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CONSTRUCTION LAW E-UPDATE

AN ORAL CHANGE ORDER?!

AUGUST 2010

In a change order dispute, owners and/or general contractors will often assert the standard, protective clause found in most subcontracts which asserts that changes to the contract or the scope of work are ineffective unless first authorized in writing. The fact that their own field personnel orally authorized and directed a subcontractor to proceed with extra work is easily "forgotten."

Recently, however, a New York appellate court, in rare deference to contractual fairness, specifically rejected such an argument. The court held, notwithstanding a "nooral-modification" clause in the subcontract, that a subcontractor was entitled to recover for overtime costs incurred during the last three weeks of a project. The court based its decision on the fact that the general contractor's own representatives testified that the general contractor directed the subcontractor to work overtime during the last three weeks of the project. The general contractor's representatives also testified that they had agreed to pay for the premium time over and above the contract price, just as they had previously done for other overtime on the project.

There was further testimony from the general contractor's project manager that the subcontractor was instructed not to bother with the "tickets" that were usually prepared by the subcontractor for extra work and formed the basis for the issuance of formal change orders. Instead, the general contractor directed the subcontractor to "just get the work done."

The Court cited the longstanding rule in New York that "oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorizations or notice of claims." It then held that, based upon the general contractor's conduct in orally directing the subcontractor to proceed with the work, the general contractor could not argue that it did not have to pay for the overtime simply because there were no written tickets or change orders covering the entire three-week period.

The general contractor was precluded from using the "no-oral-modification" clause as a bar to the subcontractor's claim for overtime, since it was the general contractor's own oral directions upon which the subcontractor relied in working such overtime.

G&C Commentary

When courts get it "right," it seems so simple. Good-faith and fair dealing in the enforcement of contracts should always be a relevant consideration.

However, don't count on the extent of honest testimony that was exhibited by the general contractor's field personnel in this case. We have often written about the many ways in which owners and/or general contractors use contract provisions to preclude otherwise valid claims, usually due to the failure of a particular notice being sent or a record kept. At least in the context of oral directions to perform extra work, courts may at times not strictly enforce the requirement of prior

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written authorization and will consider the parties' conduct in assessing entitlement to payment.

Of course, whether or not a court will allow payment for extra work in the absence of written authorization will depend upon the particular facts in any given case. Accordingly, you should not presume that you will be able to recover for extra work done pursuant to mere oral directions of the general contractor's field personnel. The safest and only recommended course of conduct is to always insist upon written authorization before performing extra work.

Yes, we know all the reasons why that may not always be practical. Proceeding otherwise, however, is at your risk, not the GC or CM field personnel orally making the demand for extra effort.