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About the Authors

Joseph Manna

Joseph Manna has nearly 20 years of experience as a trial lawyer, with one of his focuses on Construction Law and Litigation. He is consistently recognized by his peers for his legal ability, professional ethics, and the results he obtains on behalf of his clients. Mr. Manna's recognitions include being named to *The Best Lawyers in America*, *New York Super Lawyers*, and *Business First/Buffalo Law Journal's Who's Who in Law*. Mr. Manna can be contacted at 716 849 1333 or via e-mail at jmanna@lglaw.com.

About the Authors

Andrew Miller

Throughout his career, Andrew Miller has successfully represented general building contractors, site work contractors, demolition contractors, and building trades sub-contractors as both litigation and trial counsel. Many in the construction industry turn to Mr. Miller to regularly handle their legal needs including disputed and unpaid change orders; differing site conditions; unanticipated changes in the scope of work; bond claims; Article 3-A construction trust claims; and mechanic's liens. Mr. Miller can be contacted at 716 849 1333 or via e-mail at amiller@lglaw.com

LEGAL NEWSLETTER ON

ConstructionLaw

Getting Paid for Changes in Work

Changes are an inevitable part of every construction project, and no construction project is built in exact accordance with the contract or the specifications. These changes often result in extra work for the contractor, and the question on every contractor's mind is: will I get paid for these changes and extra work?

If all parties abide by a well-written contract, changes should not delay the project, reduce profits, or result in disputes and lawsuits. However, if an owner tries to get something for free or if the contractor tries to charge for something that is included in the original scope of work, disputes are inevitable.

THE EASY PART: GETTING PAID ON A WRITTEN CHANGE ORDER

Extra Work and Change-Order Clauses in Construction Contracts

Nearly every construction contract contains provisions allowing an owner to make changes and order extras as necessary. These clauses usually provide a mechanism for approval and for payment of changes and extras.

The purpose of these provisions is to protect the owner from unexpected

costs or unjust claims for more money. Absent a waiver, a contract provision requiring a written change order is binding and may bar claims for extra work where there is no written change order.

Disputes on a Written Change Order

Even when the owner issues a written change order, disputes can still arise—most commonly because of a failure to agree upon price. This is risky for the contractor—as a Court may later determine that the work was not as costly as the contractor believes.

Fortunately, there is a simple solution: if the owner's change order does not specify the price for the extra work, then you should confirm, in writing, the price you will be charging for work—i.e. Time and Material, Unit Rate, Flat Price.

THE HARD PART: GETTING PAID WITHOUT A WRITTEN CHANGE ORDER

Waiver of Change Order Requirements

Written change order requirements may be waived in three ways - by oral order, by acquiescence or by conduct.

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Getting Paid for Changes in Work

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- **Oral Change Order:** The waiver of a written change order requirement can be inferred from an owner's oral direction to proceed with work and promise to pay for the work. Orders to proceed with extra work are often verbalized, and then followed up with a writing. This is a common practice which can result in a waiver of written change order requirements if the owner does not confirm the oral direction in a subsequent writing. *So, if you are orally directed to perform extra work, agree on a price and send a letter to the owner that you performed the work at the agreed price at its request and without a written change order. Also, confirm in the writing that the owner had waived the change order requirement in the field. If no price is agreed upon, INSIST on a change order before doing the work.*
- **Acquiescence:** An owner may also waive a written change order requirement by acquiescence. This usually happens when an owner is present during project changes or alterations and does not object to those changes or alterations. For example, the owner instructs you to make a substantial alteration to the contract documents

and observes you do the work. This is the least frequent type of waiver.

- **Owner's conduct:** The third type of waiver can be established by the owner's conduct. For example, if the owner and contract consistently do not follow contract procedures for review and approval of change orders and extra work, a waiver will be inferred by conduct. For example, an owner who orally directs changes to the work and pays for some of the work, but not all, will not be able to rely on the lack of a written change order to defend against the extra costs associated with the change work. By orally approving and then paying for some change work, the owner will be found to have waived the right to rely on the written change order requirement for the balance of the additional work.

Reviewing the preceding information in this newsletter should help you avoid issues with getting paid. Always confirm in writing oral directions to proceed with extra work and the agreed upon price for that work.



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