SITKIN V. SMITH AND WRITTEN CHANGE ORDER CLAUSES

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1. *Sitkin v. Smith*—A Brief Summary

Sitkin v. Smith, 35 Ariz. 226, 276 Pac. 521 (1929) involved a contractor's claim for compensation to perform additional work verbally directed by the project owner. The contract contained two different written change order provisions. The first stated:

> **No alterations shall be made in the work shown or described by the drawings and specifications except upon written order of the Architects**, and when so made, the value of the work added or omitted shall be computed by the Architects, and the amount so ascertained shall be added or deducted from the contract price.

Id. at 229 (Emphasis added) The second provided as follows:

> Should the owner at any time during the progress of the work request any alteration, or additions to or deviations or omissions from the work in included in the specifications, such request shall be acceded to by the contractor and the same shall in no way affect or make void the contract. **No such alterations, additions, deviations or omissions which affect the price or the time for completion as agreed upon shall be done, however, without a written order from the owner.**

Id. at 229 (emphasis added). The contractor performed the extra work despite not having a written order from the architect directing it to do so, and without a written change order from the owner.

The narrow issue examined by the court of appeals focused on the parol evidence rule. Specifically, owner argued that contractor could not present oral evidence about the direction it received to perform the additional work because there was no written change order as required by the contract. The court concluded that while parol

testimony at the time of or prior to the execution of a contract is not admissible, it does not prohibit evidence that the parties subsequently modified the original written contract.

After determining the parol evidence rule did not prohibit later oral modifications, the court examined whether the written change order provision in the contract barred contractor's claims. As discussed in more detail below, the court held that owner's oral directives to perform the changed work modified the original contract.

2. Written Change Order Requirements

Today, construction contracts almost always require that change orders be in writing. Indeed, even the *Sitkin* court remarked that written change order requirements were "very common" and "binding upon the parties" back in 1929. *Id.* at 229-230.

As a general matter, written change order provisions are upheld because they serve to protect the owner by requiring that any change from the original contract be expressly authorized in advance before any additional work is performed. One court explained that written change order provisions provide owners with "timely notice of deviations from budgeted expenditures . . . and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of . . . funds."[1]

The Ohio Supreme Court set forth the policy rationale for written change orders:

> The primary purpose of requiring written authorization for alterations in a building or construction contract is to protect the owner against unjust and exorbitant claims for compensation for extra work. It is generally regarded as one of the most effective methods of protection because such clauses limit the source and means of introducing additional work into the project at hand. It allows the owner to investigate the validity of a claim when evidence is still available and to consider early on alternate methods of construction that may prove to be more economically viable. It protects against runaway project and is, in the final analysis, a necessary adjunct to fiscal planning.[2]

Despite these strong policy reasons for written change orders, verbal directives to perform extra work happen as a practical matter on construction projects on a daily basis; owners routinely direct contractors to perform additional work pursuant to oral change orders. If an owner orally induces a contractor to perform additional work

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[1] *A.H.A. General Construction, Inc. v. New York Housing Authority*, 92 N.Y.2d 20, 33-34, 699 N.E..2d 368, 677 N.Y.S.2d 9 (1998).

[2] *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Authority*, 78 Ohio St. 3d 353, 678 N.E.2d 519 (1997).

without a written change order, courts generally have concluded that it would be inequitable for the owner to rely on the lack of a written order to refuse payment. Such harsh results have frequently been avoided in reported decisions by finding that parties have waived written requirements by conduct or by knowing acceptance of extra work.

3. Waiver of Written Change Order Requirements

While written change order requirements are binding, parties may orally modify or waive that requirement during construction. Waiver occurs when a party acts in a manner inconsistent with the intent to rely on or to enforce its contractual right. This lack of intent can be proven either by oral statements or by conduct.

In *Sitkin,* the Arizona Supreme Court held a contractual requirement that all changes must be in writing may be orally changed by the parties after the contract is signed. According to the court, "the parties to a written contract . . . are as free to alter it after it has been made as they were to make it, and all attempts on their part by its terms to tie up their freedom of dealing with each other will be futile. To this end parol [verbal] agreements will be as effective as written ones. And implied agreements satisfactorily established will have all the force of express ones."[3] (Citations omitted.)

Owner admitted that Contractor made several alterations and changes at issue upon Owner's oral order during construction. Accordingly, the *Sitkin* court found:

> Under the terms of the contract, if [Owners] intended to rely upon it as written they should have made their request or order for changes in writing, but, having themselves disregarded the contract in that respect and secured the acquiescence therein of the contractor, they certainly consented to waive that condition.[4]

The Court emphasized that "evidence of subsequent agreements as to changes and alterations did not vary the terms of the written contract, but proved a modification thereof by mutual consent."

Arizona courts have also held that the parol evidence rule does not prohibit the introduction of evidence of oral modifications to a contract even when the original writing was intended to express the full agreement of the parties. "While the [parol evidence] rule does apply to oral statements or agreement made prior to or contemporaneous with the execution of the contract, it does not prevent the parties from subsequently making another and different agreement or orally modifying the original written contract."[5]

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[3] 35 Ariz at 230-31, 276 P. 2d at 522.

[4] *Id.*

[5] *Eng v. Stein,* 123 Ariz. 343, 347, 599 P.2d 796, 800 (1979); *see also* 13 Am. Jur. 2d BUILDING AND CONSTRUCTION CONTRACTS § 26 ("A waiver, modification, or abandonment of a stipulation requiring a written order for alterations or extras can be accomplished, not only by express words,

4. When Is The Written Change Order Requirement Waived?

Courts frequently disregard written change order requirements when the contractor establishes a pattern of oral directives from the owner. The contractor's waiver argument is bolstered under these circumstances if the owner subsequently paid for the oral change order work.

In an unpublished 2009 memorandum decision, the court of appeals held there was an issue of fact as to whether the written change order provision was waived. *Fraley Contracting, Inc. v. Pace Pacific Corp.,* 2009 WL 3233816 (App. 2009). The court focused on two pieces of evidence submitted by the contractor. First, the owner verbally requested that the extra work be performed, which suggested the owner itself did not intend to enforce the requirement for a writing. Second, the owner had routinely ignored the writing requirement provision and orally authorized work throughout the project. *See also Farwest Develop. & Construction of the Southwest LLC,* 2009 WL 838262 (App. 2009)(whether an owner waived the written change order provision was an issue of fact).

In a 1998 decision, the Virginia Supreme Court relied on a pattern of conduct and subsequent payment in finding that the owner had verbally authorized work beyond the original contract.[6] The contractor entered into a lump sum contract to perform site improvement work on a 42-lot project. The county subsequently approved an expanded plan for 62 building lots. The contractor sent a letter to the owner summarizing substantial changes in the scope of work required by the expanded plan. The owner allegedly responded verbally that the contractor should proceed with the work and "be fair with him in the billing."[7]

The contractor submitted invoices labeled "extra work" and the owner paid the invoices. But at the end of the project, the owner contended it was not required to pay more than the original fixed price.

The *Cardinal Development* court sided with the contractor by rejecting the owner's argument that the contractor was bound to the original contract amount since the parties had not executed any written changes. The court held that "there is clear, unequivocal, and convincing evidence in the record that [owner] and [contractor] intended to modify the terms of their contract and that [owner] agreed to pay for the additional work that [contractor] had performed."[8]

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but also by the acts or conduct of the parties impliedly indicating an intention to waive or otherwise derogate the stipulation").

[6] *Cardinal Development Co. v. Stanley Construction Co., Inc.*, 497 S.E.2d 847 (Va. 1998).

[7] *Id.* at 850.

[8] *Id*. at 851; *See also Driver Pipeline Co., Inc. v. Dadeville Gas Storage, LLC,* 2014 La. App. Lexis 2326 (Oct. 1, 2014); *Clearstory LLC v. Payton,* 2004 WL 1879194 (Va. App. 2004).

A 1997 federal court decision reached a similar result. In *Miami Valley Contractors, Inc. v. Town of Sunman, Indiana*[9], the court held that a contract provision stating that the contract could not be changed except in writing could be modified by the conduct of the parties. The court explained:

> Parties to a contract may mutually modify their contractual undertakings, and it is not always necessary to prove a written or oral modification of a contract because a modification of a contract can be implied from the conduct of the parties. Even a contract providing that any modification thereof must be in writing may nevertheless be modified orally.[10]

Courts in other reported decisions have also considered under what circumstances written change order requirements can be waived:

- Written change order requirement waived when a subcontractor told a lower tier subcontractor, "Don't worry about it, you'll be paid."[11]

- The fact that a project owner never pays for any verbally directed work will not thwart the contractor's waiver argument. The oral directives alone constituted a waiver and the owner was obligated to pay for the orally authorized extra work.[12]

The written change order requirement may also be waived if the contractor performs extra work in an emergency. In *Pioneer Roofing Co. v. Mardian Construction Co.*[13], for example, the subcontractor applied additional felts and hot asphalt to a roof system after it was determined that the previously installed roof was failing due to extreme weather. The *Pioneer Roofing* court held: "[Architect's] go-ahead actions . . . constituted a waiver of the provision in the . . . contract documents that provided: 'Claims for additional compensation, on account of extra work done, will not be recognized unless such extra work has been authorized in advance and in writing by the Architect.'"

Finally, courts are more reluctant to find a complete waiver on an isolated act. In a 1996 Wyoming decision,[14] the court ruled that a contractor failed to meet its burden to prove that the parties' action constituted waiver where "the undisputed

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[9] 960 F.Supp. 1366 (S.D. Ind. 1997)
[10] 960 F.Supp. at 1372 (quoting *City of Indianapolis v. Twin Lake Enterprises, Inc*., 568 N.E.2d 1073, 1084-85 (Ind. App. 1991).
[11] *Menard & Company Masonry Building Contractors v. Marshall Building Systems, Inc.*, 539 A.2d 523 (R.I. 1988).
[12] *Udevco, Inc. v. Wagner*, 678 P.2d 679 (Nev. 1984).
[13] 152 Ariz. 455, 465, 733 P.2d 652, 662 (App. 1986).
[14] *Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Board*, 929 P.2d 1228 (Wyo. 1996).

evidence demonstrated that during construction . . . written field orders were regularly issued which were eventually incorporated into change orders.[15]

5. Effect of Anti-Waiver Provisions

Anti-waiver language is typical in construction contracts. The AIA A201-1997 General Conditions, for example, include the following language:

> No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.[16]

Court in many jurisdictions have analyzed anti-waiver clauses similar to written change order requirements. That is, despite their name, no-waiver clauses can be waived. In *Transpower Constructors v. Grand River Dam Authority*,[17] the construction contract included an anti-waiver provision that stated the owner's failure to enforce a contract requirement would not constitute a waiver of the owner's right to enforce that requirement in the future. The court held that the owner could invoke the clause promptly after an isolated lapse but could not use it to avoid a complete waiver when there had been a pattern of conduct inconsistent with the enforcement of the contractual right. *Accord Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 78 F.3d 266, 277 (7th Cir. 1996); *Klipsch, INc. v. WWR Technology, INc.*, 127 F.3d 729, 736 (8th Cir. 1997); *APAC-Carolina v. Towns of Allendale*, 868 F.Supp. 815 (D.S.C. 1993).

However, several other decisions suggest that contractual anti-waiver provisions may negate a contractor's claim that the owner waived the written change order requirement by its conduct. In *Wisconsin Elec. Power Co. v. UnionPac. R.R. Co.*, 557 F.3d 504, 508 (7th Cir. 2009), the court acknowledged the authority indicating that no-waiver provisions themselves can be orally waived or modified, but warned that the clause's ability to be waived should not be taken too far lest the clause become 'worthless.'" To balance the competing interests, the court required that waiver be proved by clear and convincing evidence. The Court of Federal Claims required something similar—namely, "strong evidence of implied waiver." *Public Service Co. v. U.S.*, 91 Ct. Fed. Cl. 363, 369 (2010).[18]

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[15] *See also Hempel v. Bragg*, 856 S.W.2d 293 (Ark. 1993)(if there is a persistent pattern of oral changes, the complete waiver occurred). *But see Reif v. Smith*, 319 N.W.2d 815 (S.D. 1982)(isolated oral directive was sufficient to waive written requirement).

[16] AIA A201-1997 General Conditions of the Contract for Construction, subsection 13.2.2.

[17] 905 F.2d 1413 (10th Cir. 1990); *accord Wisch & Vaughan Construction Co. v. Melrose Properties Corp.*, 21 S.W.3d 36 (Mo. App. 2000).

[18] *See also Gilbert H. Moen Co. v. Spokane River Association.*, 88 Wash. App. 1064, 1997 Wash App. Lexis 2123 (1997)("[c]ontracting parties may also agree that all waivers must be in writing

At least one Arizona decision suggests our courts would also not give such effect to anti-waiver clauses. In *O'Malley Investment & Realty Co. v. Trimble*,[19] the Arizona Court of Appeals explained that parties to a contract "are wholly unable by any contractual action in the present, to limit or control what they may wish to do contractually in the future."

6. Authority to Order Changed Work and Public Projects

While a contractor generally must obtain proper authorization from the owner to perform additional work, it is not always clear who has the authority to bind the owner. As a practical matter, a contractor should request a written directive from the owner before work commences naming the owner representatives who are authorized to issue and sign change orders. Although many of the cases discussed above involved public jobs, a recent decision by the Arizona court of appeals suggests issues of actual authority may make it more difficult to bring unwritten change order claims .

In *Kamen Aerospace Corp., v. Ariz. Board of Regents*, 217 Ariz. 148, 171 P.3d 599 (App. 2007), the court of appeals rejected a contractor's claim for multiple changes to certain design guidelines related to the University of Arizona's space telescope. The revisions were issued by University engineers over a two-year period, but the engineers had no authority to contract for or bind the Board. Over the course of the project, multiple other changes were instigated by the engineers and ultimately memorialized into final change order that were executed by the contracting officer and paid by the Board. The case focused on an alleged $6.25 million in changes that did not become change orders and were rejected by the Board.

The court began by noting that public entities can only be bound by agents with actual authority. "Arizona law is clear that persons dealing with public officers are bound, at their peril, to know the extent and limits of their power and that no right can be acquired except that predicated upon authorized acts of such officers." *Id.* At 153, 171 P.3d at 604. Because the University engineers lacked such authority, they could not bind the Board.

The contractor argued the parties' conduct throughout the course of performance indicated an understanding that changes could be initiated by persons without authority, but later a person with authority would evaluate and accept the claim for extra work. The court rejected this argument, concluding that a course of conduct *by unauthorized* public officials could not bind the Board. Until a Board "officer with contracting authority executed a document embodying both the change and the cost, [the Board] was not bound." *Id.* at 155, 171 P.3d at 606. Because the Board rejected the changes, there was no course of conduct by an authorized individual.

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so that there is no question as to intention" and when parties unambiguously do so, "courts should enforce the contract as written").

[19] 5 Ariz. App. 10, 17, 422 P.2d 740, 747 (1967).

In short, all change orders—oral or written—must be based on the agreement or conduct of an *authorized* government.

Similarly, a 1997 Ohio Supreme Court decision, *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority,*[20] considered whether a public owner's environmental consultant had actual or implied authority to direct the contractor to perform additional work. There, the consultant, without any authority from the owner, directed the contractor to remove a substantial quantity of contaminated materials from the site. The contract called for the removal of only a small amount of contaminated soil from another location on the site.

When the contractor submitted a $1 million claim based on the unit price set forth in the original contract, the county argued that the change order was unenforceable because the work had not been authorized by written change order as required under the contract. The Ohio Supreme Court agreed. The *Foster Wheeler* court also rejected the contractor's argument that the environmental consultant had authority to bind the owner:

> It is generally recognized that, in the absence of express authority, an engineer, architect, superintendent or inspector in charge of or assigned to public building or construction work has no power to waive or modify a stipulation requiring a written order for alterations, even where that person may authorize alterations in writing.[21]

But a 1997 Court of Federal Claims decision[22] emphasized that the government cannot deny a claim directed by an unauthorized employee when the contracting officer was present during a telephone conversation when the directive was given and did not object. There, the contractor successfully argued that the contractor officer's silence constituted "ratification." The court held that there was a genuine issue of material fact precluding summary judgment in favor of the government: "If the CO agreed with the [technical representative] and the project engineer's directive, confirmed it to the [contractor] or kept silent during the telephone conference when the directive was given, he may well have ratified the directive."

7. When A Change Order Constitutes an Accord and Satisfaction.

An accord and satisfaction is "one of the recognized methods of discharging and terminating an existing right and constitutes a perfect defense in an action for enforcement of a previous claim."[23] Many courts have held that a fully

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[20] 78 Ohio St. 3d 353, 678 N.E.2d 519 (1997).
[21] 678 N.E. 2d at 428; *see also Seneca Valley, Inc. v. Caldwell,* 808 N.E.2d 422 (Ohio App. 2004).
[22] *Dan Rice Construction Co. v. United States,* 40 CCF ¶ 76,954 (Ct. Fed. Cl. 1997).
[23] *Green Management Corp. v. United States*, 42 Fed. Cl. 411, 431 (1998). *See also Flagel v. Southwest Clinical Psychiatrists, P.C.*, 157 Ariz. 196, 200, 755 P.2d 1184, 1188 (App. 1988).

executed change order constitutes an accord and satisfaction that bars further compensation for the change, unless the contractor unequivocally reserves its rights.[24]

When contractors sign individual change orders, they often unintentionally waive claims for the cumulative impact of multiple changes. The theory of cumulative impact claims is that the contractor fails to see the "synergistic effect" of the changes on the work as a whole when pricing individual change orders, thereby ultimately receiving less than full compensation for the changed work.[25]

Unless the contractor expressly reserves the right to collect additional impact costs, signing the change order for agreed amount may effectuate a full accord and satisfaction. For this reason, one commentator suggests that contractors include the following wording on change orders to protect against unforeseen impacts on other areas of work: "The change order includes only time and direct costs of the changed work and does not include any allowance for resultant delay or increased cost in performing the unchanged portions of the work, which claim is specifically reserved."[26]

[24] *King Fisher Marine Service, Inc. v. United States*, 16 Ct.Cl. 231, 236-37 (1989).
[25] B. Bramble & M. Callahan, CONSTRUCTION DELAY CLAIMS, 1999 CUMULATIVE SUPPLEMENT § 5.12 at 120 (Supp. 1999).
[26] R. Rubin et al., CONSTRUCTION CLAIMS: ANALYSIS, PRESENTATION AND DEFENSE 35 (1983).