Caution: Oral Change Orders on Public Projects are Usually Not Enforceable

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Think you can safely rely on the "handshake" with a public entity's project manager to "make sure" you will get paid for extra work? Think again! Under California law, oral change orders for extra work on public projects are usually "against the law" and not enforceable.

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Recent Changes to California Law

It does not matter whether the extra work was necessary, or that it was timely completed for a reasonable price, or approved by a public entity inspector, or orally authorized by even the mayor. If the contract requires that extra work can be done only pursuant to a written amendment signed by both parties, absent proof of that writing, the contractor will lose.

Such has long been the rule in California, but it was recently reinforced in the case of *P&D Consultants, Inc. v. City of Carlsbad*,[1] which became final in April, 2011. That case involved a written contract between a contractor and a city with a defined scope of work (involving the redesign of the municipal golf course) for a set price (approximately $550,000). Significantly, the contract also provided that no amendments, modifications, or waivers of contract terms would be allowed absent a written agreement signed by both parties.

During the course of the project, the contractor and the city's project manager negotiated and signed five written "extra work" amendments which increased the contract price by over $163,000. The city staff typically took several weeks to sign and return each change order to the contractor, and the city's project manager frequently orally authorized the contractor to begin the extra work before it received the signed amendment. The problem arose with respect to another $106,000 worth of "extra work" which the contractor claimed the city staff had approved yet was never reflected in any signed written change order. The parties could not resolve their dispute and the case ended up in court before a jury.

The Ruling and the Appeal

At trial, the contractor claimed that the city's project manager initially told the contractor to "put [the claim] together with the proper back up and the City [will] evaluate it," and then later told the contractor that the city was "in the process" of preparing a sixth amendment to

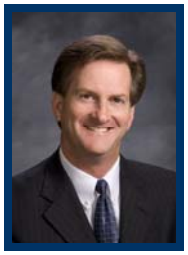
[1] 190 Cal.App.4th 1332 (review denied April 13, 2011).

the contract. The project manager disputed the contractor's version in court, and it became a classic "he said/she said" finger pointing contest. Even though the jury found in favor of the contractor, and awarded the full $106,000, the court of appeal overturned the verdict and ruled for the city.

"A Written Amendment Signed by Both Parties"

In short, the court held that since the plain language of the parties' contract limited the city's power to contract to the prescribed method, i.e. ***only pursuant to a written amendment signed by both parties***, the contractor should not have relied upon the claimed oral authorization of the project manager before proceeding with the extra work.

Seem unfair? Perhaps, but consider this: the purpose of including a written change order clause in any public works contract is to ***protect the public treasury*** from the type of situation that occurred in the *P&D Consultants* case. The obvious lesson for any contractor involved in public works projects: ***get all change orders approved by the proper person in writing before proceeding*** or you run the significant risk of never getting paid for your work.



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