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PROMISSORY ESTOPPEL – Your friend when asked to do change/extra work with no written change order

The Problem:

Have you ever run into the following situation: The Project Owner insists on performance of change or extra work with no written, signed change order, with a promise to provide you as General Contractor or CM with a change order later. You remind them that the contract requires a written, signed change order so that you will get paid for the work. The Owner responds that they are aware, but demands that this work is urgent, and asks that you please do the work, stating “we will take care of you.” You perform the change/extra work, and then comes the day of reckoning, and what does Owner say? “Our contract requires a written, signed change order; you do not have one; so, we are not paying you.” In my 30 years of litigating, arbitrating, and mediating (both as attorney, as well as mediator) construction disputes, I have literally encountered this fact pattern dozens, if not hundreds, of times.

Rule No. 1:

Rule No. 1 is and always should be – obtain a written, signed change order before performing any change/extra work. However, what happens when this lofty ideal collides with practical reality? Consider, at the least, using what I call the CO CYA Notice.

The Proposed Solution:

In the situation where a Contractor is directed to change/do extra work and promised a written, signed change order in the future, one way they can better their chances of recovery is through the use of a confirmation notice combined with a legal theory known as “promissory estoppel.” A proposed form notice is below. As you will see, it confirms the request to perform change/extra work for a certain price (and if applicable, for a certain period of time); confirms that a written, signed change order has been promised, but that the contractor has been directed to proceed; and, most importantly, states that in reliance upon the promise to provide a written, signed change order and to pay for the work to be done, that the contractor will proceed with the change/extra work requested. The letter closes, importantly, with a request that if any part of the Contractor’s understanding is incorrect, that they immediately be so advised in writing. The theory is that absent a written response, the Contractor can use the notice plus the promissory estoppel theory to recover for change/extra work even absent a written, signed change order.

The Law – Promissory Estoppel/Equitable Estoppel:

The legal elements of promissory estoppel are as follows: (1) a promise; (2) foreseeability of reliance thereon by the promisor; and (3) substantial reliance by the promisee to its detriment. It is important to note that promissory estoppel is defensive in nature. Promissory estoppel does not create a contract where none existed before, but only prevents a party from insisting upon their strict legal rights when it would be unjust to allow it to enforce them. The function of the doctrine of promissory estoppel is defensive in that it estops a promisor from denying the enforceability of the promise. So, in the situation where a Contractor has had

to file suit or a demand for arbitration for change/extra work for which it has not been paid; and a defense is then raised by the Owner that there is no written, signed change order as required by the contract; the Contractor can then use the theory of promissory estoppel, coupled with the written notice, as a counter-defense to this defense.

Another very similar concept is that of “equitable estoppel.” Equitable estoppel may arise if five factors are satisfied: (1) there was a false representation or a concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) to a party without knowledge, or the means of knowledge, of those facts; (4) with the intention that it be acted upon; and (5) the party to whom it was made must have relied on the misrepresentation to its prejudice. The theory is that a person who by speech or conduct induces another to act in a particular manner should not be permitted to adopt an inconsistent position, attitude or course of conduct.

Other theories that can be argued include waiver, that the Owner was first to breach, and quantum meruit. Each, however, has complications; complications that do not exist using the theory of promissory estoppel coupled with the CO CYA Notice.

The CO CYA Notice:

So, here it is:

You have requested we perform the following change/extra work: [Describe]. Our price to do so is \$_ [if applicable: and the extra time anticipated is [_] days]. We have requested a written, signed change order. You have advised that a written, signed change order will be given, but have directed us to proceed with the work immediately. This is to confirm that in reliance on your promise to provide us with a written, signed change order for the above-referenced work at the above-referenced price, [for the foregoing period of time,] we are proceeding with the requested change/extra work. If our understanding as set forth above is incorrect, please advise me so in writing immediately.

If your contract calls for a specific way of delivering notice, then of course follow the contract. Otherwise, the form of delivery is not as important as using this type of notice.

Hopefully you never find yourself in this situation; but, if you do, this may make the difference between your being paid or not paid for change/extra work performed by you with no written, signed change order.

This article first appeared in the ConsensusDocs Contract Law Newsletter and is linked [HERE](#).

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