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Enforceability of the Requirement of Notice in Highway Construction Contracts

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs", for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with highway construction contractor claims for compensation beyond the original contract amount and the requirements for advance notification of such claims.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new

papers, seven supplements, and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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ENFORCEABILITY OF THE REQUIREMENT OF NOTICE IN HIGHWAY CONSTRUCTION CONTRACTS

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INTRODUCTION

It frequently happens during the course of performance of highway construction contracts that situations not contemplated by the contracting parties arise, and, as a result, changes in the contract are required in order that the work may be carried out in a proper and efficient manner. Because of the frequency with which unforeseen conditions are encountered the standard highway construction contract almost always contains provisions designed to meet such emergencies. Thus the typical construction contract contains provisions relating to the issuance of change orders and the payment for altered or additional work. The manual entitled "Guide Specifications for Highway Construction," published by the American Association of State Highway and Transportation Officials, sets forth provisions relating thereto that have been adopted or followed by many or most States, and the same are set forth in the Appendix to this paper, to which reference is here made for the specific terms thereof.

Although such standard provisions are designed to resolve disputes between the State and its contractors, it not infrequently happens that the contractor deems he is entitled to additional compensation for work either (1) not covered in the contract, or (2) not ordered in writing as extra work by the State. In order to provide the State with notice of such claim not evidenced either by the terms of the contract or by written order, a clause is frequently included in construction contracts requiring the contractor to give written notice of intention to make claim for additional compensation for extra work prior to commencement of the work on which the claim is based, and providing for forfeiture of the claim in the event such written notice is not given in advance of commencement of the work. The typical terms of such clause are found in the language of Section 105.17 of the aforesaid AASHTO "Guide Specifications for Highway Construction," reading as follows:

> If, in any case, the Contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the Engineer as extra work ... the Contractor shall notify the Engineer in writing of his intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost ... then the Contractor hereby agrees to waive any claim for such additional compensation.

The purpose of such clause is, of course, to enable the State to investigate the claim while the facts are still fresh and to make early determinations as to the validity thereof. If the claim upon investigation is deemed valid, the State is then in a position to monitor the actual costs of performance on the basis of which payment for the extra work will be made.

There is a limited body of case law construing the provisions of this clause. In some cases the clause, including its forfeiture provision, has been strictly enforced. In other cases the courts have declined to enforce the requirement of written notice and forfeiture for failure of compliance. It is the purpose of this paper to examine under what circumstances the provisions of the clause, including forfeiture, will be enforced, and under what circumstances the same will not be given force and effect by the courts.

Because the body of case law that is squarely in point is somewhat limited in size, there will first be considered herein a related body of case law, substantial in size, that is fully germane and yields valuable instruction as to when the forfeiture provisions of the clause will be strictly enforced, and, under what circumstances, the State will be held to have waived the requirement of notice and be estopped to assert the penalty of forfeiture for noncompliance.

FORFEITURE OF CLAIM FOR EXTRA COMPENSATION FOR FAILURE TO SECURE WRITTEN CHANGE ORDER

There are a large number of cases dealing with the problem of the enforceability of contract terms requiring the forfeiture of claims for extra compensation where the same are based on verbal change orders. It has long been common in construction contracts to include a provision that all change orders must be reduced to writing, and when such provision is given strict interpretation, claims for extra compensation that are based on oral change orders are rejected. Even though the claim may have merit, a forfeiture of the same is effected for failure to comply with the requirement of a written change order.

The purpose of a requirement that a change order be reduced to writing is exactly the same as the purpose of the requirement of a written notice of intent to make claim for extra compensation. The purpose of the requirement that a change order be placed in writing is to put the State on notice that such order has *in fact* been issued by a duly authorized representative of the State, and enable the State to conduct such investigation of the order as may be required, and to maintain supervision and control over a situation wherein compensation above and beyond that specified in the contract terms may be expected.

The requirement of written notice that is the subject matter of this paper is, in a manner of speaking, no more than a "backup" to the requirement of written change order. That is to say, it provides notice to the State in a situation where the State is presented with a claim for extra compensation that is evidenced neither by the terms of contract nor by a change order executed in writing. It follows that the problem of the enforceability of the forfeiture provisions in the change order cases is entirely relevant to the problem under consideration in this paper,

and that an examination of the results in the change order cases is germane and instructive in respect to the instant problem.

Change Order Cases

The history of the requirement in construction contracts that change orders be reduced to writing dates as far back as the era of naval shipbuilding during the Civil War. For more than 100 years all construction contracts of the Federal Government have contained the so-called standard Changes Clause, which provides for forfeiture of claims for extra compensation in situations where the change order that is the basis of the claim is not reduced to writing.[1]

It is generally agreed that the leading case giving strict interpretation to the forfeiture provisions of the Changes Clause is the decision of the Supreme Court of the United States in *Plumley v. United States,* 226 U.S. 545, 33 S. Ct. 139, 57 L. Ed. 342 (1913). The rule announced in *Plumley* was discussed and applied by the United States Court of Claims in *General Bronze Corporation v. United States,* 338 F.2d 117 (Ct. Cl. 1964), a case instructive for purposes here. In this case an action was brought to recover additional compensation for alleged extra work performed in the construction of three parabaloidal antenna systems for the United States National Bureau of Standards. Plaintiff contractor asserted that a total of five changes in the construction contract were orally ordered by duly authorized representatives of the Federal Government, and that the same resulted both in exceeding the contract specifications and in increasing the costs of performance. The contract specifically provided that change orders must be reduced to writing and that no payment would be made for extra work unless ordered in writing by the Contracting Officer. In holding that failure to secure a written change order barred plaintiff's claim for extra compensation, the Court stated:

> [E]ven if it be assumed that, during performance, 'five changes' occurred in which NBS engineers 'concurred,' plaintiff remains confronted with an insuperable difficulty. At no time did the contracting officer by written order make the five alleged changes in the contract or authorize in writing any extras thereunder. Thus, the plaintiff is unable to bring itself within the clear requirements of the 'changes' and 'extras' clauses of the contract which require any changes or extras to be ordered <u>in writing</u> by the contracting officer. . . .
>
> Long ago, the United States Supreme Court held that a failure to obtain from the department head a <u>written</u> approval for changes or extras is fatal to a contractor's recovery under a Government contract. *Plumley v. United States,* 226 U.S. 545, 33 S. Ct. 139, 57 L. Ed. 342 (1913). The Court said at 226 U.S. 547, 33 S. Ct. 140: 'The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing. . . . There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract.'. . .
>
> If the Government is to be held strictly to its contractual obligations as though it were a private obligor, then, of course, it is entitled to insist that those who contract with it shall be held to the same accountability. If one can imagine the parties here on reversed positions, it is inconceivable that plaintiff would not insist . . . and rightly so . . . upon its freedom from a decrease in the contract price because of some change which was not specified, as the contract requires, 'by written order.' The mere fact that the defendant is also a sovereign should not prejudice it in asking that its contractual rights be honored. (Underscoring supplied by the Court.)

Application of the rule announced in *Plumley* is by no means confined to the interpretation of Federal construction contracts. In many cases involving the application of State law provisions for forfeiture of claims for extra compensation for failure to secure a written change order have been enforced.

Thus, in giving force and effect to the provisions of a building construction contract barring claims for extra work unless performed pursuant to a change order made in writing, the Illinois Court in *R & R Construction Co. v. Junior College District No. 529,* 55 Ill. App.3d 115, 370 N.E.2d 599 (1977), stated that:

> Forfeiture provisions of this type are enforceable because the owner has a right to be protected against the eventuality of a contractor incurring considerable and unnecessary expenses without the owner's approval.

It was held in *W. & O. Construction Co., Inc. v. City of Smithville,* 557 S.W.2d 920 (Tenn. 1977), that a contractor engaged to construct a wastewater treatment plant for the city of Smithville, Tennessee, was not entitled to recover additional compensation for rock removal, where the contractor failed to comply with the express provision of a contract requiring that it obtain a written change order as a condition precedent to payment of extra compensation, and there was no showing of such facts as would constitute a waiver or modification of the express contractual requirement.

The Supreme Court of New York ruled in *Van Deloo v. Moreland,* 444 N.Y.S.2d 744, 84 App. Div.2d 871 (1981), that a claim for extra compensation alleged to be due and owing under a construction contract could not be asserted where the evidence established that there had been a failure of compliance with the express provisions of contract requiring written orders for extra work as a condition precedent to the payment of any compensation for the performance of additional work.

The same Court ruled in *Comet Heating & Cooling Co. v. Modular Technics Corporation,* 393 N.Y.S.2d 573, 57 App. Div.2d 526 (1977), that a contract provision barring compensation for extra work unless ordered in writing precluded recovery where the contractor failed to establish that the alleged extra work performed by it had been ordered in writing as required by the contract.

Where there was neither evidence of a written change order nor of a request by plaintiff contractor that a change order in writing be issued, provisions in the contract barring payment of claims for extra work unless ordered in writing were controlling and precluded plaintiff from

recovery for alleged extra work performed by it. *General Specialties Co., Inc. v. Nello L. Teer Company,* 41 N. C. App. 273, 254 S.E.2d 658 (1979).

And recovery of additional compensation for extra work was denied in *Uhlhorn v. Reid,* 398 S.W.2d 169 (Tex. Civ. App. 1965), where the contract provided that change orders must be reduced to writing and the evidence failed to establish that a written change order had been issued prior to the performance of the work for which the extra compensation was claimed.

Application of Rule in Highway Construction Contract Cases

The rule that absent circumstances establishing waiver or estoppel contract provisions calling for forfeiture of claims for extra work not based on written change orders will be enforced has been applied in cases involving highway construction contracts. Illustrative of the application of the rule in highway construction contracts cases are the following.

Where the provisions of a highway construction contract specifically provided that change orders must be in writing it was held, in *A. Teichert & Son, Inc. v. State,* 238 Cal. App.2d 736, 48 Cal. Rptr. 225 (1965), that such provision could not be avoided by oral modification of the contract, and hence a claim for additional compensation for alleged extra work could not be asserted absent a showing that the claim was based on a change order executed in writing. The Court pointed out that plaintiff's "own contract demanded official change authorizations as a precondition of extra work for extra compensation" and stated that in order to recover "plaintiff would have to plead and prove ignorance of its own contract."

Commonwealth, Department of Transportation v. Acchione & Canuso, Inc., 35 Pa. Cmwlth. 65, 423 A.2d 30 (1980), involved a contract between plaintiff contractor and defendant Pennsylvania Department of Transportation for highway improvements to Roosevelt Boulevard in Philadelphia, calling for trenching excavation necessary to replace conduits encasing traffic signal wiring at existing intersections. During the course of the work it developed that PennDOT had underestimated the amount of excavation work that would be required to complete the job and an order was issued calling for an additional 17,433 lineal feet of excavation work to be performed at the contract unit price. When the project was completed plaintiff was paid at the contract unit price for all work performed, including the additional excavation. Later plaintiff filed a complaint with the Board of Arbitration of Claims seeking compensation above and beyond the contract unit price, on the ground that the additional excavation work consisted of a more expensive type of roadway trenching that raised its costs in the amount of $6.14 per lineal foot over and above the contract unit price at which it was paid. PennDOT appealed from an award of the Board in favor of plaintiff.

In reversing the action of the Board the Commonwealth Court ruled that plaintiff was barred from recovery by the express provisions of the contract specifying that all extra work must be ordered by the Engineer in writing. In holding that the failure of the plaintiff to secure such writing precluded recovery on its part the Court stated:

> Although our review of this case compels us to deny recovery of more than the contract price, we are not insensitive to the problems and complexities inherent in government contracts. We cannot lend to a strict constructional view that would require contractors to cease work and negotiate or renegotiate an agreement with every unforeseen occurrence before it proceeds to perform its obligation under the contract. To so hold would not only prove practically and technically disastrous to contractors, but damaging to those citizens of our Commonwealth who have a vital interest in the prompt finality of locally important public projects.
>
> However [plaintiff's] predicament is not the result of its efforts to expeditiously perform the contract obligations. On the contrary, the contractor's successive failure . . . to make certain that the additional amounts of trenching would not affect the contract's unit price, or to follow the established contract procedures bar recovery beyond the bid price.

In another Commonwealth Court case, *Security Painting Company v. Commonwealth, Department of Transportation,* 24 Pa. Cmwlth. 507, 357 A.2d 251 (1975), involving a contract for bridge painting, the question at issue was whether a claim for additional compensation was barred by failure to comply with the requirement that change orders be reduced to writing. The applicable provisions of contract in this case specified that "no claim for extra work . . . will be allowed by the Secretary of Transportation . . . unless such work is ordered in writing by the chief highway engineer. . . . Any such work or material which may be done or furnished by the contractor without such written order first being given shall be at said contractor's risk, cost and expense and he hereby covenants and agrees that without such written order he shall make no claim for compensation for work or material so done or furnished." In holding that the failure of plaintiff to secure a written change order from the engineer for alleged extra work performed under the bridge painting contract operated to bar a claim for additional compensation the Court observed that: "One contracting with the Commonwealth often does so at great risk. Before submitting his bid, a contractor should become aware of all contractual provisions and their ramifications. A failure to do so is often a prelude to disappointment or financial loss."

The facts in *Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc.,* 504 F.2d 1365 (C. A. 8, 1974), were as follows: Plaintiff contractor entered into a contract for the installation of gas lines under the streets of certain towns in the State of North Dakota. The dispute that was the subject matter of the instant diversity action in Federal court grew out of a claim for additional compensation for extra work. It was alleged that at the time of the execution of the contract it was contemplated that the mains were to be located in the paved portion of the streets, where it was faster and more economical for plaintiff to make the installations, but, that during the course of performance of the contract, the location of the mains was moved to behind the curbs, which location greatly increased the costs of installation. A claim for $450,000 over and above the contract price was asserted by the plaintiff, on the ground that the laying of the mains in the redesignated locations constituted extra work not contemplated by the contract. The "extras" clause of the contract provided, in part, as follows:

> Contractor shall be allowed no additional compensation for any extras

on any work performed by the Contractor not contemplated by this agreement or by said plans and specifications, except under written order . . . which order shall specify the amount payable to the Contractor on account of such extra work. . . . In no event will bills or claims for extras or extra work so ordered be allowed unless submitted . . . within thirty (30) days from the date of furnishing or completion of extra work.

In holding that plaintiff was barred from recovery by reason of noncompliance with the contractual provisions relating to extra work the Federal Court of Appeals stated:

> [T]he clear and unambiguous terms of the 'extras' clause were not complied with. The 'extras' clause provides for a written order for any extra work performed and in addition requires claims to be submitted within 30 days of completion of the extra work. It is undisputed that no written orders were prepared, nor was any claim made until some 10 months after completion of the job. Non-compliance with this 'extras' clause bars recovery for alleged extra work performed under the contract.

Thus it is seen that provisions for forfeiture of claims for extra work for failure to secure a written change order do not contravene public policy, and, in the absence of circumstances constituting waiver or estoppel, will be given force and effect. The rule is stated in 65 AM. JUR. 2d, *Public Works and Contracts,* Sec. 190, as follows:

> There is nothing unreasonable in such provisions, and no reason why they should not be given effect. They are universally held to be valid and binding upon the parties, and, in the absence of any waiver . . . a contractor for public work cannot recover additional compensation for alterations or changes in the work, or for extra work, performed, without a compliance with the stipulation requiring a written order . . . for such alterations or extras.

FORFEITURE OF CLAIM FOR EXTRA COMPENSATION FOR FAILURE TO FILE WRITTEN NOTICE

This paper now turns to an examination of the cases involving the enforceability of contract provisions calling for forfeiture of claims for extra work for failure to file written notice of intention to make such claim prior to commencement of the work on which the claim is based. (See provisions of Sec. 105.17, AASHTO "Guide Specifications," *supra,* p. 3.)

It will be seen that in the cases allowing enforceability of forfeiture that the same reasoning is invoked and the same rules applied as in the cases allowing forfeiture of claims for extra work for failure to secure a written change order.

Enforcement of Forfeiture in Cases Involving Highway Construction Contracts

Provisions in highway construction contracts requiring forfeiture of claims for extra work for failure to file written notice of intention to make claim for extra work, prior to the commencement of such extra work, have been given force and effect by the courts, in a limited number of cases. In the cases that follow, claims for additional compensation for extra work were denied because of the failure to give written notice of the claim for extra work in advance of performance of the work, as required by the terms of the highway construction contract.

Plaintiff contractor, in *Blankenship Construction Company v. North Carolina State Highway Commission,* 28 N.C. App. 593, 222 S.E.2d 452 (1976), entered into a contract with defendant State Highway Commission for the construction of a segment of I-85 in North Carolina. After commencement of the work plaintiff encountered subsurface rock conditions critically different from those anticipated, resulting in a substantial error in the amount of rock originally estimated to be excavated. Rather than the projected amount of 130,000 cubic yards, in actuality between 750,000 and 800,000 cubic yards of rock were required to be removed.

The contract provided, *inter alia,* that in the event subsurface conditions were encountered that proved substantially different from those anticipated the Engineer should be promptly notified in writing of such fact; that accurate cost records of the work caused by changed conditions should be kept; and that the contractor should file with the Commission a written notice of intention to make claim for additional compensation for such work. Although plaintiff discussed the matter of changed conditions over the telephone with the Chief Engineer of the State Highway Commission, no written notice of the discovery of changed conditions was given; nor were cost records of additional work due to changed conditions kept; nor did the contractor file with the Commission written notice of intention to make claim for additional compensation for unforeseen work, as called for by the contract.

Approximately one year after the completion of the project plaintiff filed the instant action seeking compensation for the work involved in the unexpected rock excavation. The State defended on the ground that plaintiff was barred from recovery by reason of failure to:

1. Give written notice of changed conditions.
2. Keep written cost records of the additional work occasioned by changed conditions.
3. Give written notice of intention to file a claim for additional compensation for the work resulting from changed conditions.

In ruling for the State the trial court found that no credible evidence had been adduced to show that plaintiff: "(a) gave written notice to the Engineer of the defendant, before beginning work on any item of construction now mentioned in its claim, that it was entitled to compensation for the work to be performed over and above that stipulated in the contract or for any work it contended was not in the contract; (b) gave written notice to the Engineer of the defendant, before beginning work on any item of construction now mentioned in its claim, that it would file a claim for additional payment for such alleged work; (c) kept, during the course of construction of the work in issue, accurate and detailed cost records of such work in accordance with the provisions of the contract; (d) made any cost records available to the Engineer of the defendant during the course of construction of the work in issue in order

that the Engineer could supervise and check the keeping of such records."

In sustaining the findings so made and upholding the judgment entered below the Court of Appeals stated:

> Strict compliance with the contract provisions is a vital prerequisite for the recovery of additional compensation based on altered work, changed conditions, or extra work. . . . In construing the provisions [of contract] we are not blind to the possibility that the Contractor in this case encountered considerably changed conditions and extra work. But the position of the Contractor must be balanced against the Commission's compelling need to be notified of a 'changed conditions' or 'extra work' problem and oversee the cost records for the work in question. The notice and record-keeping requirements are clearly set forth in the contract. The Contractor's failure to comply with these procedures is inexcusable. . . . The notice and recordkeeping procedures of these provisions are not oppressive or unreasonable; to the contrary, they are dictated by considerations of accountability and sound fiscal policy. *The State should not be obligated to pay a claim for additional compensation unless it is given a reasonable opportunity to insure that the claim is based on accurate determinations of work and cost. The notice and recordkeeping requirements constitute reasonable protective measures, and the Contractor's failure to adhere to these requirements is necessarily a bar to recovery for additional compensation.* (Emphasis added.)

A claim for additional compensation for the performance of extra work was asserted by plaintiff highway contractor in *State Highway Department v. Hewitt Contracting Company,* 113 Ga. App. 685, 149 S.E.2d 499 (1966). The Standard Specifications incorporated into the contract between plaintiff and the Georgia State Highway Department provided, in part, as follows:

> In any case where the Contractor believes that extra compensation is due him for work or material not clearly covered in the contract or not ordered by the Engineer as Extra Work, the Contractor shall notify the Engineer in writing of his intention to claim such extra compensation before he begins the work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required by Force Account, then the Contractor hereby agrees to waive the claim for extra compensation.

The complaint did not allege that plaintiff had furnished the State's Engineer with the required written notice of its intention to make claim for extra compensation, nor was evidence adduced at trial tending to establish such fact. In denying the claim, and giving effect to the forfeiture provisions of the Standard Specifications the Court stated:

> Provisions of this nature in highway construction contracts have been held to be legal and binding on the parties in the absence of special circumstances . . . which authorize a finding that the Highway Department has waived or is estopped to rely on same. Clearly they are binding upon the plaintiff contractor in this case, and since the petition does not allege that the contractor sought in any way to comply with the provisions requiring the giving of notice of claim for extra compensation . . . and since no circumstances which would excuse compliance are alleged, we must assume that no such notice was given and that such circumstances did not exist. It necessarily follows therefore that the contractor is prohibited from recovering compensation for such additional work by the provisions of . . . the Standard Specifications.

Central Penn Industries, Inc. v. Commonwealth, Department of Transportation, 25 Pa. Cmwlth. 25, 358 A.2d 445 (1976), involved a contract for the construction of a portion of I-84 in the State of Pennsylvania. It appeared that during performance of the contract plaintiff encountered unexpected rock conditions which required it to excavate approximately 500,000 cubic yards of rock in excess of the amount indicated for removal by the Soils Profile furnished to plaintiff by defendant Pennsylvania Department of Transportation. Such unanticipated work caused the cost per cubic yard of excavation to be increased in the amount of 9.2 cents over the bid price. A claim for additional compensation using the figure of 9.2 cents as a multiplier was presented to the Pennsylvania Board of Arbitration of Claims, and an award in the requested amount of the claim was granted. PennDOT appealed from such action to the Commonwealth Court.

Section 1.9.9 of the Specifications relating to the presentation of contractors' claims provided, in part, as follows:

> Neither the contractor nor the surety shall be entitled to present any claim . . . for additional compensation for any work performed which was not covered by the . . . contract . . . unless he or it shall have given the Secretary due notice in writing of his or its intention to present such claim. . . .
>
> The 'due notice in writing' as required above, must have been given to the Secretary of Highways . . . within ten (10) days from the inception of the claim as a condition precedent to presenting the claim.

In reversing the ruling of the Board of Arbitration of Claims allowing plaintiff's claim the Commonwealth Court premised its action squarely on the failure of the plaintiff to observe and comply with the provisions of Section 1.9.9 of the contract requiring written notice of claim to be presented within a given time period. It stated in respect to strict compliance with such provisions:

> The writing quoted was not simply a provision tucked away among the many sections of Form 408, Specifications, incorporated by reference to the contract; it was, rather, attached to the signed portion of the contract and would not have been overlooked by any bidder using reasonable care in making the contract or pursuing the work. . . . PennDOT could have spared [plaintiff] extra expense by care in communicating, and [plaintiff] might have spared itself the same expense by following the dictates of the contract. In any event, Section 1.9.9 is there, *and it is not our function to rewrite the contract.* (Emphasis added.)

The contract between plaintiff contractor and the Massachusetts Department of Public Works before the Court in *State Line Contractors, Inc. v. Commonwealth,* 356 Mass. 306, 249 N.E.2d 619 (1969), called for the construction of a segment of I-495. It appeared that after com-

mencement of work under the contract alterations were required which the plaintiff asserted constituted extra work that was compensable at a rate in excess of the unit price specified in the contract. The contract required as a condition precedent to recovery for extra work: (1) the issuance of a written change order, or (2) if such written order were not issued the giving of notice of claim for additional compensation by the filing of certain statements. The applicable provisions of the Standard Specifications read as follows:

> Article 23. Extra Work. The Contractor shall do any work not herein otherwise provided for when and as ordered in writing by the Engineer, such written order to contain particular reference to this article. . . .
>
> If the Contractor claims compensation for extra work not ordered as aforesaid . . . he shall within one week after the beginning of such work . . . make a written statement to the Engineer of the nature of the work performed . . . and shall on or before the fifteenth day of the month succeeding that in which any such work shall have been done . . . file with the Engineer an itemized statement of the details and amount of such work . . . and unless such statement shall be made as so required, his claim for compensation shall be forfeited and invalid, and he shall not be entitled to payment on account of any such work.

It appeared that no written order for extra work was issued by the Commonwealth's Engineer, as provided for in the Standard Specifications, nor did plaintiff contractor file the written statements pertaining to the nature and details of the extra work, which were required by the Specifications to be filed with the Engineer. In holding that plaintiff's claim for additional compensation was forfeited for failure either to secure a written change order or to comply with the filing of statements relating to extra work, the Supreme Judicial Court of Massachusetts stated:

> Article 23 sets forth the procedure by which the contractor can be ordered to perform 'extra work.' The auditor did not find that the engineer has submitted a written order as required by the first paragraph. The auditor's report is silent as to compliance by [plaintiff] with the provisions of the third paragraph respecting the filing of the details of such extra work. Articles 23 and 58 . . . make such compliance a prerequisite to recovery by [plaintiff].

And in *Inland Bridge Company v. North Carolina State Highway Commission,* 30 N.C. App. 535, 227 S.E.2d (1976), the Court, without elaboration or extended discussion, rejected the claim of plaintiff contractor against defendant State Highway Commission for additional compensation for alleged extra work performed under a highway construction contract, on the ground that the claim was barred by reason of failure to comply with the provisions of contract requiring written notice of intention to make claim for additional compensation.

Requirement of Written Notice in Other Types of Construction Contracts

Clauses requiring written notice of intention to make claims for extra compensation are, needless to say, not confined to contracts for highway construction, the same being frequently employed in contracts calling for the performance of a host of different types of construction work. The forfeiture provisions of such clauses, whether appearing in contracts between private persons or in contracts between the Government and individuals, are generally upheld and enforced, in the absence of circumstances constituting grounds of waiver or estoppel. The following cases are illustrative.

Where a contract with the Department of General Services of the State of Florida for the construction of a youth detention facility required that claims for additional compensation be made in writing by the contractor "no more than twenty days after the occurrence of the event giving rise to such claim or else such claim shall be waived or deemed invalid," failure of the contractor to file the written claim for extra compensation within the 20-day period prescribed by the contract barred the claim. *Tuttle/White Constructors, Inc. v. State, Department of General Services,* 371 So.2d 1096 (Fla. App. 1979).

Under a contract for the construction of a campsite in a Massachusetts State Park, provisions of the contract requiring as a condition precedent to the filing of a claim for additional compensation that a written statement of the nature of the additional work be submitted to the Department of Public Works "on or before the first working day following the commencement of any such work" were mandatory, and failure to file the written statement within the time limit prescribed precluded recovery for the extra work. *D. Federico Company, Inc. v. Commonwealth,* 11 Mass. App. 248, 415 N.E.2d 855 (1981).

Under a contract for construction of a housing project providing by its terms that "if the Contractor wishes to make a claim for an increase in the Contract Sum he shall give . . . written notice thereof within twenty days after the occurrence of the event giving rise to such claim," failure of the contractor to give such written notice within the prescribed time period barred its claim for additional compensation for extra work performed. *Dicon, Inc. v. Clearspan Construction Company, Inc.,* 468 F. Supp. 1050 (E. D. Mo. 1979).

Allen-Howe Specialties Corporation v. U.S. Construction, Inc., 611 P.2d 705 (Utah 1980), was an action brought, *inter alia,* to recover damages for delay caused by crowded work site conditions. The contract provided that any "claim of the Contractor arising out of any alleged interference due to the conduct of other work shall be made to the Owner in writing within five (5) days of the occurrence of the alleged interference and shall be deemed to have been waived unless so made." The Supreme Court of Utah ruled that such provision of the contract was controlling, and that by reason of the failure to submit its claim within the prescribed 5-day period, plaintiff was conclusively presumed to have waived its claim for damages for delay due to interference with work conditions at the job site.

The Federal Court for the Eastern District of Oklahoma ruled in *Johnson Controls, Inc. v. National Valve & Manufacturing Company,* 569 F. Supp. 758 (E. D. Okla. 1983), that under Oklahoma law strict compliance with unambiguous contract provisions is required, and where

under a contract to provide instrumentation work for an electric power plant plaintiff contractor did not make a written request for an extension of time within the period of 10 days after the issuance of an order for acceleration of work, as required by the contract, nor file a written application for extra compensation prior to undertaking the additional work which was brought about as the result of the acceleration, as required by the contract, plaintiff's claim for extra compensation must be denied.

Thus, it is seen that clauses in construction contracts requiring the filing of written notice of intention to make claim for extra compensation prior to commencement of the work on which the claim is based, and providing for forfeiture of claim, in the event of failure to provide the required notice written in the specified time period, do not contravene sound public policy, and will be enforced by the courts, absent circumstances showing ground of waiver or estoppel.

WAIVER OR ESTOPPEL AS GROUNDS FOR REFUSAL TO ENFORCE FORFEITURE PROVISIONS OF CONSTRUCTION CONTRACTS

This paper now turns to a consideration of those cases in which the courts have refused to enforce the forfeiture provisions of construction contracts. As in the preceding part of the paper there will first be examined the results arrived at in the cases dealing with the enforceability of forfeiture for failure to comply with the requirement that change orders be reduced to writing.

It has been suggested by learned commentators that the decision in *Plumley, supra,* requiring forfeiture, "has only been followed in the rare case where it could not in some fashion be escaped."[2] It is indeed true that there is a significant and substantial body of case law wherein the courts have refused to enforce the penalty of forfeiture for failure to secure a change order reduced to writing. In all instances the refusal to enforce forfeiture has been based on the doctrines of waiver or estoppel. That is to say, the courts have found that the State or Owner had committed such acts, or the course of conduct between the parties had been such that, in equity and good conscience, contractual provisions for forfeiture could not be asserted against the Contractor. The cases will be examined with a view to determining what the factual circumstances are that compel the somewhat drastic result of setting aside and holding for naught solemn contractual agreements in respect to forfeiture that have been duly entered into in writing by and between competent contracting parties.

It may be noted as a preliminary matter that the principle sometimes asserted that the doctrines of waiver or estoppel will be applied to the sovereign only in extreme circumstances is but rarely made the hinge of decision. The fact of the matter is that a reading of the cases makes abundantly clear that the courts display little in the way of disinclination to apply waiver or estoppel against the State where the circumstances are such that the application of such doctrines is necessary to the end of accomplishing substantial justice in disputes between sovereign and citizen.

Application of Waiver or Estoppel in Change Order Cases

The matter next for consideration herein is the identification of the precise grounds of waiver or estoppel that have been announced and relied on by the courts in declining to enforce forfeiture for failure to comply with provisions of contract requiring that change orders be reduced to writing.

Reif v. Smith, 319 N.W.2d 815 (S.D. 1982), is an interesting and useful decision in that there are specified and set forth therein most of the various fact situations that have been pinpointed by the courts in the various jurisdictions and relied on as constituting grounds of waiver or estoppel.

Section 15 of the construction contract before the Court in this case provided that: "Work shall be changed and contract price and completion shall be modified only as set out in written change order."

During the course of performance difficulties in carrying out the work in a proper and efficient manner were encountered as a result of faulty plans and specifications. In order to surmount such difficulties and make necessary correction of the faulty plans and specifications, oral orders were issued to proceed in a manner other than as specified in the contract, which modifications to the contract resulted in the performance of extra work by the contractor. However, none of the verbal change orders, or oral agreements between the parties to modify the terms of contract, were reduced to writing. In holding that the failure to issue written change orders, or to reduce to writing oral agreements entered into between the parties to modify the written terms of contract, did not bar the contractor's claim for extra compensation, the Supreme Court of South Dakota stated:

> Generally, provisions like section 15 prevent contractors from recovering for alterations or extras not subject to a written order. Such provisions, however, are impliedly waived by the owner where he has knowledge of the change, fails to object to the change, and other circumstances exist which negate the provision, i.e., the builder expects additional payment, the alteration was an unforeseen necessity or obvious, subsequent oral agreement, or it was ordered or authorized by the owner.
>
> Additionally, repeated or entire disregard for contract provisions will operate as a waiver of section 15. . . . The record reflects that [defendants] were on the job site repeatedly, they knew of certain changes and authorized others.

Thus, the Court specified the following facts as being significant to the determination of whether or not the doctrines of waiver or estoppel will be accorded application in a given situation:

1. Knowledge by the owner that extra work was being performed.
2. Failure on the part of the owner to object to the performance of the extra work.
3. The fact that the contractor was led to expect additional compensation for the extra work.
4. The fact that the extra work was necessary to proper performance of the contract.

5. The fact that the extra work was orally ordered by the owners.
6. The concurrence of the contractor in carrying out the changes orally ordered by the owner as constituting a verbal agreement between the parties to modify the written terms of contract.
7. The conduct of both the contracting parties during performance of the contract as establishing a pattern of continuing disregard for the written provisions of contract.

The foregoing listing of factual circumstances to be considered in giving application to the doctrines of waiver or estoppel is important, in that it includes virtually all of the fact situations that have been seized on and emphasized by the courts in cases in other jurisdictions as constituting grounds of waiver or estoppel.

The following representative cases from varying jurisdictions serve to illustrate the application of the factors enumerated by the South Dakota court as constituting grounds of waiver or estoppel.

It has been held, for example, that the issuance of an oral change order, verbally assented to and carried out by the contractor, constituted the formation of an oral agreement between the parties to modify the written terms of contract, and that such oral agreement was, upon execution, binding on both of the parties to the contract.

Thus, in allowing a claim for extra work based on verbal authorization by the Owner and contrary to the express language of a building contract specifying that "no charges . . . for extra work . . . shall be made or will be recognized or paid . . . unless agreed to in writing . . . before such work is done," the Court in *Moore v. Continental Casualty Company,* 353 F. Supp. 105 (W. D. Okla. 1973), stated that:

> It is well recognized . . . that in circumstances where a contract calls for written change orders for extras and contrary thereto the extras are supplied on a verbal arrangement and the verbal arrangement has been executed, the parties are deemed to have modified or altered their contract by the executed oral agreement and all parties are bound by such agreement.

In holding that a contractor was entitled to recover for extra work notwithstanding there was a failure of compliance with a contract provision requiring that change orders be made in writing, the Court in *Meadows v. Kinser,* 603 S.W.2d 624 (Mo. App. 1980), ruled that oral requests made by the owner for alterations to the contract and agreed to by the contractor amounted to conduct constituting a waiver of the contract terms. The Court stated:

> The general rule is that when a construction contract requires a written change order, there is no right to recover for extra work without such a writing or waiver by the owner. A waiver of a written change order may be shown by presenting evidence that the parties have orally agreed upon the 'extras' and that the 'extras' have been supplied pursuant to this agreement. . . . We find that the trial court did not err in allowing evidence to be introduced to establish a waiver of this provision.

Stating that "notwithstanding a written agreement that any change to a contract must be in writing, the parties by subsequent oral agreement and by their conduct may waive the requirements" the Court, in *Hoffman v. Glock,* 315 A.2d 551 (Md. App. 1974), in sustaining a contractor's claim for extra work not evidenced by changes ordered in writing as required by the terms of the contract, said that the conduct of the owners, in verbally agreeing to changes not reduced to writing "waived the requirements that changes be . . . in writing and are estopped from trying to enforce the writing requirement."

Actual knowledge by the owner that the contractor is engaged in performing extra work orally ordered by the owner has been held to constitute ground of waiver or estoppel in a number of cases. The courts reason that where the owner issues a verbal change order, and, by reason of being on the job site, or otherwise, has actual knowledge that the contractor is engaged in carrying out the extra work so ordered, the owner cannot be heard to complain that he has been prejudiced by lack of notice of the performance of extra work by the contractor.

Thus, in *Universal Builders, Inc. v. Moon Motor Lodge, Inc.,* 430 Pa. 550, 244 A.2d 10 (1968), where the facts established that the contractor performed extra work pursuant to verbal authorization by the owner and that the owner was constantly on the job site and thoroughly aware that the contractor was performing the extra work so ordered, it was held that the owner was estopped to assert the invalidity of the contractor's claim for additional compensation on the ground that the work was not performed pursuant to written change order, as required by the terms of the contract.

E. E. Black, Ltd. v. State, 50 Haw. 267, 439 P.2d 213 (1968), involved a contract for the construction of a segment of highway in the State of Hawaii. In its bid plaintiff contractor proposed to furnish 17,280 tons of filler at $7.04 per ton for the construction and completion of the entire segment. Such bid was based on the State's estimated quantity of filler that would be needed for the project. Relying on this estimate, plaintiff constructed a plant and installed equipment necessary to process the projected amount of filler. However, during the course of construction it became apparent that the quantity of filler required for the project had been grossly overestimated. Only 10,689 tons of filler were actually used, being 40 percent less than the estimate calling for 17,280 tons. As a result plaintiff's cost per ton greatly exceeded the estimate in the amount of $7.04 per ton. Plaintiff thereafter brought the instant action claiming additional compensation under Article 4.3(1) of the contract, which provided that if alterations were ordered which increased the cost of any item more than 25 percent an upward adjustment in compensation would be effected. It was conceded at trial both that the cost of the filler was increased by more than 25 percent, and that the State had directed plaintiff by verbal order to reduce the amount of the filler, thereby bringing about the increase in the item cost of the filler to plaintiff.

The State defended on the ground that the verbal change order was inoperative to render the State liable for additional compensation because Article 4.3 of the contract required that change orders be reduced to writing. In affirming judgment entered below for plaintiff the Supreme

Court of Hawaii stressed that the State was fully aware of the increase in item cost of the filler resulting from the oral order to reduce the amount of the filler, and characterized the State's argument that liability could not attach in the absence of a written change order as being "specious."

It has been held in a number of cases that where the conduct of the parties in carrying out the contract was such as to establish a pattern of continuing disregard for the written provisions of contract, that such course of conduct constituted grounds of waiver of compliance with the terms of contract, including those relating to the issuance of written change orders.

Thus, it was held in *D. K. Meyer Corporation v. Bevco, Inc.*, 206 Neb. 318, 292 N.W.2d 773 (1980), that where the course of conduct between plaintiff subcontractor and defendant general contractor made it clear that both parties had "ignored the provision of the contract requiring a written change order prior to the modification of the project," that defendant could not insist on the express language of the contract and deny the validity of plaintiff's claim for extra work involved in correcting construction work that was inadequate by reason of faulty plans and specifications in the original contract.

And in *Worcester Air Conditioning Company v. Commercial Union Insurance Company,* 439 N.E.2d 845 (Mass. App. 1982), it was held that a waiver of the provisions of contract that change orders be in writing was established by a showing that it was the persistent practice of the parties in carrying out the contract to dispense with the contract requirement of written change orders when matters arose requiring prompt decision and instant action.

In *Owens v. City of Bartlett,* 215 Kan. 840, 528 P.2d 1235 (1975), an action was brought by plaintiff contractor against defendant City of Bartlett to recover for extra work alleged to have been performed under a contract for the construction of a water distribution system. The City sought to defend on the ground that there had been a failure of compliance with the terms of contract providing that "no claims for any extra work or materials shall be allowed unless it is ordered in writing by the Owner or its authorized representative." In holding that by its course of conduct the City had waived such provision of contract the Supreme Court of Kansas stated:

> It is generally recognized that the mere fact that extra work or materials have been done or furnished with the knowledge of the proper officer or representative of the public entity, without any objection on the part of such officer or representative, does not, standing alone, establish a waiver or modification of a stipulation requiring a written order for such work. However, a waiver or modification of such a stipulation may properly be found where it appears that the work or materials were orally ordered or authorized by the public entity through its proper officer or representative and there are other circumstances tending to show an intention to waive or otherwise derogate from the stipulation on the part of the public entity.
>
> In the present case the parties, throughout the performance of the contract, entirely disregarded the stipulation. An extra water hydrant, 600 feet of pipe, footings and lines to a water tower were orally ordered and these resulted in extra work and materials furnished by the contractor over which there is no dispute. When rock was encountered in the ditching the city through its mayor agreed to and did arrange for special equipment which it rented at the city's expense. The removal of rock was treated the same as other extras. Itemized statements covering at least a portion of these were paid including several hundred dollars for the rock removal. . . . Such action by the council after the extras had previously been authorized by oral communication of the engineer or mayor did not constitute compliance with the provision in the contract that no claim for extra work or materials shall be allowed 'unless it is ordered in writing by the Owner or its authorized representative.' The same course of conduct was followed throughout the performance of the contract and the city entirely disregarded the stipulation for orders in writing. . . . [W]e hold that the words, acts and conduct of the mayor and city council constituted an effective waiver or modification of the extra work provision in the contract.

The fact that an oral change order was accompanied by a promise on the part of the owner to pay for the work so orally ordered, together with the fact that the contractor placed good faith reliance on the owner's verbal order and promise to pay for extra work, have been held to constitute grounds of waiver or estoppel.

The contract in *In Re King Enterprises,* 678 F.2d 73 (C. A. 8, 1982), called for the construction of an airplane hangar. By the terms thereof the owner was authorized to make changes in the plans and specifications, but the contract provided that no such changes "shall be made . . . except upon prior written order of the Owner." In holding that plaintiff contractor was entitled to recover for work performed in carrying out changes not ordered in writing by the owner, the Federal Court of Appeals pointed to the facts that: (1) the changes were verbally ordered by the owner; (2) the owner gave the contractor oral assurances that the extra work so ordered would be compensated; and (3) the contractor relied on such assurances in incurring additional expenses necessary to the performance of the contract as modified.

Waiver or estoppel has been applied to prevent unjust enrichment in situations where the owner has verbally ordered extra work and the contractor, placing good faith reliance on such order, has incurred extra costs in the performance of the work, and the owner has accepted and enjoyed the uncompensated benefits of the completed extra work.

Suit was brought in *Joray Mason Contractors v. Four J's Construction Company,* 61 Ill. App.3d 410, 378 N.E.2d 328 (1978), to recover for extra work performed under a construction contract. It was conceded by both parties at trial that the work which was the subject matter of the suit had been performed pursuant to verbal change order in contravention of the terms of contract specifying that all change orders must be executed in writing. The evidence disclosed that the owner had accepted, received, and enjoyed the benefits of the uncompensated extra work upon completion thereof. In awarding compensation for the extra work the Court emphasized that one of the most important factors in determining whether contract provisions relating to the requirement of written change orders should be waived is "whether there has been a receipt and enjoyment of the benefits" of completed extra work.

A brief word is now in order with respect to contract terms, other than those relating to the requirement of written change orders, which seek to impose forfeiture of claims for extra work for failure of compliance with specified contract provisions.

Failure to Comply With Requirement of Written Supplemental Agreement

Construction contracts sometimes provide that before any extra work shall be performed the parties shall enter into a written supplemental agreement in respect thereto setting forth the basis and terms of payment for the extra work. Such contracts further provide that in the event of failure to enter into such supplemental agreement no claim for extra work will be recognized. In a few cases the doctrines of waiver or estoppel have been applied to preclude enforcement of such forfeiture provision.

Illustrative is *State Highway Department v. Wright Contracting Company,* 107 Ga. App. 758, 131 S.E.2d 808 (1963). The contract before the Court in this case called for the widening and resurfacing of a portion of highway of the State of Georgia. Because unforeseen subsurface conditions were encountered unanticipated work was required to be performed to complete the contract, and such work was verbally authorized by the State Highway Department. The Department sought to defend against a claim for additional compensation for such work on the ground that there had been a failure of compliance with a provision of the Georgia Standard Specifications incorporated into the contract, which required that before the commencement of unexpected work the "Engineer shall secure from the Contractor a written agreement for the work to be done and the basis of payment." In holding that the failure to secure such written agreement before commencement of the work did not bar plaintiff's claim for additional compensation, the Court said that "the fact that the defendant directed the plaintiff to do the work without first securing a written agreement as provided in the contract led the plaintiff to assume that the provision had been waived, and it would be manifestly unjust for the defendant to insist upon the strict terms of the contract after having so misled the plaintiff and received the fruits of its labors."

Failure to Comply With Changed Conditions Clause

Most highway construction contracts contain the standard Changed Conditions Clause, which provides that in the event the contractor encounters subsurface conditions other than those as represented he shall promptly notify the State thereof in writing, and in the event he fails to do so no claim for additional compensation for unforeseen work resulting from the changed conditions will be recognized. In some cases the doctrines of waiver or estoppel have been applied to deny to the State the right to enforce such forfeiture provision for failure on the part of the contractor to submit the required written notice.

Frederick-Snare Corporation v. Maine-New Hampshire Interstate Bridge Authority, 41 F.Supp. 638 (D. C. N.H. 1941), is illustrative. In this case plaintiff contractor brought suit to recover additional compensation for unforeseen work involved in conducting excavation operations, which unexpected work was concededly made necessary when at the commencement of performance under the contract subsurface conditions other than those anticipated by the parties to the contract were encountered. The evidence established that defendant Interstate Bridge Authority was fully aware of the difficulties encountered by plaintiff contractor subsequent to the discovery of the unexpected conditions, but sought to defend against the claim for unforeseen work on the ground that plaintiff had failed to furnish written notice of changed conditions, as required by the terms of the contract. In holding that the fact that defendant had actual notice of the changed conditions estopped it to assert the invalidity of plaintiff's claim, the Court stated:

> The term 'Notice' as used in the contract shall mean and include 'written notice.' No written notice was given. Counsel for the defendant contends that because no written notice was given to the . . . Bridge Authority the Contractor is barred from recovering the cost of extra work performed.
>
> Counsel differ as to the construction to be given the definition of 'notice' in the contract. But whatever it may be, the point is too technical to work out justice between the parties. Writing furnishes proof. In this case the defendant had actual notice and the parties were reasonably conversant with all the facts requiring notice and no damage resulted.

It has been seen from the foregoing review of cases relating to change orders, supplemental agreements, and changed conditions, that the courts frequently refuse to enforce forfeiture provisions in construction contracts, notwithstanding that the agreements for forfeiture contained in such contracts are consented to by both of the contracting parties and incorporated into the written terms of contract duly executed by both of the contracting parties. And it has been seen that the grounds of waiver or estoppel that have been applied by the courts to deny forfeiture fall into identifiable fact categories.

This paper now turns to a consideration of those cases in which the doctrines of waiver or estoppel have been applied to deny forfeiture of claims for extra compensation for failure to file written notice of intention to make claim for extra work before commencement of the work on which the claim is based.

Waiver of Requirement of Written Notice

As before stated there are a limited number of cases construing the provision of highway construction contracts requiring the filing of written notice of intention to make claim for extra compensation before commencement of the work on which the claim is based. The cases in which the State has been held to have waived the requirement of written notice and to be estopped from asserting forfeiture for noncompliance appear to fall into two categories. These are: (1) cases in which actual knowledge of the performance of extra work was held to satisfy the requirement of written notice; and (2) cases in which substantial compliance has been held to satisfy the requirement of written notice. The cases will be considered in such order.

Actual Knowledge of Extra Work as Satisfying the Requirement of Written Notice

It has been held that because the purpose of the requirement of written notice is to alert the State to the fact that extra work will be performed for which additional compensation is to be expected, under certain circumstances, actual knowledge by the State of the performance of extra work will satisfy the requirement of the written notice. This is particularly true where the State, although possessing actual knowledge of the performance of extra work, fails to protest or to take any action to halt the performance of such extra work on the part of the contractor. The following cases are illustrative.

In *Northern Improvement Company v. South Dakota State Highway Commission,* 267 N.W.2d 208 (S.D. 1978), a petition for declaratory judgment was filed jointly by plaintiff contractor and defendant State Highway Commission for rulings in respect to matters of dispute which had arisen in connection with a construction contract calling for the performance of dirt, grading, gravel, and asphalt work on a Federal-aid highway in South Dakota. Among numerous difficulties encountered by the contractor in carrying out the work was the fact that the gravel derived from the specified sites contained insufficient binder clay for proper compaction. The evidence established that plaintiff had requested permission of the engineer to add additional clay at no additional cost to the State, but was refused authority to make any change in the specifications. And, as a result, instability occurred, which compelled plaintiff to assign an entire crew of men to do extra work as the road broke up. In addition, the gravel base course for the shoulders contained insufficient binder. After plaintiff was finally verbally authorized to mix clay with the gravel to correct the situation, the engineer orally ordered plaintiff to lay out the shoulders with a stringline, causing further delay. Other problems leading to extra work included the fact that the specifications and the engineer set the AC 85-100 content of the asphalt so high that rolling and compaction problems were encountered.

On several occasions plaintiff discussed these various problems affecting performance with the resident engineer, the district engineer, and personnel of the engineering department at the headquarters of the State Highway Commission in Pierre, South Dakota. And the evidence made clear that plaintiff had repeatedly requested the engineer assigned to the project to issue written change orders and to enter into written supplemental agreements covering the extra work necessitated by the construction difficulties. In all instances plaintiff was refused. It performed the extra work under oral protest, but never served written notice of intention to make claim for additional compensation for the extra work, as required by the contract.

The pertinent provisions of the South Dakota Standard Specifications for Roads and Bridges, incorporated by reference into the contract, provided that:

> [W]here the Contractor deems that extra compensation is due him for work or material not clearly covered in the contract . . . the Contractor shall notify the Engineer in writing of his intention to make claim for such extra compensation before he begins work on which he bases the claim. If such notification is not given, and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as defined for force account then the Contractor hereby agrees to waive the claim for such extra compensation.

In ruling that the State was estopped to assert the invalidity of plaintiff's claim for extra work, notwithstanding the whole failure of plaintiff to comply with the provisions of contract requiring written notice of intention to make claim for additional compensation, the Court laid stress on the fact that the State was at all times fully aware that construction difficulties were being encountered, and that plaintiff was compelled to perform extra work in order to overcome such difficulties. The Court emphasized that not only were the engineers assigned to the project kept advised of the recurring problems, but headquarters personnel of the State Highway Commission were also fully informed of plaintiff's difficulties, and concluded that "the fact the contractor discussed the problems with the resident engineer, the district engineer, department engineering in Pierre, is sufficient to estop the defendant."

And in *New Ulm Building Center, Inc. v. Studtman,* 302 Minn. 14, 225 N.W.2d 4 (1974), actual knowledge that extra work was being performed was held to constitute a waiver of contract terms requiring written notice of intention to make claim for extra work. The Supreme Court of Minnesota, in allowing recovery, pointed to the fact that the owners under a construction contract were constantly on the job site and hence fully aware of the fact that extra work was being performed, and ruled that under such circumstances an implied waiver was established of contract provisions specifying that no claim for extras would be recognized unless a written statement of the extras and the cost thereof was presented to the owners by the contractor before commencement of the extra work.

Thorn Construction Company, Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979), involved a contract between plaintiff contractor and the Utah Department of Transportation for the construction of an access road in a public park owned by the State of Utah. After completion of the project suit was filed by plaintiff to recover for alleged extra work performed in connection with the widening of a turning area in the road. It was admitted by the State at trial that the work for which claim was made was not contemplated in the original contract between the parties and that the performance of the work had been verbally ordered by the project engineer during the course of construction. It was further conceded that the work was performed on the basis of oral assurances by the engineer that additional compensation would be paid for the extra work, although no cost estimates were discussed or agreed upon. The State sought to deny payment of the claim on the sole ground that plaintiff had failed to comply with Section 105.17 of the Standard Specifications, incorporated into the contract, requiring the filing of written notice of intention to make claim for extra work, and reading as follows:

> If, in any case, where the contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the engineer as extra work . . . the contractor shall notify the engineer in writing of his intention to make a claim for such additional compensation before he begins the work on which he bases his claim.

In rejecting the State's contention that the failure to file the required written notice worked a forfeiture of the claim for additional compensation, the Court stated that because the engineer had orally ordered the extra work and the same was carried out both under his direction and subject to assurances made by him that the work would be paid for, the State was "on notice" of the extra work, and hence estopped to assert the provisions of contract requiring forfeiture for failure to give written notice of claim for extra work.

Next for consideration are the cases in which it has been held that the requirement of written notice may be satisfied by a showing of substantial compliance therewith.

Substantial Compliance as Satisfying the Requirement of Written Notice

In the following cases the courts applied the doctrine of substantial compliance to unseat or avoid the contract requirement of notice filed in writing.

Zook Brothers Construction Company v. State, 171 Mont. 64, 556 P.2d 911 (1976), was an action brought by plaintiff contractor to recover damages for an alleged breach of contract on the part of defendant Montana Department of Highways, the asserted breach of contract occurring when the Department failed to clear the right-of-way prior to the commencement date of the contract calling for construction of a segment of highway. The delay in clearing the right-of-way was caused by inability to secure relocation of existing utility lines and by problems encountered in seeking to secure right-of-way through various mining claims within the work area. As a result of such delay the State issued a suspension order. Approximately four days thereafter plaintiff wrote a letter to the Department of Highways expressing its general concern over the effect of the delay on performance. After completion of the project the instant action for breach of contract was brought by plaintiff.

The Department defended on the ground, *inter alia,* that the letter to the Department did not comply with plaintiff's contract obligations in that it (1) neither expressly stated a claim for additional compensation, nor (2) expressly gave notice of intention to file such claim at a later date.

In rejecting this defense and affirming judgment entered below for plaintiff the Court took the position that the general tenor of plaintiff's letter coupled with the Department's written reply that it "would give full consideration to all factors relative to the State's failure to obtain right-of-way," was sufficient to put the Department on notice that a claim for extra compensation might be expected at some time in the future, and hence the purpose of the requirement of written notice of claim for extra compensation was satisfied.

The contract between plaintiff contractor and defendant owner before the Supreme Court of Nevada in *Eagle's Nest Limited Partnership v. Brunzell,* 669 P.2d 714 (Nev. 1983), called for the building of condominiums by use of a new construction technique involving large precast concrete forms poured directly at the job site, the utilization of which effected considerable savings by reason of dispensing with the necessity of transporting massive concrete forms to the work place. Difficulties with the new equipment arose during the course of construction, and plaintiff wrote a letter to defendant advising that unforeseen costs would be incurred as a result and that "it is our intent to submit our billing to you at a later date." Section 9.2.1 of the contract provided that "if the contractor wishes to make a claim for an increase in the Guaranteed Maximum Price . . . he shall give the Owner written notice thereof within a reasonable time after the occurrence of the event giving rise to such claim. . . . No such claim shall be valid unless so made." The question before the Supreme Court of Nevada was whether the letter satisfied the requirements of notice in the contract and hence entitled plaintiff to make claim for extra costs. In holding that the letter sufficiently complied with the mandatory requirement of written notice the Court stated:

> The letter clearly indicated that [plaintiff] was 'being delayed' as a result of difficulties caused by mechanical problems with one of the . . . molds. Further, the letter indicated that the contractor disclaimed any liability for the resulting extra costs, and intended to bill [defendant] at a later date. The latter thus provided some notice that [plaintiff] was incurring additional costs, for which the contractor expected to recover from [defendant]. The question presented is whether the district court correctly found that the letter provided sufficient notice to comply with the requirements of Section 9.2.1.
>
> We believe that the letter did provide sufficient notice, and that the district court did not err in finding that [plaintiff] had complied with Section 9.2.1. . . . Appellant apparently would interpret this provision to require [plaintiff] to prognosticate in some fashion all delay costs before they had been incurred. However, we believe that under the circumstances presented in this case appropriate notice might consist of an initial notice that difficulties had arisen, to be followed by a detailed statement of the extra costs incurred when these costs could be determined with sufficient accuracy. [Plaintiff's] letter that he was having trouble with the molds clearly provided appellant with warning that the contractor was experiencing overruns and additional costs, and gave [defendant] the opportunity to take remedial measures.

And substantial compliance was also the basis of the holding in *E. C. Ernst, Inc. v. General Motors Corporation,* 482 F.2d 1047 (C.A. 5, 1973), where in construing the provisions of a construction contract requiring the contractor to give written notice of intention to make claim for extra work, the Federal Court of Appeals for the Fifth Circuit ruled that under circumstances requiring repeated contract changes because of inclement weather, the contractor could not be held to the burdensome duty of alerting the owner to successive changes by submitting quotidian written notices of claims for extra work. It stated: "Bearing in mind the generally accepted purpose of the notice provision, which is to alert

the other party of a grievance against it, we think the giving of such daily notice is more of a burden than the contract or the law should impose."

Thus, it is seen that the provisions of contract calling for written notice of intention to make claim for extra work may be satisfied by a showing of a substantial compliance therewith, and the provisions of contract calling for forfeiture for noncompliance thereby rendered inapplicable and inoperative.

It is to be noted at this point that although certain of the grounds of waiver or estoppel relied on by the courts in the cases dealing with change orders, supplemental agreements, and changed conditions do not appear in the cases relating to notice, this is solely due to the paucity of case law in the latter field, and it is to be emphasized that the grounds of waiver or estoppel asserted and relied on by the courts in the former cases are fully germane and applicable to fact situations involving the requirement of written notice.

SUMMARY

Proceeding now to a summarization of the conclusions to be drawn from the herein review of the apposite case law pertaining to the enforceability of the requirement of written notice, it may be stated that the following propositions appear from the decided cases:

I. Provisions of contract requiring the filing of written notice of intention to make claim for extra work before commencement of the work on which the claim is based, and calling for forfeiture of claim for extra work in the event of failure of compliance, do not contravene sound public policy, and will be enforced by the courts absent circumstances constituting grounds of waiver or estoppel.

II. The State or Owner[3] may in certain fact situations be held to have waived the requirement of written notice and be estopped from asserting the penalty of forfeiture for noncompliance. In the cases wherein the doctrines of waiver or estoppel have been applied certain facts have been identified as being significant to the determination that the doctrines of waiver or estoppel should be given application. The fact situations announced and relied on by the courts as giving rise to application of the doctrines of waiver or estoppel include the following:

(i) The fact that extra work verbally ordered by an authorized representative of the State or Owner was necessary to proper performance of the contract.

(ii) The fact that an oral order by the State or Owner to perform extra work was accompanied by a promise to pay for the extra work.

(iii) The fact that the Contractor placed good faith reliance on a verbal order to perform extra work duly issued by an authorized representative of the State or Owner.

(iv) The fact that the Contractor concurred in the performance of changes verbally ordered as constituting an oral agreement with the State or Owner to modify the written terms of contract.

(v) The fact that the receipt and enjoyment by the State or Owner of the benefits of extra work completed pursuant to verbal order would result in unjust enrichment to the State or Owner if not compensated.

(vi) The fact that the course of conduct and dealing between the parties during performance of the contract was such as to establish a pattern of continuing disregard by both parties for the written terms of contract, including the provision relating to notice.

(vii) The fact that the State or Owner in possession of actual knowledge of the performance of extra work failed to protest or take any action to halt the performance of the extra work by the Contractor.

(viii) The fact that the State or Owner could not complain of being prejudiced by lack of notice of extra work in a situation where the State or Owner was in possession of actual knowledge that extra work was being performed by the Contractor.

(ix) The fact that the actions of the Contractor constituted substantial compliance with the provisions of contract relating to written notice.

Thus, where the question arises as to whether grounds of waiver or estoppel exist in a situation involving failure to file written notice of intention to make claim for extra compensation, the foregoing checklist of grounds of waiver or estoppel should be consulted.

And in so doing probably the most significant point to keep in mind is whether or not the facts establish that the State or Owner had actual notice of the fact that extra work, necessary to proper performance of the contract, was about to be, or was being, performed, by the contractor. As has been shown by the herein review of cases, the courts have shown a strong disinclination to allow the State or Owner to assert prejudice by reason of lack of receipt of written notice in situations where the facts make clear that, by one means or another, the State or Owner was made fully aware of the performance of extra work on the part of the Contractor, and, thereafter, took no steps to halt the performance of the extra work, for which additional compensation might reasonably be expected, and which upon completion would result in unjust enrichment to the State or Owner, if not accorded compensation.

If, however, none of the facts as shown on the preceding checklist appear, there is no reason why the entirely lawful requirement of written notice with forfeiture for noncompliance should not be enforced. Such provision is inserted in construction contracts for a reasonable and legitimate purpose, and in the absence of a showing of facts constituting grounds of waiver or estoppel, such clause should be, and will be, given full force and effect by the courts.

APPENDIX

[Excerpts from "Guide Specifications For Highway Construction," promulgated and published by the American Association of State Highway and Transportation Officials]

104.02 Alteration of Plans or Character of Work. The Department reserves the right to make, at any time during the progress of the work, such increases or decreases in

quantities and such alterations in the work within the general scope of the contract, including alterations in the grade or alignment of the road or structure or both, as may be found to be necessary or desirable. Such increases or decreases and alterations shall not invalidate the contract nor release the surety, and the Contractor agrees to perform the work as altered, the same as if it had been a part of the original contract.

Under no circumstances shall alterations of plans or of the nature of the work involve work beyond the termini of the proposed construction except as may be necessary to satisfactorily complete the project.

Unless such alterations and increases or decreases materially change the character of the work to be performed or the cost thereof, the altered work shall be paid for at the same unit prices as other parts of the work. If, however, the character of the work or the unit costs thereof are materially changed, an allowance shall be made on such basis as may have been agreed to in advance of the performance of the work, or in case no such basis has been previously agreed upon, then an allowance shall be made, either for or against the Contractor, in such amount as the Engineer may determine to be fair and equitable.

No claim shall be made by the Contractor for any loss of anticipated profits because of any such alteration, or by reason of any variation between the approximate quantities and the quantities of work as done.

If the altered or added work is of sufficient magnitude as to require additional time in which to complete the project, such time adjustments may be made in accordance with the provisions of subsection 108.07.

Should the Contractor encounter or the Department discover during the progress of the work subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract, the Engineer shall be promptly notified in writing of such conditions before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause an increase or decrease in the cost of, or the time required for performance of the contract, an equitable adjustment will be made and the contract modified in writing accordingly.

104.03 Extra Work. The Contractor shall perform unforeseen work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated. Such work shall be performed in accordance with the specifications and as directed, and will be paid for as provided under subsection 109.04.

109.04 Extra and Force Account Work. Extra work performed in accordance with the requirements and provisions of subsection 104.03 will be paid for at the unit prices or agreed prices stipulated in the order authorizing the work, or the Department may require the Contractor to do such work on a force account basis to be compensated in the following manner:

(a) *Labor.* For all labor and foremen in direct charge of the specific operations, the Contractor shall receive the rate of wage (or scale) agreed upon in writing before beginning work for each and every hour that said labor and foremen are actually engaged in such work.

The Contractor shall receive the actual costs paid to, or in behalf of, workmen by reason of subsistence and travel allowances, health and welfare benefits, pension fund benefits or other benefits, when such amounts are required by collective bargaining agreement or other employment contract generally applicable to the classes of labor employed on the work.

An amount equal to . . . % (35% suggested) of the sum of the above items will also be paid the Contractor.

(b) *Bond, Insurance, and Tax.* For property damage, liability and workmen's compensation insurance premiums, unemployment insurance contributions and social security taxes on the force account work, the Contractor shall receive the actual cost, to which cost . . . % (10% suggested) will be added. The Contractor shall furnish satisfactory evidence of the rate or rates paid for such bond, insurance, and tax.

(c) *Materials.* For materials accepted by the Engineer and used, the Contractor shall receive the actual cost of such materials delivered on the work, including transportation charges paid by him (exclusive of machinery rentals as hereinafter set forth), to which cost . . . % (15% suggested) will be added.

(d) *Equipment.* For any machinery or special equipment (other than small tools) including fuel and lubricants, plus transportation costs, the use of which has been authorized by the Engineer, the Contractor shall receive the rental rates agreed upon in writing before such work is begun for the actual time that such equipment is in operation on the work.

(e) *Miscellaneous.* No additional allowance will be made for general superintendence, the use of small tools, or other costs for which no specific allowance is herein provided.

(f) *Subcontracting.* For administration costs in connection with approved subcontract work, the Contractor shall receive an amount equal to . . . % (5% suggested) of the total cost of such work computed as set forth above.

(g) *Compensation.* The Contractor's representative and the Engineer shall compare records of the cost of work done as ordered on a force account basis.

(h) *Statements.* No payment will be made for work performed on a force account basis until the Contractor has furnished the Engineer with duplicate itemized statements of the cost of such force account work detailed as follows:

(1) Name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman.
(2) Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
(3) Quantities of materials, prices, and extensions.
(4) Transportation of materials.
(5) Cost of property damage, liability and workmen's compensation insurance premiums, unemployment insurance contributions, and social security tax.

Statements shall be accompanied and supported by receipted invoice for all materials used and transportation charges. However, if materials used on the force account work are not specifically purchased for such work but are taken from the contractor's stock, then in lieu of the invoices the Contractor shall furnish an affidavit certifying that such materials were taken from his stock, that the quantity claimed was actually used, and that the price and transportation claimed represent the actual cost to the Contractor.

The additional payment, based on the percentage stated above, shall constitute full compensation for all items of expense not specifically designated. The total payment made as provided above shall constitute full compensation for such work.

[1] For the specific language of the Changes Clause and a more detailed discussion of the interpretation of all the terms thereof, see the paper entitled "Legal Problems Arising from Changes, Changed Conditions, and Disputes Clauses in Highway Construction Contracts," by Ben H. Walley and John C. Vance, appearing in *Selected Studies in Highway Law,* Vol. 3, p. 1441.

[2] *The Standard Form Changes Clause,* by Crowell and Johnson, 8 WM. & MARY L. REV. 550, 555 (1966).

[3] The word "Owner" as hereinafter appearing in this paper is used to mean a private person, firm, or corporation.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, contractors, federal administrators, and others involved in disputes regarding the provision of adequate advance notice on work to be performed that was not covered in the contract on highway construction projects. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in interpreting the requirement of notice in construction contracts.

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