

Everything You Ever Wanted to Know about Extra Work and the Changes Clause

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I. Why Contracts Have a Changes Clause Allowing Change Orders.....	2
II. "Constructive Changes".....	3
III. Limitations on the Owner's Power to Order Changes.....	4
A. Exceeding the Scope, or Defeating the Purpose, of the Contract.....	4
B. Competitive Bidding Laws Constraint.....	9
IV. The Relationship Between Extra Work and Change Orders	11
A. General Rule: Extra Work Requires a Change Order	11
B. What the Contract Requires the Contractor to Do.....	12
1. Implied Warranty of Complete and Accurate Contract Documents	13
2. Corollary to Implied Warranty of Complete and Accurate Contract Documents	17
3. Implied Warranty of Accurate and Complete Bidding Information (Non-disclosure of Material Facts).....	19
4. Determining Whether a Misrepresentation or Nondisclosure Occurred	22
5. Effect of Disclaimers	25
C. What the Contract Requires the Owner to Do.....	29
1. Site Access and No Interference	29
2. Third Party Cooperation	31
V. Contract Clauses Designed to Defeat Extra Work Claims	31
A. Written Change Order Required for Extra Work	31
B. Notice Requirements and Extra Work Claim Forfeitures.....	34
C. No-Damage-for-Delay Clauses	36
D. Accord and Satisfaction Language in Change Orders.....	39
E. Disclaimers.....	40
F. Excuse, Waiver and Estoppel	40

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I. WHY CONTRACTS HAVE A CHANGES CLAUSE ALLOWING CHANGE ORDERS

No architect or engineer ever produced a perfect set of plans and specifications. It is not humanly possible to do so. Too many elements of the work must be coordinated in too many ways. Besides, the plans and specifications cannot prescribe every detail of the work. Every construction project is different. Each is built by a combination of contractors who marshal their forces together, at a unique location, for just that one job. Work is often impacted by the unforeseeable: inclement weather, subsurface conditions, new building codes, unavailability of materials, and activities adjacent to, or sometimes through, the project site. No set of plans and specifications can anticipate such conditions or events, nor other factors that make the owner alter the project midstream. This is why contracts allow owners to make changes in the work.

If there were no changes clause in the contract, the contractor would have a right to build exactly what was called out in the plans and specifications. The owner could direct no changes without the contractor's consent. If the contractor refused to consent, the change could not be made.

That is why every competently drafted construction contract has a changes clause. As *City Street Improvement Company v. Kroh* (1910) 158 Cal. 308, 321, 110 Pac. 933, explains

It is always a wise precaution, in making contracts of this magnitude, to insert provisions to control the case of extra work which may appear to be necessary or desirable while the construction is going on. As was remarked in *Kitchel v. Union County*, 123 Ind. 540, [24 N. E. 366]: "No prudent individual would make a contract for the construction of a building of any

magnitude without incorporating a provision somewhere making specific and definite arrangements concerning extra work."

Although the language in changes clauses varies from contract to contract – and those variations may have significance – most changes clauses cover the following points:

(1) The right of the owner to unilaterally modify the plans and specifications, and the duty of the contractor to perform the work as changed.

(2) Mechanisms for the owner and contractor to agree on the cost and time implications of the change.

(3) Mechanisms for resolving disputes over costs and time. Typically, these mechanisms (a) require the contractor to maintain detailed daily records of the labor, services, equipment and material used for the changed work, and (b) specify markups that can be added to those costs to cover overhead and profit.

II. "CONSTRUCTIVE CHANGES"

An aside is required here about "constructive changes." The "constructive change" concept is a legal fiction; it is an assumption of facts needed to invoke legal rules that cannot be used unless those facts exist. A "constructive change" assumes that an owner's breach of the contract caused the contractor to suffer damages for which a contract change order should have been written. This legal fiction is only required to circumvent limitations on the jurisdiction of federal agency boards of contract appeals. Those boards can only consider claims which fall under a contract clause that grants a remedy to the contractor; any other claims

must be decided in court (*U.S. v. Utah Constr. & Mining Co.* (1966) 384 US 394; *Boomer v. Abbott* (1953) 121 Cal.App.2d 449, 462-63, 263 P.2d 476).

As a result of this jurisdictional limitation, many contractor claims were split; part went to the boards and the rest had to go to court. To avoid this inefficiency and extra expense, the boards started characterizing certain events as "constructive changes" for which the boards could grant a remedy under the changes clause of the contract. The "constructive change" concept has evolved to include disputes over (1) contract interpretation and resulting extra work claims, (2) delay or acceleration for which the government is responsible, and (3) failure of the government to disclose material facts.

The concept has no relevance to disputes arising from private or local government contracts. Regardless of whether the owner misinterpreted the contract documents, ordered extra work, failed to issue a change order, or delayed the work, the contractor's recovery is still for breach of the contract, and the contractor can obtain full recovery in the courts or under any of the arbitration procedures now in use.

III. LIMITATIONS ON THE OWNER'S POWER TO ORDER CHANGES

A. EXCEEDING THE SCOPE, OR DEFEATING THE PURPOSE, OF THE CONTRACT

Although the changes clause permits the owner to make unilateral changes – and requires the contractor to perform the modified work – there is a limit to the owner's power (*Valley Construction Co. v. City of Calistoga* (1946) 72 Cal.App.2d 839, 842, 165 P.2d 521 ["the right to make alterations in the plans is

limited to changes that do not unreasonably alter the character of the work or unduly increase its cost"). Whether the owner exceeds that permissible limit, is a question of fact (*Valley Construction* at 72 Cal.App.2d 842-44). By doing so, the owner breaches the contract (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 238, 38 P.3d 1120, 115 Cal.Rptr.2d 900 ["Under the cardinal change doctrine, the cardinal change 'constitutes a material breach of the contract.' [citation] The contractor may recover breach of contract damages for that additional work."]).

The permissible limit can be exceeded by an extraordinary increase in the quantity of work (*Daugherty v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 92 Cal.Rptr. 120), by an extraordinary decrease in the quantity of work (*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 268 P.2d 12; *Boomer v. Abbett* (1953) 121 Cal.App.2d 449,463-65, 263 P.2d 476), or by an extraordinary change in the quality of the work (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 55 Cal.Rptr. 1, 420 P.2d 713 [change in the center of gravity of missile transportation trailers that plaintiff agreed to build]).

Hensler v. City of Los Angeles (1954) 124 Cal.App.2d 71, 268 P.2d 12, involved construction of a runway and taxiways for LAX across a state highway. The city could not get timely consent from the state to detour the highway, so it deleted the affected work by change order. Hensler laid concrete around this gap, and sued for his lost profits on the deleted work. Held (124 Cal.App.2d at 78-80):

There is no question but that . . . the language of this agreement looks to a complete work of public improvement. . . . By the terms of the

agreement, plaintiff bound himself to deliver the completed work required of him. The corollary duty assumed by the city was to permit plaintiff to consummate the work he had undertaken, subject to its right to make changes, within designated limitations, in order to complete the project more satisfactorily. The deletions ordered by the engineer did not have for their purpose the satisfactory completion of that which both parties set out to accomplish; the fact is that the project was abruptly terminated in an unfinished state, thus leaving the so-called improvement unusable in connection with the existing runways. Nor were those deletions unnecessary to the project -- the court found that defendant completed virtually all the work deleted from plaintiff's contract through the medium of a new contract with a different company. . . .

The power vested in the engineer to effect changes in the quantities of the work is not so extensive as to enable him to abrogate or change the contract which the parties executed [citations], nor does it authorize defendant to employ such right to defeat the object of the contract which is reasonably deducible from its terms. The changes which may be ordered . . . must clearly be directed either to the achievement of a more satisfactory improvement or the elimination of work not integrally necessary to the project. The purpose of such powers is to maintain a degree of flexibility in adapting conditions to the end sought. However, the discretion committed to the engineer must be exercised within the framework of the contract and for the purpose of implementing the work originally intended. It cannot be used in an arbitrary manner, divorced from the object and intention of the contract, for the purpose of legitimatizing the deletion of so integral a part of the work as to leave the improvement in an unfinished condition and still insulate the city from liability. [citations] Such a construction would render nugatory plaintiff's fundamental rights under the contract and give to defendant an unconscionable advantage plainly not intended. . . .

In *Boomer v. Abbett* (1953) 121 Cal.App.2d 449, 263 P.2d 476, the federal government contracted with Abbett to build a 25 mile transmission line in northern California that required about 225 steel towers. Abbett subcontracted to Boomer the erection of the towers. The subcontract had a typical flow-down clause incorporating the prime contract into the subcontract. The government issued a change order deleting one mile in the middle of the transmission line involving 16 towers. Subcontractor Boomer sued Abbett for its costs of preparing to perform that

work and its lost profits on that work. In reversing a directed verdict against Boomer, the court explained (121 CA2d at 464-65):

We do not believe that the prime contract, as a matter of law, authorized the deletion of the 16 towers without liability except for an "equitable adjustment." There can be no doubt that the prime contract contemplated that some towers might be deleted during construction, and that such deletion could be made without liability. But the contract also contemplated and provided that the transmission line was to be constructed. It is a contract to construct a transmission line, not to construct about 225 towers. It is one thing to delete towers found to be unnecessary in the construction of the transmission line. It is quite another to delete an integral part of the work that results in the transmission line not being constructed. This 1-mile gap in the transmission line was not bridged until four years after this dispute arose, and then by a wooden pole line. . . .

Under the cases, if the contract imposes a duty on the government to complete the construction of the structure involved in the contract, a "changes" clause does not authorize the deletion of an integral part of the work. [citations] These cases establish the law to be that under a changes clause the government has no power to change the essential nature or main purpose of the contract, but may only make changes incidental to the primary object of the contract. The change order under such clauses may not essentially alter the project contemplated by the contract.

This construction of such clauses is not only in accordance with their obvious purpose, but is also strongly supported by public policy. If the government were empowered by such clauses to alter materially the object of the contract, after construction had started, all bidders would have to take such possibility into consideration and materially raise their bids in anticipation of such losses, thus increasing the cost of public works.

Thus the question is, did the deletion of the 16 towers materially alter the fundamental object of the contract, or merely provide for a deletion incidental to the primary object of the contract? This was a question of fact . . . that should have been left to the jury.

A change order, or group of change orders, that exceeds the permissible limit may be called a change in the scope of the work or change in the character of the work (*Valley Const. Co. v. City of Calistoga* (1946) 72 Cal.App.2d 839, 165 P.2d 521) or a "cardinal change" in the contract (*Cray Research, Inc. v. Department of Navy* (D.C.Dist. 1982) 556 F.Supp. 201). Exceeding the limit may also be

characterized as an "abandonment" of the contract (*C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 218 Cal.Rptr. 592; *Daugherty v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 92 Cal.Rptr. 120; *Opdyke & Butler v. Silver* (1952) 111 Cal.App.2d 912, 917-19, 245 P.2d 306; but see *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 115 Cal.Rptr. 2d 900, 38 P.3d 1120, where the majority purports to distinguish "abandonment" from "cardinal change" for purposes of local government contracts only [27 Cal.4th at 236-38], and the dissent explains why the distinction is nonsense which no other jurisdiction in the United States has adopted [27 Cal.4th at 248-253]).

Besides describing changes beyond the permissible limit by different names, the courts have also struggled to define the permissible limit. It has been described as "what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into" (*Freund v. U.S.* (1922) 260 US 60, 63), or as prohibiting "changes [that] are of great magnitude in relation to the entire contract" (*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 406, 55 Cal.Rptr. 1, 420 P.2d 713), or as prohibiting changes "to the essential nature or main purpose of the contract . . . Thus the question is, did the [change] materially alter the fundamental object of the contract, or merely provide for a [change] incidental to the primary object of the contract?" (*Boomer v. Abbett* (1953) 121 Cal.App.2d 449, 464-65, 263 P.2d 476), or as prohibiting changes in "the character of the work or unduly increase its cost" (*Valley Construction Co. v. City of Calistoga* (1946) 72 Cal.App.2d 839, 842, 165 P.2d

521).

The cardinal change/abandonment theory can be used by a subcontractor against a prime contractor (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corporation* (2003) 111 Cal.App.4th 1328, 1343-46, 4 Cal.Rptr.3d 655 [tunnel for City of San Diego]; *Daugherty v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 92 Cal.Rptr. 120 [private job]; *Boomer v. Abbett* (1953) 121 Cal.App.2d 449, 263 P.2d 476 [transmission line for federal government]).

B. COMPETITIVE BIDDING LAWS CONSTRAINT

In addition to the cardinal change/abandonment limitation on change orders, there is a special limitation on government contracts that were awarded under an open, competitive bidding requirement. At some point the public agency can no longer modify a contract by change order, but must go back out to competitive bidding for the new work.

This limitation may appear in the statutes or ordinances governing the agency, for example, California Health & Safety Code section 32132 (local hospital districts, 5% of the contract price), and California Public Contract Code section 20137, (counties over 500,000 population, 10% of the contract price per change order), section 20142 (designated county official in county over 500,000 population, 10% of the contract price per change order, but not over \$25,000), section 20145 (L. A. County, 10% of the contract price per change order, aggregate 25%), section 20395 (county road commissioner, 10% of the contract price per change order, but not over \$25,000), section 20455 (1911 Act contracts, 10% of the contract price per change order, but not over \$25,000), section 21551 (San Diego County Flood Control

District, 10% of the contract price per change order, but not over \$100,000).

If no statute or ordinance defines the limitation, the courts will. In *Bent Bros., Inc. v. Campbell* (1929) 101 CA 465, 281 Pac. 717, after the contractor had started work on a dam project, the state engineer demanded changes in the design that moved the central portion of the arch and the left abutment about 50 feet, but left the central mass of the dam, spillway, outlet and flood control works substantially the same as originally designed. These changes increased the concrete used by about 10% over the engineer's estimate, and appear to have increased the price by about 10%. The court held (101 CA at 469-70):

[N]othing has been called to our attention which would indicated any substantial change, either in the character of the work to be done, or, in the view of the extent of the work to be done, any really substantial addition thereto. As we have shown, the added work does not reach the percentage degree approved in the case of *Frazer et al. v. City of Ardmore* [103 Okl. 31, 229 Pac. 143, where the final quantities were 19.2% higher than the engineer's estimate].

In *Cray Research, Inc. v. Department of Navy* (D.C.Dist. 1982) 556 F.Supp. 201, the court held: "The 'cardinal change' doctrine prevents government agencies from circumventing the competitive procurement process by adopting *drastic* modifications beyond the original scope of a contract. The basic standard is whether the modified contract calls for essentially the same performance as that required by the contract when originally awarded so that the modification does not materially change the field of competition. [citations]"

Whether the limitations have been exceeded always turns on the facts in the particular case (*Air-A-Plane Corporation v. U. S.* (Ct.Cl. 1969) 408 F.2d 1030,

1032-1033, *Boomer v. Abbott* (1953) 121 Cal.App.2d 449, 263 P.2d 476).

If the public agency issues a change order, or group of change orders that exceeds the agency's limitation under the competitive bidding requirements, the contractor can sue for breach of the contract (*Shea-Kaiser-Lockheed-Healy v. Dept. of Water & Power* (1977) 73 Cal.App.3d 679, 140 Cal.Rptr. 884).

IV. THE RELATIONSHIP BETWEEN EXTRA WORK AND CHANGE ORDERS

A. GENERAL RULE: EXTRA WORK REQUIRES A CHANGE ORDER

Change orders should be issued when the contractor is required to do extra work. Extra work is labor, services, equipment or materials provided by the contractor that was neither required by the contract nor expected to be included by the parties when the contract was executed (*City Street Improvement Company v. Kroh* (1910) 158 Cal. 308, 321, 110 Pac. 933 ["Extra work is, of course, work not included in the contract."], *C. F. Bolster Co. v. J. C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247; *Frank T. Hickey, Inc. v. L. A. J. C. Council* (1955) 128 Cal.App.2d 676, 683, 276 P.2d 52).

If the owner admits that extra work was required, a change order will be issued. If the owner refuses to issue a change order, the contractor will usually proceed with the work and pursue a claim for extra work under either a breach of contract theory (*Byson v. Los Angeles* (1957) 149 Cal.App.2d 469, 473, 308 P.2d 765 ["Plaintiff could comply with the demands of the city [for extra work] and sue for breach of contract."]) or an implied contract theory (*City Street Improvement Company v. Kroh* (1910) 158 Cal. 308, 323, 110 Pac. 933 ["In cases where extra

work is caused by authorized deviations from a building contract, and no agreement is made regarding the price thereof, or payment therefor, the law implies an agreement by the owner to pay the reasonable value of the extra work. . . . and for the extra labor, the party is entitled to his *quantum meruit*."]; *Benson Elec. Co. v. Hale Bros. Assoc., Inc.* (1966) 246 Cal.App.2d 686, 697-98, 66 Cal.Rptr. 73; *C. F. Bolster Co. v. J. C. Boespflug etc. Co.* (1959) 167 Cal.App.2d 143, 151, 334 P.2d 247).

B. WHAT THE CONTRACT REQUIRES THE CONTRACTOR TO DO

Most extra work disputes arise when the contractor reads the plans and specifications differently than they are read by the owner or design professional. These disputes are usually resolved by the parties doing a careful analysis of the contract documents, applicable reference documents, and customs and practices in the industry. When the analysis reveals that extra work is required, the contractor is entitled to a change order. If the dispute goes into arbitration or litigation, expert witnesses often will testify about what the contract documents and reference documents really require, or what the industry customs and practices are in these situations (*e.g.*, *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291-93, 85 Cal.Rptr. 444, 466 P.2d 996).

Sometimes these disputes fall into patterns for which legal doctrines have been developed. The underlying concept is that a contractor only has to build what the parties actually agreed would be built. This concept leads to (1) the implied warranty that contract documents are complete and accurate, and (2) what amounts to another implied warranty that information made available to bidders

accurately and completely represents the actual nature of the work (a breach of this inchoate warranty is now often described as a non-disclosure of material facts). The implied warranty that contract documents are accurate and complete focuses upon what the contract documents actually require the contractor to do. It is breached when the contract documents call for work that cannot be done or will not achieve the purpose of the project; therefore, extra work is required to produce the proper or desired result. The implied warranty of accurate and complete bid information focuses upon all of the information made available to the contractor for preparation of its bid, not just the contract documents. It is breached when the owner provides incomplete or inaccurate pre-bid information about job conditions, thereby misleading bidders about the scope or nature of the work, and, as a result, requiring extra work to produce the result anticipated by the owner.

Many situations otherwise falling under these doctrines are now addressed by a changed or differing site conditions clause. That clause is not discussed here.

1. Implied Warranty of Complete and Accurate Contract Documents

Both statutes and court decisions require the owner to provide the contractor with complete and accurate contract documents. Any extra work required to correct deficiencies arising from inadequate plans or specifications must be paid for by the owner as either a breach of the implied warranty that the contract documents are complete and accurate, or as a breach of a statutory duty to provide such contract documents.

Examples of the California statutes are: California Government Code

section 4004 ("Prior to the commencement of the public work, the engineer [defined to include engineers of the state, a county, a city and any "other district or political subdivision or agency of the state"] shall prepare and file in his office . . . full, complete and accurate plans and specifications . . ."), and California Public Contract Code section 1104 ("No local public entity [or] charter city . . . shall require a bidder to assume responsibility for the completeness and accuracy of . . . plans and specifications on public works projects, except on clearly designated design-build projects."), section 10120 ("Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out." On this statute see discussion in *Welch v. State of California* (1983) 139 Cal.App.3d 546, 559, 188 Cal.Rptr. 726), section 10503 ("Before entering into any contract for a project, the Regents of the University of California shall cause to be prepared estimates and either: ¶ (a) Complete plans and specifications setting forth such directions as will enable a competent mechanic or other builder to carry them out. . . . [or] Documents for the solicitation of bids on a design-and-build basis . . . [or] for construction manager mode of contracting . . . [or] on a cost-plus fee mode of contracting . . . [or] other contracting mode . . ."), section 10720 ("Before entering into any contract for a project, the trustees . . . shall cause to be prepared full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out."), sections 20124, 20391 and 20404 for counties, their highways,

bridges and subways, section 20621 for county drainage districts, section 20192 for municipal utility districts, section 20201 for public utility districts, and section 22039 for agencies that have joined the uniform construction cost accounting program.

The court case usually cited as the source for the owner's implied warranty that the contract documents are complete and accurate is *U.S. v. Spearin* (1918) 248 U.S. 132, 63 L.Ed. 166, 39 S.Ct. 59. The court held (at 248 U.S. 137-38):

[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work . . . [¶] "[T]he insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. . . . [¶] . . . The breach of warranty . . . [made the Government] liable for all damages resulting from its breach.

California cases also find such an implied warranty in contract documents. The seminal California case is probably *Souza & McCue Construction Co., Inc. v. Superior Court* (1962) 57 Cal.2d 508, 20 Cal.Rptr. 634, 370 P.2d 338. There the contractor was allowed to amend its cross-complaint to allege that the city had concealed its breach of the warranty. The court held (at 57 Cal. 2d 510-11):

A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. [citations] This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. [citations] The fact that a breach is fraudulent does not make the rule inapplicable. [citations].

In *Macomber v. State of California* (1967) 250 Cal.App.2d 391, 58 Cal.Rptr. 393 the plans failed to accurately show the existing conditions into which a new spiral staircase had to fit. The court observed (at 250 Cal.App.2d 397):

The State does not question the general rule that a contractor who, acting reasonably, is misled by incorrect plans and specifications and who, as a result, submits a bid which is lower than he would otherwise have made, may recover in a contract action for extra work necessitated because of the incorrect plans and specifications. [citations] Also, the State concedes that its plans and specifications were incorrect.

In *Tonkin Construction Co. v County of Humboldt* (1987) 188 Cal.App.3d 828, 233 Cal.Rptr. 587, the contract required work on a seawall to be completed within 40 working days of the notice to proceed, or the contractor would be assessed liquidated damages. That work could not be performed without a dredge that was under contract with the Corps of Engineers. The contract informed Tonkin that it had to coordinate scheduling with the Corps. Despite all of Tonkin's coordination efforts, the dredge did not timely arrive. Tonkin recovered its extra work and standby costs. Held at 188 Cal.App.3d 832:

Clearly an implied term of the contract herein was that once the notice to proceed was issued, the dredge would be available for work on the project. The apparent intention of the parties was completion of the seawall within 40 working days of the issuance of the notice to proceed. . . . This intention of prompt completion of the seawall could not have been effectuated absent an implied term that the County would insure the dredge's availability for work on the project. . . .

Tonkin, acting as a reasonable public works contractor, was misled by this incorrect implied representation in its submission of a bid. Tonkin justifiably relied on this representation in determining the cost of constructing the seawall. Accordingly, it did not include in its bid the cost of maintaining the seawall for an indefinite period of time while awaiting the arrival of the dredge. As the County impliedly warranted the correctness of these representations, it is liable for the cost of extra work which was

necessitated by the dredge's failure to arrive.

2. Corollary to Implied Warranty of Complete and Accurate Contract Documents

A corollary to the implied warranty that the contract documents are complete and accurate is the absence of any duty of the contractor to correct defects in the contract documents by building something other than what the contract documents prescribe. In *Kurland v. United Pacific Insurance Company* (1967) 251 Cal.App.2d 112, 59 Cal.Rptr. 258, the subcontract called for the air conditioning system to cool the building 30 degrees below the outside temperature. However, the subcontractor did not design the system, and the subcontract required the system to be built according to plans and specifications provided by the owner. The specified system was inadequately designed, and could not achieve the 30 degree temperature reduction. The subcontractor refused to perform extra work to make the system achieve that goal. The owner and prime contractor sued the subcontractor's performance bond surety for the cost of that extra work. They lost. Held at 251 Cal.App.2d 117-19:

Our conclusion is that the subcontractor did not warrant or guarantee that the system embodied in the architect's plans and specifications would produce the desired variation from outside temperature for the cooling of the apartment building.

Since the plans and specifications were prepared by the owners' architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with his specific proposal, we cannot reasonably conclude that the subcontractor assumed responsibility for the adequacy of the plans and specifications to meet the purpose of achieving "a 30 degree variation from outside temperature for cooling." The language upon which the plaintiff relies constituted a statement of the purpose sought to be achieved by means of the owners' plans and specifications rather than an undertaking on the part of the subcontractor of responsibility for the adequacy of such plans and specifications as the design of a system capable of

producing the desired result.

* * *

In the light of the reasoning which has been heretofore set forth in this opinion, we construe the "guarantee" as being an undertaking on the part of the subcontractor not that the system as designed was adequate to produce the results desired by the owners but that the subcontractor's work pursuant to the plans and specifications would be done as effectively as possible to achieve those desired results. Because of the defects in the design to which the subcontractor had to adhere, that goal could not be reached. It would not be reasonable to construe the language of "guarantee" as being sufficiently broad to constitute a basis for a transfer to the subcontractor of responsibility for defective plans and specifications procured by the owners.

In *Sunbeam Construction Co. v. Fisci* (1969) 2 Cal.App.3d 181, 184, 82 Cal.Rptr. 446, the owner sought the cost to fix a leaking roof. The court explained the owner's argument (at 2 Cal.App.3d 184):

[The owner] concedes that the roof was constructed in a good and workmanlike manner and in exact conformance to the plans and specifications furnished by [the owner], which did not call for a pitch, slope or crown. [The owner's] sole contention is that a contractor is liable under an implied warranty for leaking of a roof covering where drainage of water is not provided by it, even though the contractor complies with the plans and specifications furnished which do not provide for drainage.

The court rejected the owner's argument and affirmed a summary judgment in favor of the contractor.

Thus, when the contract documents tell the contractor what to do, but fail to adequately describe the work or conditions required to achieve the anticipated result, the contractor cannot be compelled to perform extra work to achieve that result without getting a change order for the extra work, or without compensation for the extra work if the contractor proceeds without a change order.

3. Implied Warranty of Accurate and Complete Bidding Information (Non-disclosure of Material Facts)

Turning to the implied warranty that bidding information is accurate and complete, the court case usually cited as the source of that warranty is *Hollerbach v. U.S.* (1914) 233 U.S. 165, 58 L.Ed. 898, 34 S.Ct. 553. The contract was for repair of a dam; the existing conditions were misrepresented in the bidding documents. The court held (at 233 U.S. 172):

[T]he specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. . . . this positive statement of the specifications must be taken as true and binding upon the Government . . . [U]pon it rather than upon the claimants must fall the loss resulting from such mistaken representations. . . .

The seminal California case is probably *Gogo v. Los Angeles County Flood Control District* (1941) 45 Cal.App.2d 334, 114 P.2d 65. The contract required excavation of rock for a dam. The agency represented both orally and in bidding documents that ongoing quarry operations would reduce the rock grade to a certain elevation. It did not. When the contractor came onto the job site, it had to remove over twice the estimated 52,000 cubic yards of rock. Held (at 45 Cal.App.2d 341-42):

It may be stated generally that where the plans and specifications induce a public contractor reasonably to believe that certain indicated conditions actually exist and may be relied upon in submitting a bid, he is entitled to recover the value of such extra work as was necessitated by the conditions being other than as represented. [citations, including *Hollerbach*] The facts of the instant case bring it within the foregoing rule.

The authorities are divided concerning the theory upon which recovery is allowed in this type of case. . . . [T]he correct basis of recovery is on the theory that the action is one to recover damages for the misrepresentation by which the contract was induced. (*Hollerbach v. United States* [233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898] . . .) It would be inequitable to permit defendant to enforce the literal terms of the contract which called for the excavation of "all materials" necessary to complete the job when plaintiffs were induced by defendant's misrepresentation to submit a bid which was much lower than

was warranted by the true facts. If instead of stating in the specifications that West Slope Construction Company would excavate to rough grade, defendant had stated the true facts of which it had knowledge—that West Slope Construction Company was obligated by contract to excavate no lower than five feet above grade—the present situation would not have arisen. Having failed to impart this knowledge to plaintiffs and having wilfully or carelessly misrepresented the true situation, defendant is obligated to plaintiffs for the additional work occasioned.

The warranty of accurate and complete bidding information extends to subcontractors. In *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 55 Cal.Rptr. 1, 420 P.2d 713, North American provided bidding documents to Coleman describing trailers North American needed to transport missiles it was building for the federal government. Those documents indicated that the trailers' center of gravity was different than North American actually wanted. Coleman's bid was based upon the information provided, so it refused to proceed with the revised center of gravity without a substantial price adjustment. North American terminated the contract. Coleman sued for its costs trying to perform; North American cross-claimed for the difference between Coleman's bid and the cost to have another firm build the trailers. Held (at 65 Cal.2d 404):

A contractor who, acting reasonably, is misled by incorrect plans and specifications issued by another contracting party as the basis for bids and who, as a result, submits a bid which is lower than he would otherwise have made may recover in a contract action for extra work necessitated by the incorrect plans and specifications.

In *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, 85 Cal.Rptr. 444, 466 P.2d 996, the court describes a breach of the implied warranty that bidding information is accurate and complete as a cause of action for

non-disclosure of material facts:

In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead, (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff. [footnotes omitted]

Thus, the elements of a cause of action for breach of the implied warranty that bidding information is accurate and complete – or for non-disclosure of material facts – are: (1) information that was made available to the bidders contained material facts about the project, and (2) the contractor relied upon that information in preparing its bid, but (3) that information failed to disclose other material facts (a) that the owner concealed from the contractor, or (b) that the owner knew were not reasonably discoverable by the contractor, or (c) that significantly qualified the facts which were disclosed, or (d) that made the facts disclosed likely to mislead the bidder, and (4) as a result of its reliance, the contractor's bid did not cover all of the work which was required.

Subsequent California cases follow the *Warner* formulation. In *Welch v. State of California* (1983) 139 Cal.App.3d 546, 188 Cal.Rptr. 726, the contract for repair of a bridge fender required work by divers. The contract documents provided misinformation about the tides and current under the bridge. Caltrans had recently repaired a nearby fender on the same bridge, had relied upon information from that project to design the one in this case, but failed to disclose any information about that project in the bidding documents for this project. Strong currents interfered

with diving, and high tides forced a change in construction methods from pouring concrete in place to precasting in sections. Welch sued for the increased costs. Held (at 139 Cal.App.3d 558):

The undisclosed information doubtless would have qualified or cast doubt upon any false impression of favorable tide conditions given by the tide data in the general note. The failure to disclose such information compounded the effect of misleading half-truths in the general note.

Therefore, Welch had a cause of action for nondisclosure.

In *Howard Contracting Inc. v. G. A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 83 Cal.Rptr.2d 590, the contractor recovered damages for nondisclosure, because the agency failed to disclose construction constraints which it knew would be contained in permits that were not issued until after bid day.

4. Determining Whether a Misrepresentation or Nondisclosure Occurred

When the contractor asserts a breach of the implied warranty of complete and accurate contract documents, the court will search the contract documents for an actual statement by the owner that misled the contractor. When the court cannot find one, the contractor loses. In *Wunderlich v. State of California* (1967) 65 Cal.2d 777, 784-785, 56 Cal.Rptr. 473, 423 P.2d 545, the Caltrans contract documents told bidders that "samples" taken from potential borrow sites "indicated" material of "satisfactory quality" for base, gravel blanket and mineral aggregate. Caltrans offered access to its test results from those sites. For the borrow site Wunderlich ultimately decided to use, an internal Caltrans memo, which was shown to Wunderlich's estimator before bid time, reported tests showing 55% to

88% of the material passing a No. 4 sieve (material passing this sieve is sand, material not passing is gravel). Wunderlich assumed from this information that the borrow site would yield the median amount of gravel (about 30%). Wunderlich found much less gravel, and complained to Caltrans. Caltrans performed new tests, which were consistent with the pre-bid tests. Wunderlich sued claiming that Caltrans had warranted the quantity of gravel in the selected borrow pit. The court rejected that argument (at 65 Cal.2d 783-85):

The Special Provisions state simply that samples had been taken from the pit, and that they appeared to point to the fact that there was suitable material in the pit. There was no representation as to quantities in the source, or that a consistent proportion of materials would be found throughout the source. . . . [T]he memorandum . . . does not purport to disclose the average of overall condition of the Wilder pit. It purports to explain, rather, that the pit was composed of sand and gravel, and expressly states that "some test holes encountered considerable coarse material, while others were practically all sand." It forewarns bidders that there might be more sand than anticipated . . . Although the memorandum accurately reported the fact that borings results ranged from 55 percent to 88 percent sand, this would hardly seem to warrant the conclusion that the pit would average the median of that range, as claimed by plaintiffs. . . .

* * *

There is no positive representation as to the material content of the Wilder pit. The state did little more than report the results of its testing. . . . and the plaintiffs were given or had access to the identical, accurate information that was available to the state.

What plaintiffs argue, in effect, is that by the presentation of its borings and tests, though accurately reported, the state assumes liability for the contractor's erroneous assumption in bidding that the pit would average approximately a fixed percentage of gravel. . . .

* * *

In the instant case . . . [a]ll the information the State had concerning the soil conditions was available to claimant and claimant had been invited to make an investigation of its own. Under these circumstances, the State is not chargeable for claimant's loss. . . .

When the contractor asserts a nondisclosure of material facts, the

court will search for an impact on the contractor's bid from information that was withheld or from half-truths in the bidding information. When it cannot find any, the contractor loses. In *Wiechman Engineers v. State of California* (1973) 31 Cal.App.3d 741, 107 Cal.Rptr. 529, the contract documents offered access to soil borings which showed substantial subsurface boulders, and Weichman's estimator's own site visit revealed many boulders on the surface. When the boulders Weichman encountered made construction of the road much more difficult and time consuming, Weichman sued for nondisclosure of the boulder information Caltrans had. The court rejected Weichman's argument, holding (at 31 Cal.App.3d 752-53):

Here, there was no representation of any kind as to subsurface conditions. Absent such a representation, there was no disclosed fact which was likely to mislead plaintiff.

Secondly, knowledge of the boulderous condition was not known or accessible only to the state, nor did the state have such facts as were not known or reasonably discoverable by plaintiff, if plaintiff had made what would have been admittedly a reasonable and prudent inquiry.

As previously pointed, out, section 5-1.05 of the Special Provisions of the contract provided in part: "Where such investigations [of subsurface conditions in areas where work is to be performed] have been made, bidders or Contractors may, upon written request, inspect the records of the Department as to such investigations"

Nothing in this language in any way limited accessibility or precluded plaintiff from obtaining all information available if it desired to inquire. Thus, there was no concealment of the boulderous condition on the job site or the test hole surveys. The record clearly shows actual visibility of boulders in the job area, a fact readily apparent and *known* to plaintiff *before* the bid was submitted, as evidenced by Barkley's detailed testimony.

Finally, Barkley, the very person entrusted with the responsibility to investigate and prepare the contractor's bid, not only assumed the state had test information as to the road subsurface, but testified he simply decided not to inquire about the same, fully mindful of the fact that the movement of rocks and boulders necessarily would be involved in the performance of the contract. We observe that had plaintiff elected to examine the available test

hole surveys, it merely would have confirmed what onsite observations disclosed; namely, that the work of construction was to be undertaken in a boulderous area and the degree and nature of the condition would be something to consider when submitting a bid. Plaintiff elected to make its decision in this regard based on its own expertise in performing the work and its own judgment that further inquiry as to subsoil conditions was not required.

A public entity is not liable for an imprudent or careless investigation on the part of a contractor. . . .

See also *Jasper Construction, Inc. v. Foothill Jr. College Dist. of Santa Clara County* (1979) 91 Cal.App.3d 1, 153 Cal.Rptr. 767.

5. Effect of Disclaimers

The courts refuse to allow general disclaimers to overcome either of the implied warranties.

In *U. S. v. Spearin* (1918) 248 US 132, 137, 63 L.Ed 166, 39 S.Ct 59, the court held that the implied warranty that the contract documents are complete and accurate

is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract. [¶] Neither § 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. [footnotes omitted]

In *Hollerbach v. U.S.* (1914) 233 U.S. 165, 58 L.Ed. 898, 34 S.Ct. 553, paragraph 20 of the specifications declared that

quantities given are approximate only, and that no claim shall be made . . . on account of any excess or deficiency . . . Bidders . . . are expected . . . to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

And, specifications paragraph 70 required each bidder to "visit the site . . . and ascertain the nature of the work . . . and obtain the information necessary to enable him to make an intelligent proposal." Nonetheless, the court rejected the argument that these clauses insulated the owner from its positive misrepresentations of job site conditions in other clauses, holding (at 233 U.S. 172):

[I]t would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.

California courts follow the same rules. In *E. H. Morrill Company v. State of California* (1967) 65 Cal.2d 787, 789-90, 423 P.2d 551, 56 Cal.Rptr. 479, the contract stated, "Boulders . . . vary in size from one foot to four feet in diameter. The dispersion of boulders varies from approximately six feet to twelve feet in all directions, including the vertical." However, the boulders found were substantially larger and more concentrated. Held (at 65 Cal.2d 791-93):

[T]he complaint states a cause of action for recovery on a theory of breach of implied warranty . . .

* * *

The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications "is not overcome by the general clauses requiring the

contractor, to examine the site, to check up the plans, and to assume responsibility for the work. . . ." (*United States v. Spearin*, 248 U.S. 132, 137 [63 L.Ed. 166, 39 S.Ct. 59].) Accordingly, the language in section 4 requiring the bidder to "satisfy himself as to the character . . . of surface and subsurface materials or obstacles to be encountered" cannot be relied upon to overcome those representations as to materials and obstacles which the state positively affirms in section 1A-12 not to exist, and plaintiff was entitled to rely and act thereon.

Even when the disclaimers are more specific, California courts are inclined to read them narrowly to preserve a contractor's implied warranty claim. In *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 85 Cal.Rptr. 444, 466 P.2d 996, the test-hole logs had a warning:

The test-hole information on these plans shows conditions found only at the date and location indicated. Bidders are cautioned that the city in no way warrants that such information is representative of conditions at any other location, or at any other time. Groundwater levels, particularly, are subject to change.

City argued that this warning disclaimed the warranty, but the court held (at 2 Cal.3d 292):

[W]e find, on closer examination, that the warranty and the disclaimer pass each other without collision. The warranty describes the subsurface conditions at the test holes, but says nothing about conditions elsewhere on the site. The disclaimer states that "the test-hole information . . . shows conditions found only at the date and location indicated," and cautions bidders that the city does not warrant that the data is representative of other locations, but it in no way disclaims the accuracy of the test-hole logs. Reading the two together, we conclude that the bidder takes the risk in making deductions from accurate test data, but the city retains responsibility for any inaccuracy in the data. [footnotes omitted]

Welch v. State of California (1983) 139 Cal.App.3d 546, 551, 188 Cal.Rptr. 726, holds:

Although the contract between Caltrans and Welch contains a provision requiring on-site inspection by contractors as well as other general disclaimers of warranty, it does not absolve the State from responsibility for positive and material misrepresentations contained in the plans and upon which a contractor had a right to rely. [citations] There is no provision in the contract specifically disclaiming any responsibility on the part of the State for the accuracy of the tide data contained in the general note.

In *Tonkin Construction Co. v County of Humboldt* (1987) 188 Cal.App.3d 828,233 Cal.Rptr. 587, the county argued that the contractual requirement that Tonkin coordinate scheduling with the Corps of Engineers constituted a disclaimer as to the exact time of the dredge's arrival. Held (at 188 Cal.App.3d 833-34):

[T]he facts of the instant case do not reveal an explicit disclaimer with respect to the County's implied representation of the dredge's availability. Absent a contract provision specifically disclaiming responsibility on the part of the public body for the accuracy of the contested information, general disclaimers of warranty will not absolve the public body from responsibility for positive and material misrepresentations contained in the plans and upon which a contractor had a right to rely.

However, when the disclaimer is precise and is contained in the same contract clause as the representation on which the breach of warranty claim is based, the disclaimer may be enforced. In *Wunderlich v. State of California* (1967) 65 Cal.2d 777, 56 Cal.Rptr. 473, 423 P.2d 545, the court held that there was no representation concerning the quantity of gravel Wunderlich could expect in the borrow site. The court also pointed out (at 65 Cal.2d 785-86):

[A]ny representation as to the quantity of materials in any of the sources described by the state was explicitly and clearly disclaimed by an express provision of the Special Provisions. At the outset of the same paragraph in which the representation is found, the bidders are referred to section 6 of the Standard Specifications. That section provides expressly that when sources

of material are designated, the contractor shall satisfy himself as to the *quantity of acceptable material* which may be produced at the source, and disclaims state responsibility for the quantity of acceptable material. *Hollerbach* [v. *U.S.* (1914) 233 U.S. 165, 58 L.Ed. 898, 34 S.Ct. 553] and the other cases relied upon by plaintiffs to establish liability of the state do not stand for the proposition that the government may never effectively disclaim the intention to warrant conditions. In the *Hollerbach* cases there was no specific disclaimer [citation], just as there was no indication to bidders of the basis upon which the statement had been made. In the instant case, however, the very paragraphs containing the alleged warranty contain direct references to disclaimer paragraphs and to a specific disclaimer of the attributes of the source allegedly warranted.

C. WHAT THE CONTRACT REQUIRES THE OWNER TO DO

Besides prescribing the work that the contractor must do, the contract also assures that the contractor will be allowed to proceed with that work.

1. Site Access and No Interference

Except as specifically allowed by the terms of the contract, the owner cannot interfere with the contractor's performance of the work; to the contrary, the owner must facilitate the contractor's performance. Acts or omissions of the owner, beyond what the contract permits, can disrupt the contractor's orderly performance of the work, delay performance of some work, or require the performance of some work to be accelerated. Extra work is often the result. For that extra work, the contractor is entitled to a change order (Civil Code sections 1655, 1656). This concept was explained in *Gray v. Bekins* (1921) 186 Cal. 389, 395, 199 Pac. 767:

In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a

breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance.

This rule has been regularly reiterated in various contexts: *Lapp-Gifford Company v. Muscoy Water Company* (1913) 166 Cal. 25, 30, 134 Pac. 989 ("Appellant having contracted for the construction of a pipe-line over a fixed and determined route, the law implies a covenant either that it possesses or will procure a right to construct such pipe-line over the route specified."); *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613, 220 P.2d 729 ("[The contract contained] an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. . . . Defendants' conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract."); *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920, 136 Cal.Rptr 890 ("District owed appellant a legal duty not to hinder, delay, interfere with or prevent his performance. . . . where plans, specifications and conditions of contract do not otherwise provide, there is an implied covenant that the owner of the project is required to furnish whatever easements, permits or other documentation are reasonably required for the construction to proceed in an orderly manner."); *Howard Contracting Inc. v. G. A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 50, 83 Cal.Rptr. 2d 590 ("The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate performance of work. When necessary permits relating to the project are not available or access to the site is limited by the

owner, the implied covenant is breached.").

2. Third Party Cooperation

Another ramification of the contractor's right to perform the work is the owner's duty to obtain third party consent or cooperation necessary to perform the contract. If the owner fails to do so, regardless of the reason for the failure, the contractor is entitled to a change order for any extra work or delay arising from the third party's failure to consent or cooperate (*Klauber v. San Diego St. Car Co.* (1892) 95 Cal. 353, 30 Pac. 555; *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 268 P.2d 12). Note, however, that the owner's duty can be altered by the contract. By the terms of the contract, the contractor may become responsible for obtaining necessary third party consent or cooperation, *e.g.*, pulling building permits.

V. CONTRACT CLAUSES DESIGNED TO DEFEAT EXTRA WORK CLAIMS

Owners, design professionals, and other consultants to owners, have created dozens of contract clauses that are designed to control and prevent extra work claims. Courts will first look closely at the specific language of these clauses in the context of the contract to determine what they require. Often that is different from what the owner or contractor contends. Some of the typical clauses and how the courts have interpreted them are discussed below.

A. WRITTEN CHANGE ORDER REQUIRED FOR EXTRA WORK

Many contracts require a written change order before the contractor performs any extra work, and declare that the failure to get one is a bar to, or waiver of, all claims for the extra work. In *Acoustics, Inc. v. Trepte Constr. Co.*

(1971) 14 Cal.App.3d 887, 92 Cal.Rptr. 723, section 29 of the contract General Conditions required defects in the contract documents to be brought to the State Architect for resolution and "[s]hould the Contractor proceed with the work affected without instruction from the State Architect, he shall be responsible for any . . . added cost resulting therefrom." Enforcing this clause, the court rejected the extra work claim (at 14 Cal.App.3d 912), because:

Compliance with contractual provisions for written orders is indispensable in order to recover for alleged extra work. . . . [¶] [provisions] of the General Conditions established conditions precedent to the right of Trepte to claim or receive additional moneys for allegedly extra work, and Trepte's failure to comply with these conditions releases the State from liability therefor.

However, the written change order requirement can be waived. In *Weeshoff Construction Company v. Los Angeles County Flood Control District* (1979) 88 Cal.App.3d 579, 589-90, 152 Cal.Rptr. 19, the court held:

California decisions have . . . established that particular circumstances may provide waivers of written "change order" requirements. If the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written "change order" requirement may be waived. [citations]

In the present case, there is much evidence to support plaintiff's claim that the district intended to force it to utilize temporary pavement on Whittier Blvd. Trial testimony included: (1) prior to April 20, 1973, plaintiff's procedure for filling his contractual requirement to restore three traffic lanes daily had been to backfill excavations with hard packed sand (a procedure which was found by the trial court to comply with contract requirements); (2) on April 19, 1973, the district's senior construction specialist, T. D. Russi, issued a written memorandum directing plaintiff to provide a method of operation which would restore three traffic lanes on Whittier Blvd. at commute hours as required by contract; (3) on April 20, 1973, the district advised plaintiff that if, by April 22, he had not provided sufficient traffic lane restoration, the district itself would commence restoration procedures; (4) when plaintiff inquired of Russi how he must comply, he was verbally ordered to "fix it." (5) On April 22, the district itself placed temporary

pavement on a portion of Whittier Blvd. and informed plaintiff that the cost incurred by district for such restoration would be deducted from plaintiff's final payment. Thereafter, plaintiff used temporary pavement to restore Whittier Blvd. at the end of the day and removed the temporary pavement before beginning work each morning. . . . [¶] [I]t is clear that the district, by its conduct, exerted an intentional attempt to affect a contractual change without complying with the change order provision. . . . We find there is substantial evidence to support the trial court's finding that by its conduct, the district did intend to waive the contractual provision requiring a written change order . . .

See also *Frank T. Hickey, Inc. v. L.A.J.C. Council* (1954) 128 Cal.App.2d 676, 682-83, 276 P.2d 52.

The written change order requirement can also be overcome by oral modifications to the extent the modifications have been performed (California Civil Code section 1698[b]). Oral change orders are enforced on this basis (*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 551-52, 59 Cal.Rptr. 752). As the court pointed out in *Girard v. Ball* (1981) 125 Cal.App.3d 772, 785, 178 Cal.Rptr. 406, there is a "commonly known custom and practice in the construction industry where oral agreements frequently modify or extend written agreements."

The written change order requirement also can be rescinded (*McFadden v. O'Donnell* (1861) 18 Cal. 160, 164-65 ["Whether the contract provided against extra work except agreed to in writing, is immaterial; for the parties could rescind this provision in the contract if they chose and agree to alterations by parol."]).

Notwithstanding clauses purporting to prevent modifications of the contract, the parties' conduct can effect such modifications, including abandonment of the written change order requirement (*Opdyke & Butler v. Silver* (1952) 111

Cal.App.2d 912, 916, 245 P.2d 306 ["The parties to a written contract . . . are as free to alter it after it has been made as they were to make it, and all attempts on their part by its terms to tie up their freedom of dealing with each other will be futile. . . . To this end parol agreements will be as effective as written ones. . . . And implied agreements satisfactorily established will have all the force of express ones."]; *Bettelheim v. Hagstrom Food Stores, Inc.* (1952) 113 Cal.App.2d 873, 249 P.2d 301 [held, lease provision prohibiting waivers unless in writing was waived; "[e]ven a waiver clause may be waived by conduct.")].

B. NOTICE REQUIREMENTS AND EXTRA WORK CLAIM FORFEITURES

Many contracts require specific notice of claims for extra work, changed conditions or other matters, and frequently declare the claims to be released or waived if the notice is not timely or properly given.

Contracts are to be interpreted reasonably – to avoid unusual, extraordinary, harsh, unjust or inequitable results; to avoid forfeitures; and to avoid placing one party at the mercy of the other (California Civil Code sections 3542 & 3520; *Yamanishi v. Bleily & Collishaw, Inc.* (1972) 29 Cal.App.3d 457, 462-63, 105 Cal.Rptr. 580; *Hertzka & Knowles v. Salter* (1970) 6 Cal.App.3d 325, 335, 86 Cal.Rptr. 231; *Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 713-16, 27 Cal.Rptr. 478). This doctrine often impels a court to find ways to interpret notice requirements to avoid forfeitures.

For example, a notice requirement can be construed as a covenant, or promise by the contractor, instead of a condition precedent to recovery (California

Civil Code section 1436; Restatement Contracts 2d section 226). The courts prefer interpreting the language as a covenant, rather than a condition, in order to avoid a forfeiture of the contractor's claim (California Civil Code sections 1442, 1670.5, Restatement Contracts 2d section 227; *Hawley v. Orange County Flood etc. Dist.* (1963) 211 Cal.App.2d 708, 713, 27 Cal.Rptr. 478). When the notice requirement is found to be a covenant, the owner is entitled to recovery, as an offset against the contractor's claim, whatever damages the owner actually suffered from not getting timely notice.

The general rule on forfeiture clauses is set forth in *Universal Sales Corporation, Ltd. v. California Press Manufacturing Company* (1942) 20 Cal.2d 751, 771, 128 P.2d 665 ("Forfeitures are not favored by the courts, and if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. [citations] 'A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible.' [citations]")

In *D. A. Parrish and Sons v. County Sanitation District* (1959) 174 Cal.App.2d 406, 344 P.2d 883, the contract required written notice of a claim within 10 days after discovering the factual basis for the claim, and, it provided: "The Contractor's failure to notify the Owner within such ten (10) day period shall be deemed a waiver and relinquishment of any such claim against the Owner." In refusing to enforce this forfeiture, the court held (at 174 Cal.App.2d 414): "[A]

forfeiture clause, such as this, will not only be strictly construed [citation] but has been interpreted by this court not to apply to claims arising from breaches of the contract caused by the other party."

Besides interpreting the contract requirement as a covenant or rejecting the forfeiture, courts find that the owner got "constructive notice" thereby satisfying the contract requirement (e.g., *Welding, Inc. v. Bland County Service Authority* (Va. 2001) 541 S.E.2d 909 [mention of the claim issues in the progress meeting minutes was found to satisfy the notice requirement]) or courts find that the notice would serve no useful function in the context of the case.

Finally, the courts also have inherent equitable power to relieve parties from the failure to perform conditions which result in a forfeiture (California Civil Code section 3275; Restatement Contracts 2d section 229; *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800-01, 167 P.2d 483).

C. NO-DAMAGE-FOR-DELAY CLAUSES

Extra work often causes delays in completion of the project. Many contracts have a no-damage-for-delay clause. California cases and statutes limit the enforceability of those clauses.

In *Milovich v. City of Los Angeles* (1941) 42 Cal.App.2d 364, 108 P.2d 960, the contract required the city to timely provide steel pipe for the water line Milovich was building. It failed, but asserted the no-damage-for-delay clause as a bar to Milovich's delay damages claim. In rejecting the city's argument, the court narrowly construed the contract language against the city, and observed (at 42

Cal.App.2d 378):

To uphold appellants' contention in this regard would be to give to the language of the contract a construction at variance with equitable principles and to clothe the appellant department with an unconscionable advantage over the contractor, by permitting the former to make amends for its contractual derelictions, delays and neglect by simply extending the time within which the contract could be completed regardless of the financial loss accruing to the contractor. This we cannot do in the absence of a plain, unequivocal intention on the part of the contracting parties, as evidenced by the language of the contract, to restrict the remedy of the contractor to that of obtaining an extension of time.

In *McGuire & Hester v. City etc. of San Francisco* (1952), 113 Cal.App.2d 186, 189, 247 P.2d 934, work on a water line took more than twice the contract time, because the city failed to timely obtain rights of way, thereby pushing the work into winter weather. Section 49 of the contract provided:

Apart from granting the Contractor extensions of time for unavoidable delays, no payment or allowance of any kind shall be made to the Contractor by way of compensation or damages on account of any hindrance or delay from any cause in the progress of the work or any portion thereof, whether such delay be avoidable or unavoidable.

In refusing to enforce this no-damage-for-delay clause, the court observed (at 113 Cal.App.2d 189)

Nowhere [in the contract] is there the slightest suggestion that defendant will be absolved from damages caused by its not keeping its agreement to secure rights of way prior to the starting of the work. To construe that language in section 49 . . . to mean that it was thereby intended by the parties that the only remedy for the contractor, when the city broke its solemn agreement to procure rights of way in advance, was for the contractor to obtain an extension of time to do the work, would be to give the clause and the contract as a whole a strained, unreasonable and unfair interpretation.

In *Hawley v. Orange County Flood Control Dist.* (1963) 211 Cal.App.2d 708, 712, 27 Cal.Rptr. 478, the contract provided:

[I]f the contractor suffers any delay caused by the failure of the District . . . to supply necessary plans or instructions . . . the contractor shall be entitled to an extension of time . . . but shall not be entitled to any damages for such delay.

The trial court found that, given the job conditions, the district had compelled Hawley to keep a sewer trench open for an unreasonable time (2 months), and, as a result, the trench caved-in, dislocating the sewer line, opening up joints in it, and allowing sewage to leak and flood the trench. Hawley sued for the clean-up costs. At the close of his evidence, the trial court granted a nonsuit, believing that the no-damage-for-delay clause precluded any recovery. The appellate court reversed. First, it extensively reviewed California, out-of-state and federal cases which refused to enforce no-damage-for-delay clauses when the delay was caused by events the parties did not contemplate at the time the contract was executed, such as an owner's breach of contract. Then, the court concluded (at 211 CA2d 717) that "whether or not the delay damage clause was intended by the parties to prevent recovery under the peculiar circumstances here involved resolves itself into a factual question requiring the weighing of all the facts presented."

For public works projects, these California cases have been codified into California Public Contract Code section 7102. That statute makes unenforceable any public works prime contract or subcontract clause that limits damages for delay when the "delay is unreasonable under the circumstances involved, and not within the contemplation of the parties." In *Howard Contracting, Inc. v. G. A. MacDonald Construction Co., Inc.* (1998) 71 Cal.App.4th 38, 83 Cal.Rptr.2d 590, the contract allowed time extensions for unforeseen events, but not

damages, unless the event was an unreasonable and unanticipated delay caused by the city. The city contended that, given the facts in the case, Howard was only entitled to time, not damages, under the limited no-damages-for-delay clause in the contract. In rejecting that argument, the court held (at 71 Cal.App.4th 49-51):

[Public Contract Code] Section 7102, however, specifically prohibits public agencies from requiring "the waiver, alteration, or limitation of . . . applicability of [the statute's restrictions on no-damage-for-delay clauses and renders] [a]ny such waiver, alteration, or limitation . . . void." Even before the adoption of section 7102, California courts generally held that "no damage for delay" clauses in public contracts did not apply to delays arising from a breach of contract caused by the other party to the contract. [citations]

* * *

. . . The trial court found the delays were caused by the City's breaches of contract and implied covenant [to provided timely access to the project site] in failing to disclose known restrictions on project performance, to obtain necessary permits, and to provide timely access to perform the work. Those findings render the "no damage for delay" provision in the contract inapplicable. . . . [or] a basis exists for concluding that the delays were unreasonable and not within the contemplation of the parties.

D. ACCORD AND SATISFACTION LANGUAGE IN CHANGE ORDERS

Language in the contract or language in a change order frequently attempts to turn a change order into an accord and satisfaction (California Civil Code sections 1521-1523) for all potential disputes related to the change, for example, delay or impact claims. Sometimes the courts will buy these efforts and bar the related claims (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 302, 136 Cal.Rptr. 603), other times they will not (*Semas v. Bergmann* (1960) 178 Cal.App.2d 758, 761, 3 Cal.Rptr. 277).

The party claiming an accord and satisfaction has the burden of proof (*Higson v. Montgomery Ward & Co.* (1968) 263 Cal.App.2d 333, 343, 69 Cal.Rptr.

497).

Further, all language in the contract, and in any change order purporting to be an accord and satisfaction, must be interpreted to give effect to the mutual intention of the parties (California Civil Code section 1636; *Rabinowitz v. Kandel* (1969) 1 Cal.App.3d 961, 965, 81 Cal.Rptr. 897). That generally permits looking at the circumstances surrounding the execution of the contract or change order, and the conduct of the parties (California Civil Code section 1860; *California Metal Enameling Co. v. Waddington* (1977) 74 Cal.App.3d 391, 395-96, 141 Cal.Rptr. 443). These sources frequently provide a basis for avoiding or minimizing the effect of the language in question.

E. DISCLAIMERS

Disclaimers in contract documents are common. Typically they say that, if the true conditions on the job are different from information provided in the contract documents, then the owner is not responsible for the difference, so the difference cannot be the basis for an extra work claim. The disclaimers are usually coupled with a clause requiring the contractor to inspect the site, and rely only upon the information gathered by the contractor. Information that would have been discovered in the inspection also cannot be the basis for extra work claims. See the discussion of disclaimers above.

F. EXCUSE, WAIVER AND ESTOPPEL

Whatever the language in the contract, conduct by the parties may excuse performance, waive performance, or estop the party entitled to performance from claiming it.

Any performance required by a contract can be excused by various acts, conditions or events (California Civil Code sections 1440, 1441, 1511, 1512, 1515; Restatement Contracts 2d sections 246 & 247; *Peter Kiewit Sons' Co. v. Pasadena City Jr. College Dist.* (1963) 59 Cal.2d 241, 243-45, 28 Cal.Rptr. 714, 379 P.2d 18).

When a contractor's extra work claim arises from willful acts or omissions of the owner, or a violation of law, then any performance required of the contractor to perfect his claim may be excused (California Civil Code section 1668; *Klein v. Asgrow Seed Co.* (1966) 246 Cal.App.2d 87, 54 Cal.Rptr. 609; *Halliday v. Greene* (1966) 244 Cal.App.2d 482, 53 Cal.Rptr. 267; but see limitations on this doctrine in *Cregg v. Ministor Ventures* (1983) 148 Cal.App.3d 1107, 196 Cal.Rptr. 724; *Tokio etc. Co. Ltd. v. McDonnell Douglas Corp.* (2d Cir. 1980) 617 F.2d 936).

Any performance required under a contract can be waived. Examples: Written change order requirement (*Weeshoff Constr. Co. v. Los Angeles County Flood etc. Dist.* (1979) 88 Cal.App.3d 579, 590, 152 Cal.Rptr. 19), written claim requirement, even with a contract clause declaring it cannot be waived (*Transpower Constructors v. Grand River Dam Authority* (10th Cir. 1990) 905 F.2d 1413); *Bettelheim v. Hagstrom Food Stores, Inc.* (1952) 113 Cal.App.2d 873, 249 P.2d 301 [held, lease provision prohibiting waivers unless in writing was waived; "[e]ven a waiver clause may be waived by conduct."]).

Any party by its conduct can be estopped to rely upon (prevented from relying upon) any requirement in the contract (*Maurice L. Bein, Inc. v. Housing*

Authority (1958) 157 Cal.App.2d 670, 681-82, 321 P.2d 753).

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