

## Change Orders – Did You Get It In Writing?

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Practice Area: Construction Law and Litigation

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They say that “variety is the spice of life.” Unfortunately, the variety of the law as it differs from Court to Court gives many heartburn. Recently, a California court ruled that a contractor on a public works contract was not entitled to payment for change order work absent a written change order. In that project, the contract required that all changes be in writing. In the case, there was no dispute that the municipality had orally requested and authorized the change order work. Later, the municipality defended its nonpayment by asserting that the contract required all change orders to be in writing. Despite the contractor performing under the municipality’s oral directive, the California court took a strict reading and ruled against the contractor, holding that the contractor performed the change order work without a written change order at its peril.

The above result is different from that which has been found in Wisconsin. As far back as 1923—and perhaps farther—the Wisconsin Supreme Court has ruled that although a provision in a public works contract required changes to be in writing, the provision could be waived by the municipality if the municipality accepted the change order work performed. In that case, the Supreme Court ruled that the municipality had waived its right to require a written change order. *Park v. Great Lakes Dredge and Dock Company*, 180 Wis.2d 278, 192 N.W. 2d 1012 (1923).

Certainly, there are many proponents for the strict contract construction approach taken by the California court. There are likely as many proponents of the approach taken by Wisconsin. On a deeper level, California’s approach seems to value predictability as parties are required to abide by hard and fast contract rules. Wisconsin’s approach seems to value practicality, recognizing that written change orders are sometimes simply not realistic to expect during a project and are often dispensed with by parties who have a sufficient and trusting business relationship.

Denying that handshake changes occur is naive. Believing that all handshake changes are always crazy regardless of the circumstances is also naive. The point is that understanding what is and is not required by what written contract you do have and how the law interfaces with it is a fundamental part of evaluating the risk of going forward on just a handshake change. Parties should realize that Wisconsin’s courts can sometimes provide relief when your handshake friend of today disappointingly becomes a litigating foe of tomorrow.

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