the funds that it was paid by the hiring party, even though the property owner is unjustly enriched and gets to keep both the labor and materials without paying for them.

So, if you are a contractor, do not let your license lapse and do not start a job if it has until you get it reinstated or the harsh reality might be that you will do the work and provide the materials for free. If you have questions about licensing or your status with the California State Contractors Board call us or another knowledgeable construction attorney.

Reasonableness of Reliance on Information given by Owner for Preliminary Notice is Question of Fact

In *Force Framing Inc. v. Chinatrust Bank* (2010) 187 Cal. App.4th 1368 the Appellate Court addressed the issue of the reasonable reliance of a contractor on the preliminary information given it by the owner as to who the construction lender was for the project.

Force Framing was given a preliminary information sheet by Magnolia, the owner of the project which listed the lender as East West Bank, in Diamond Bar, California. However, the actual construction lender was Chinatrust Bank. Force Framing served its preliminary 20-day notice on East West Bank based upon the preliminary information sheet provided by Magnolia.

Subsequently, when Force Framing was still owed $1,398,882 it served a stop notice on Chinatrust Bank but Chinatrust did not withhold the funds and when sued filed a motion for summary judgment claiming that it recorded a deed of trust against the property and Force Framing had constructive notice that Chinatrust was the actual construction lender and it had never received the 20-day preliminary notice required by law.

The trial court found that the subcontractor who seeks to enforce a stop notice has a duty to investigate who owns the construction loan and serve the 20-day preliminary notice on them. Thus, the trial court granted the motion for summary judgment in favor of Chinatrust.

The Appellate Court examined the statute, *Civil Code* § 3097, which states that the stop notice claimant must give 20-day preliminary notice to the construction lender or the reputed construction lender. It examined what "reputed" construction lender was under the case law and determined that a "reputed construction lender" is a person or entity reasonably and in good faith believed by the claimant to be the actual construction lender. Examining the record the Appellate Court found no evidence that would cause Force Framing to doubt that the information as to the lender given it by the owner was incorrect, therefore, it reversed the trial court and remanded the case for trial because there was a triable issue of fact regarding the reasonableness of Force Framing's belief that East West was the lender for the project.

We now have both Orange County and Park City Offices. Ashley Baron, a U.S.C. undergraduate and law school graduate, has been a lawyer for the past 29 years. Ms Baron has tried over 100 cases. The firm performs construction, business, arbitration, labor law and litigation support for developers, general contractors, material suppliers, subcontractors, banks, title companies and other businesses in Orange, Riverside, San Bernardino, Los Angeles and San Diego Counties. For further information contact us at (714) 974- 1400 or e-mail us at ashleybaronesq@yahoo.com. Please take a look at our all new web site at: www.ashleybaron.com where you can learn more about our firm, can read and review our past newsletters and our blog of current information.