



Owners: Say What You Mean and Do What You Say

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According to the owners' wishes, contracts frequently require contractors to put changes to the work in writing in order to be compensated. However, throughout the construction project, owners often become lackadaisical with contract requirements and verbally agree to or pay for additional work without requiring a written change order. An owner may have no problem compensating the contractor for certain work that the owner knew about or specifically ordered. However, what the owner may not realize is that waiving the written requirement in one situation may waive the requirement in others.

There are several ways in which an owner may waive the contractor's contractual obligation to create written change orders before performance. The owner, or an onsite representative, might verbally agree to the change in the work and agree to compensate the contractor. Alternatively, the owner may know of the change or additional work being made and not object to it. Similarly, an owner may later discover the additional work and accept or approve it. Courts have interpreted all these actions as specific waivers of the written requirement.

More importantly, however, these specific waivers can lead to a broader waiver by "course of dealing." Although it is arguable whether a "course of dealing" argument is appropriate in the context of waivers, the argument has moved courts. Recently, in *Tripoli Management, LLC v. Waste Connections of Kansas*, the course of dealing argument faced a Kansas federal court. In *Tripoli*, a contractor sued an owner for compensation for additional work. The owner refused to pay because the contractor did not submit change orders in writing before performing the additional work -- as required by the contract. Based on this argument, the owner motioned for a summary judgment. The court denied the owner's motion because of evidence that, during the construction project at hand and prior projects, the owner routinely agreed to additional work without a written change order.

Tripoli was not the first time that a court held that the course of dealing between owners and contractors resulted in the waiver of a written requirement provision. In *Memmer Construction v. Craig*, the Ohio court came to a similar result. According to the *Memmer* court, by routinely requesting and approving changes verbally, the owner waived the written change order requirement. Consequently, the owner's argument that the contractor failed to submit written change orders failed.

The lesson here is clear. Owners, make sure you enforce contractual requirements for written change orders. If you do not, you may end up paying for any oral agreement or other form of acceptance for additional work. Furthermore, even if no oral agreement ever occurred, you may end up paying to litigate the issue. The simplest solution is always to require the contractor to follow up any oral agreement for change with written confirmation.