

Written Change Order Requirements and Waiver

You reviewed your subcontract and noticed for the first time that it required change orders to be in writing and signed *prior* to the start of the changed work. You're discouraged because the general contractor had requested, even convinced you, to do additional work quickly and without a written change order. The general contractor orally promised to pay, and told you the work had to be done right away: "don't worry," he said, "you'll be paid." You performed the extra work, billed it, and now, months later, the general contractor refuses to pay. You're out of luck because of the requirement that the change order be written and signed prior to performing the work ... right?

Not necessarily. The Minnesota Court of Appeals recently reaffirmed the longstanding principle that contract provisions—even written change order requirements—can be waived. The case, *Stafne Construction & Aggregate, LLC v. Bambenek, et al*, A10-873 (Minn. Ct. App. filed April 19, 2011), held that the owner had waived the written change order requirement by making oral requests for extra work that involved additional costs.

The owners were held to have waived the requirements that "modifications" to the contract involving extra cost must be in writing. The Court found that the owners had repeatedly requested oral modifications to the contract by requesting additional work. Thus, the Court determined that the owners had demonstrated actions inconsistent with the written change order requirements. These same principles apply to the general contractor/subcontractor relationship when there is a written changes clause in the subcontract, but the general contractor makes requests for additional work without putting them into writing.

The best course of action is for the contractor or subcontractor to have a written, signed change order prior to performing the extra work, just as the contract or subcontract usually requires. However, even if those provisions are not followed, the subcontractor may still recover for the extra work, as long as there is a sufficient record of the general contractor or owner making repeated requests for additional work, and there is an understanding that the general contractor or owner will pay for it. The holding in *Stafne Construction*, reaffirming the principle that contract provisions can be waived by contractor and owner actions, validates the adage that actions can speak louder than words.

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