YoungWilliams P.A.

Modification of Construction Contracts

Steve Williams
Commercial Litigation Group
YoungWilliams P.A.

steve.williams@youngwilliams.com

www.youngwilliams.com

Direct: 601.360.9007
Fax: 601.355.6136
Mobile: 601.594.9007

Street:
210 East Capitol Street
Suite 2000
Jackson, Mississippi 39201

Mail:
P. O. Box 23059
Jackson, Mississippi 39225-3059

Steve Williams

Steve Williams specializes in business litigation, arbitration, construction claims and disputes, commercial collections, contract negotiations and contract disputes and the needs of those involved in the construction industry. He has represented owners, contractors, subcontractors and suppliers in almost every type of construction setting including contract preparation, negotiations, bidding, claims, disputes, litigation and arbitration.

He is a trial attorney who has practiced in all Courts, state and federal. He is experienced in appellate work and is admitted to practice before the United States Supreme Court. Steve received his Juris Doctor from the University of Mississippi School of Law in 1975 where he was a staff member of the Mississippi Law Journal for two years and business manager of the Mississippi Law Journal from 1974 to1975. Steve received his AB degree in Economics from Davidson College, Davidson, North Carolina, in 1972. He graduated from Clinton High School in1968. Steve is a member of the American Bar Association, the Mississippi State Bar, and the Hinds County Bar Association. He served as president, vice-president, secretary and treasurer over various years for the Jackson Young Lawyers Association.

MODIFICATION OF CONSTRUCTION CONTRACTS

A. Introduction.

In most construction projects, changes in the work are expected, and most construction contracts contain clauses which give the owner the right unilaterally to direct changes during the course of performance. As a part of the bargain, the contractor is entitled to an adjustment in the price if the change increases the cost of the work or the time of performance. Or, the owner may be entitled to a credit where the change reduces the amount or the cost of the work. Sometimes, these clauses also provide guidance where the cost of the work has increased as a result of "constructive changes," or situations where a claim or dispute is treated as if a change order had been issued.

B. Definitions.

A number of terms are used which relate to changes on construction projects. An understanding of the terminology is needed before discussing changes.

A modification is a separate mutual agreement between the owner and the contractor to change the work. It involves an agreement by both parties. Like any other contract, a construction contract can be modified, but there must be mutual assent, consideration and compliance with any formal legal requirements.

A Change clause gives the owner the right unilaterally to direct changes within the scope of the work as originally contemplated. In exchange for the right, a contractor is entitled to an equitable adjustment in the price and/or the time for the performance.

Extra work is work of a character not contemplated by the parties and not controlled by the contract. It is usually a claim by the contractor at the end of the project that he has performed work requested by the owner but not required by the contract.

Additional work is work within the general scope of the contract although not included in the plans and specifications.

Waiver is the acceptance of non-conforming work or relinquishment of a known right by one of the parties.

Constructive changes allow "the contractor to recover for work ordered, but not required by the contract despite the contractor not being issued the required change order." Justin Sweet, Sweet on Construction Industry Contracts: Major AIA Documents (John Wiley & Sons, 1987), p.215.

Cardinal changes are changes which go beyond the scope of the original contract. Cardinal changes need not be performed by the contractor.

C. The Changes Clause.

Almost every construction contract has a changes clause. Several typical types of such clauses are discussed in chapter III. But such changes are not without limitation. Two such limitations merit discussion.

The first limitation relates to the concept of cardinal changes.

D. Scope of the Work.

A primary limitation on the owner's right to change the work may be found, by way of example, in the language of the standard changes clause utilized by the federal government. Federal Acquisition Regulation 52.243-1, Changes, provides that the owner

may only make changes in the work "within the general scope of the contract." This involves the concept of the cardinal change.

A cardinal change occurs when the owner's directives go beyond the scope of the work or so many change orders are issued that the project appears substantially different from that originally contemplated. In Wunderlich Contracting Co. v. United States, 240 F.2d 201 (10th Cir. 1957), the government ordered over 6,000 changes during the construction of a hospital. The court held that the accumulation of so many changes went beyond the scope of the work.

Although the cardinal change doctrine originated in federal government contract cases, it has been referred to in private construction contracts. In Nat Harrison Associates, Inc. v. Gulf States Utilities, Co., 491 F.2d 578 (5th Cir. 1974) (La. Law), the Court stated:

> There is a point, however, at which changes in the contract are to be considered beyond the scope of the contract and inconsistent with the changes section. . . A determination of the permissive degree of change can only be reached by considering the totality of the change and this requires recourse to its magnitude as well as its quality… Damages can be recovered without fulfillment of the written notice requirement where the changes are outside the scope of the contract and amount to a beach.

Nat Harrison Associates, Inc., 491 F.2d 578 (5th Cir. 1974) (La. Law).

Although the Mississippi Supreme Court has not specifically addressed the question of "cardinal changes," federal courts applying Mississippi law have concluded that Mississippi does not follow the principle. See Jackson v. Sam Finley, 366 F.2d 148 (5th Cir. 1966); Litton Systems, Inc. v. Frigitemp Corp., 613 F. Supp. 12377 (D.C. Miss. 1985).

On federal projects in Mississippi, the cardinal change rule will apply. Other Mississippi projects, public and private, will be governed by the specific language contained in the contract. Unless the contract contains "scope of the work" language similar to the federal clause, the Mississippi courts will probably not recognize a claim based upon the cardinal change rule.

E. Competitive Bidding Limitation.

Additionally, with respect to state agency authority to direct changes or modifications in construction contracts, the competitive bidding laws place limitations on changes. M.C.A. §31-7-13 (Supp. 2004) provides:

> "All agencies and governing authorities shall…contract for public construction... as herein provided.
>
> * * *
>
> (g) **Construction contract change authorization.** In the event a determination is made by an agency or governing authority after a construction contract is let that changes or modifications to the original contract are necessary or would better serve the purpose of the agency or the governing authority, such agency or governing authority may, in its discretion, order such changes pertaining to the construction that are necessary under the circumstances without the necessity of further public bids; provided that such change shall be made in a commercially reasonable manner and shall not be made to circumvent the public purchasing statutes. In addition to any other authorized person, the architect or engineer hired by an agency or governing authority with respect to any public construction contract shall have the authority, when granted by an agency or governing authority, to authorize changes or modifications to the original contract without the necessity of prior approval of the agency or governing authority when any such change or modification is less than one percent (1%) of the total contract amount. The agency or governing authority may limit the number, manner or frequency of such emergency changes or modifications.

M.C.A. § 31-7-13(g) (emphasis added).

This author is aware of no cases which interpret the above statutory limitation on the issuance of public contract change orders. There is no definition of the phrase, "commercially reasonable manner." A question which should be posed is at what point does a change to a contract become not commercially reasonable or a circumvention of the public bidding laws?

Other states have not clearly defined the limits of the authority of state and local agencies and governments in this area. Some require that the changes be "incidental" to the original contract, see, Greenlee County v. Webster, 215 P. 161, 164 (Ariz. 1923), while others look to see if the proposed change alters "the essential identity or the main purpose of the contract." Del Balso Constr. Corp. v. City of New York, 15 N.E.2d 559 (N.Y. 1938).

Hopefully, the courts will protect the competitive bidding requirements and prevent circumvention of the public bid laws while construing the statutory authority for changing contracts in a way that allows state governments a reasonable degree of latitude in administering public works contracts.

With respect to unit price contracts, the Attorney General of Mississippi has opined that reasonable variations from estimated quantities in unit price contracts do not constitute "additional work" or a change in the terms of the contract. As long as the quantities do not exceed the maximum amounts allowed by the contract, no further action is required by the governing authority to approve those variations. If the actual quantities unreasonably exceed the estimated quantities so as to "appear questionable," then the

governing authority should require a sufficient reason for the excess quantities before authorizing payment.

The Attorney General reiterated the requirement that additional work or changes in the contract be approved in writing prior to the work being done. Otherwise, payment for additional work cannot be authorized. MS AG Op. Baker (January 26, 1994). In yet another opinion letter, the Attorney General of Mississippi addressed the question of whether a municipality which entered into a contract with a construction company for a sewer rehabilitation project could, after commencement of construction, pay the construction company for claims for extra compensation for "changed site conditions," for work not performed according to the plans and specifications, and other "unusual conditions." No change orders had been authorized to be issued or issued permitting the payment in advance of items for which extra compensation was claimed. The opinion writer concluded:

> As a general proposition, when there has been no official action approving in advance additional work by a contractor, a governing authority is not permitted to pay for the additional work. See MS AG Op., Baker (January 26, 1994), and Butler v. Board of Sup'rs for Hinds County, 659 So.2d 578 (Miss. 1995), copies of which are enclosed. However, if a contract is to be performed and paid upon a "unit price," a governing authority may find, consistent with fact, and encompass such findings in an order spread upon its minutes, that a proposed change order is necessary or incidental to the completion of the work as originally bid, is commercially reasonable, is not made to circumvent the public purchasing statutes, and that the increase in costs is reasonable, and thereafter approve the change order even after the work has been performed.

E. Constructive Changes.

A "constructive change" arises when no formal change order is issued, but is a result of, for example, defective specifications, improper contract interpretation by the architect or engineer, or improper refusal to grant a time extension. It results from the requirement that the contractor perform additional work for which he is entitled to recover. The contractor is allowed to recover for work performed, but not required by the contract, if it is subsequently determined that the contractor should have been issued a change order.

Frequently, a contractor encounters work or costs which exceed those originally anticipated for the project. Many times, the contractor will ask the owner for additional compensation. Often this is done by requesting a change order. Equally as often, the architect or owner refuses to issue a change order. What happens next?

In effect, the constructive change order doctrine permits the parties to bypass the requirements of the contract where the parties cannot agree on the issuance of a written change order. The term is almost exclusively associated with federal government contracts. It developed as a legal fiction to enable the Board of Contract Appeals to grant relief which was beyond their jurisdiction under the Contract Disputes Act of 1978.

A constructive change results from an act or a directive by the owner or his agent that requires a change but for which the owner refuses to issue a written change order. Generally, constructive changes fall in one of three categories:

(1) Situations where the drawings or specifications are insufficient and the contractor is required to do extra work;

(2) Where the contract is misinterpreted by the owner and work is erroneously rejected or the contractor is required to perform work not actually required by the contract; or

(3) Where the owner refuses to grant time extensions after the work has been excusably delayed.

The federal contract clause anticipates disputes concerning constructive changes. Federal Acquisition Regulation 52.243-4 reads as follows:

> (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes -
> (1) In the specifications (including drawings and designs);
> (2) In the method or manner of performance of the work;
> (3) In the Government-furnished facilities, equipment, materials, services, or site; or
> (4) Directing acceleration in the performance of the work.
> **(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating—**
> **(1) The date, circumstances, and source of the order; and**
> **(2) That the Contractor regards the order as a change order.**
> (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
> (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
> (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general

> nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.
> (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract. (emphasis added).

As highlighted above, subparagraph (b) requires the contractor to give the government written notice stating (1) the date, circumstances and source of an order which constitutes a change and (2) that the contractor regards the directive as a change order. The contractor must promptly notify the owner of his expectation of an increase in the contract sum or for an extension of contract time caused by the change. Chris Berg, Inc. v. United States, 455 F.2d 1037 (Ct. Cl. 1972).

Despite the frequent use of the "constructive change" concept in federal contract disputes, the designation is rarely used in connection with private contract disputes. In the private or state setting, the contractor may resort to breach of contract claims, quantum meruit claims, or other provisions of the contact such as the "changed conditions" clause.

In at least one case, the Mississippi Supreme Court held that Mississippi does not recognize the doctrine of “constructive changes” in a construction case. In Sentinel Industrial Contracting Corp. v. Kimmins, 743 So.2d 954 (Miss. 1999), the Court stated:

> The trial judge instructed the jury that they could award Kimmins damages if they found that Sentinel/Centre's conduct amounted to a "constructive change order." Mississippi law does not recognize "constructive change orders." However, the court's instruction to the jury on the definition of "constructive change order" sufficiently complies with Mississippi law. Instruction P-20 states in pertinent part:
>
> A constructive change consists of two elements:
> 1) A change element--which calls for examination of the actual performance to

> see whether it went beyond the minimum standards demanded by the subcontracts; and
> 2) An order element--in which a Sentinel/Centre representative, by word or deed, required Kimmins to perform work that was not a necessary part of its subcontracts.
>
> The trial court erred in instructing the jury on "constructive change orders," a concept not recognized under Mississippi law. However, the instruction is in line with our previous decisions allowing recovery for extra compensation without regard for written change orders where the owner imposes extra-contractual work while denying change order requests.

Sentinel Industrial Contracting Corp. v. Kimmins, 743 So.2d at 965

The Sentinel case involved a claim between a subcontractor and a general contractor on a private project. Although the Court rejected the notion of a constructive change, it allowed recovery based on a concept of "extra-contractual" work, or changes by breach of contract.

F. Change by Breach of Contract.

In Bagwell Coatings, Inc. v. Middle South Energy, Inc., 797 F 2d 1298 (5th Cir. 1996), the Fifth Circuit Court of Appeals addressed a change situation while applying Mississippi law. In that case, a private project contractor was required to fireproof certain structural steel. Further, the contract provided that the contractor would be provided unobstructed access to the steel.

By the time the contractor was allowed to begin its work, there were numerous attachments to the steel, duct work, piping and other matters, which hindered and delayed the contractor's performance of the fireproofing work. The contract also provided that compensation for changes would only be allowed if the owner agreed to the change in writing. In Bagwell Coatings, the owner claimed that the contractor failed to comply

with the written change order requirements and was barred from obtaining additional compensation. The Fifth Circuit Court of Appeals rejected the argument, relying instead on the owner's contract obligation to provide the contractor with access to steel. Based on this reasoning, the change clause "never came into play." Id. at 1305.

Under the Bagwell scenario, basic breach of contract provides the contractor with an alternative theory for recovery which is not based on a written change clause.

G. Authority to Issue Change Orders.

A contractor should always investigate the authority of any person ordering changes on the owner's behalf to be sure that the owner will be bound by his actions. Frequently, architects are granted the authority to make minor changes that do not involve additional costs. For example, AIA Document A201 (1987 Ed.) provides:

> **7.4 Minor changes**
>
> 7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the contract Sum or extension of the contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

Although what constitutes a "minor" change may be fertile ground for dispute, an architect's authority to make other changes on behalf of the owner is severely limited. Changes that require additional costs or time extensions should be handled by written change orders signed by the owner and the contractor.

In Kirk Reid Co. v. Fine, 139 S.E.2d 829 (Va. 1965), the Court stated:

> [I]t is clear that the authority of the architects and the engineer to act as agents of the defendant was of a limited scope, confined to those areas set forth in the contract and

> where, in special instances, their power might be broadened. It is equally as clear that changes in the work, except of a minor nature, could only be made on the written order of the [owner] or the written order of the architects or engineer stating that the [owner] had authorized such changes.

Kirk Reid Co. v. Fine, 139 S.E.2d at 833

Extra work performed at the direction of an unauthorized person is ordinarily not compensable. The lesson for the contractor is to deal with the owner unless the contract clearly vests authority for changes in the architect/engineer.

With respect to public projects, Mississippi has provided some room for changes initiated by the engineer or architect on public contracts without the prior approval of the agency or government body. Such changes are limited to 1% of the total contract amount and such authority must have been granted to the agent by the government authority. See M.C.A. §31-7-13(g) quoted above. Even so, it is still likely that the engineer or architect will be required to make the changes in writing.

H. Requirement for Written Change Order.

Not infrequently, contractors proceed with extra work or additional work prior to obtaining an authorized written change order or directive from the owner or its authorized representative. As seen above, change order provisions in construction contracts are generally required to be in writing. This requirement is enforceable.

On several occasions, the Mississippi Supreme Court has held that a contractor who performs "changed" work without first obtaining a written change order "proceeds at his peril." See City of Mound Bayou v. Roy Collins Construction Co., 499 So.2d 1354, 1358 (Miss. 1986); Citizens Nat. Bank of Meridian v. L. L. Glasscock, 243 So.2d 67

(Miss. 1971); Delta Construction Co. of Jackson v. City of Jackson, 198 So.2d 592 (Miss. 1967).

I. Exceptions to the "Writing" Requirement.

Often, contractors are faced with situations where the owner or its representatives orally directs changes but later refuses to pay the contractor due to the lack of a written change order. The theory most often used to overcome the written order requirement is "waiver" or "modification." The parties to a contract can include a provision requiring written change orders, and they can also waive or modify that requirement.

A number of factors will play a part in a court's determination of waiver including:

(1) The owner's knowledge of the contractor's claim for extra compensation;

(2) The owner's insistence that the work be performed;

(3) Any prior course of conduct where extras were performed and paid for without written orders; and

(4) The owner's assurance or implication that a written order was unnecessary.

A contractor must, therefore, assert his intention to make a claim for compensation for changed or extra work. At a minimum, the contractor should confirm in writing the oral directive and his intent to proceed under protest prior to performing any work with regard to the change. In addition to waiver or modification, the contractor might characterize the claim differently to avoid the effect of a written changes requirement. If the clause requires written changes for "extra work," the contractor might argue that the work actually constituted "additional work" and was beyond the scope of

the contract. In that case, the changes clause might not apply, and the contractor can claim breach of contract.

With respect to Mississippi public contracts, the courts are less likely to avoid the requirement that changes be directed in writing. In Delta Construction Co. of Jackson v. City of Jackson, 198 So. 2d 592 (Miss. 1967), a contractor sought additional compensation for moving additional dirt as orally directed by the engineers. The contract permitted the engineers to make changes up to 25% of the estimated costs of any major work item. Other changes required a supplemental agreement executed by the city.

The contractor gave notice that the dirt would overrun, but did not receive a supplemental agreement signed by the owner. His claims for additional compensation were dismissed. The court noted the essential nature of the clause requiring a written agreement for the changes where government bodies are involved. The court stated that:

> The contract in the instant case requiring a supplemental agreement for extra work over minor changes is essential, because municipalities and other governmental agencies obtain funds with which to build public improvements from bond issues based upon estimates furnished to them, and municipalities must reserve the right to stop a project if they determine the extra work will exceed the amount of money allocated to any given phase of a project.

Delta Construction Co., 198 So.2d at 600.

The court also rejected other arguments advanced by the contractor as follows:

a. Estoppel - Not applicable: ". . . an estoppel in pais, as distinguished from an estoppel of record, is such as will arise from acts and declarations of the parties sought to be charged who designedly induces another to alter his position injuriously to himself. Moreover, where the doctrine is sought to be applied, it is necessary that the

party in whose favor it is invoked must also act in good faith. We are of the opinion that the doctrine is not applicable in the instant case, because the Contractor and the Engineers under the terms of the contract could not have agreed in writing to change the contract so as to charge the Owners without a supplemental agreement from the Owners." Id. at 600.

b. No quantum meruit or implied contract: ". . . [N]o recovery can be had on an implied contract, or quasi contract, or upon quantum meruit for extra work where the claim is based upon an expressed contract." Id. at 600.

c. No waiver: ". . . The principal argument of concern to this Court is the contention that there was a waiver on the part of the City of Jackson and the Jackson Municipal Airport Authority of their right to rely upon the provisions of the contract relating to a supplemental agreement in case of charges involving additions of more than twenty-five percent to any major item. After carefully restudying this question, and recognizing that such provision can be waived by a governmental subdivision in an appropriate case, we are nevertheless of the opinion that the allegations of the complaint are insufficient to state a cause of action based upon such waiver." Id. at 605.

The contractor was, however, granted relief for the additional dirt up to 25% of the quantity of the excavation at the original contract price.

In addition to contract requirements, there are several statutes in Mississippi which limit the authority of public owners to pay contractors for additional work unless they are made a part of the body's official minutes. An example is M.C.A. § 19-13-15

(Supp. 1994) which requires all pay requests of contractors to be made a part of the minutes of the County Board of Supervisors. It provides in part:

> In all cases of public work let by the Board of Supervisors where the contract price exceeds one thousand dollars ($1,000.00), the board may contract so as to provide for making partial payments to the contractor therefor as the work progresses. In no case shall the retained amount of such partial payments be less than two and one-half percent (2-1/2%) nor more than ten percent (10 %) of the value of the work done and material used in the performance of the contracts, such value to be estimated by some competent person employed by the board to superintend such work, and not until the superintendent shall furnish to the board such estimate, in writing, on his oath as to the correctness of such estimate with the oath annexed thereto, shall be filed with and recorded in the minutes of the board. . . .

Similar provisions apply to municipalities, M.C.A. §21-15-17 (1972), and the Mississippi Department of Transportation, M.C.A. §65-1-5 (Supp. 1999).

In Warren County Port Commission vs. Farrell Construction Co., 395 F.2d 901 (5th Cir. 1968), the contractor was instructed by the engineer to furnish labor and a barge to assist an independent firm hired by the Commission in taking soil borings. The court held:

> The only permissible method for the alteration of a contract with a board of supervisors is by a subsequent order entered on the minutes . . .
>
> . . . an order actually entered upon the minutes is nevertheless void if the minutes are not signed by the president of the board, or, in his inability, by the vice president of the board, within the time prescribed by law . . .
>
> In the absence of that indispensable prerequisite [signed minutes], these Boards, and the public they represent, could not be bound, by waiver or otherwise.

> In short, in the absence of statutory formalities, neither the instructions of the engineer in charge of the work nor "waiver" could authorize extra work.

Warren County Port Commission, 395 F. 2d at 903-904

In the case of Butler v. Board of Sup'rs for Hinds County, 659 So.2d 578 (Miss. 1995), the Hinds County Board of Supervisors contracted with Dunn Construction Company for the renovation of the Hinds County Courthouse. Dunn subcontracted with Butler to meet all of the painting needs on the project. Thereafter, Butler completed all of the painting needs to the specifications and terms of the contract between Dunn and the board with one exception in the amount of $34,652.86 which represented additional unapproved expenses.

Butler encountered site conditions different from those in the plans. The problem was existing plaster walls which were unexpectedly deteriorating due to an uncontrolled environment. The deterioration prevented Butler from being able to paint the existing plaster walls in the manner provided for by the plans between Dunn and the board. Upon discovering the problem, Butler consulted the board's architect for the project and was directed to strip the existing plaster and apply a "Glid-Wall System" which would allow a smooth finish, maximum performance of the paint and long lasting adhesion. Butler contended that the work was outside the scope of his contract with Dunn and outside the scope of Dunn's contract with the board.

Butler performed the work on the "Glid-Wall System" at the direction of the board's architect. Pursuant to the subcontract with Dunn, Butler subsequently submitted a change order request to Dunn for $34,652.86. Dunn in turn submitted the change order

request to the board which denied responsibility for the work. The Mississippi Supreme Court held:

> Butler, as everyone, was charged with the knowledge that a board of supervisors can *only* make the county liable for a contract by a valid order duly entered upon its minutes. *Groton Bridge & Mfg. Co. v. Board of Supervisors of Warren County,* 80 Miss. 214, 31 So. 711, 712 (1902); *Colle Towing Co.,* 57 So.2d 171, 172 (1952). Furthermore, as *Colle Towing Co.* clearly states, the importance of the public policy involved will be the overriding factor in such disputes even when "the rule may work an apparent injustice." *Id.,* 57 So.2d at 172. Accordingly, because of the paramount public policy and the clear absence of Board approval upon its minute book, the lower court is affirmed. 659 So.2d at 582.

A subsequent writing, however, might satisfy the requirement that change orders be in writing. In Baton Rouge Contracting Co. v. West Hatchie Drainage District, 304 F. Supp. 580 (N.D. Miss. 1969), the Court held that where an owner accepts changed work and later modifies the plans and specifications to reflect the changes, then the contractor will be compensated for the changed work even though no writing was issued until after the work was fully performed. The court held:

> "Changes in the drawings and specifications were not made by the contacting officer, in writing, until the work had been fully performed. However, the Contractor performed the work and the Contracting Officer thereafter issued his written modification or change of the contract to cover a portion of the additional work. The Court is of the opinion that the Owner, having accepted the fruits of the changes, is not in a position to complain that they were not evidenced by a written order or modification."

Baton Rouge Contracting, Co., 304 F.Supp. at 589.

In City of Mound Bayou v. Roy Collins Construction Co. Inc., 499 So. 2d 1354 (Miss. 1986), the Mississippi Supreme Court carved out a narrow exception to the written

change order rule. The Court ruled for the contractor, even though there had been no written change order, because the City's Mayor requested the contractor to perform work not within the scope of the contract and the City's engineers acted in bad faith in orally directing work to be done. The Court stated:

> "The contractors should recover in the instant case because Barrett [the engineer] and Mound Bayou by a persistent pattern of conduct waived the contractual provision regarding changes to be executed in writing, and moreover Barrett and Mound Bayou failed to act in good faith in performing their contractual obligation."

City of Mound Bayou, 499 So. 2d at 1360.

The Court relied on Baum & Company v. Covert, 62 Miss. 113 (1884), which had permitted recovery for the contractor on a private project where no written change order was issued.

In private construction projects, subsequent conduct may relieve the writing requirement. In Baum & Company v. Covert, 62 Miss. 113 (1884), the contract provided that no extras, or outside work of any kind, were to be allowed or paid for, unless they were agreed upon in writing and signed by the owner and architect prior to the work being performed. The court held:

> This suit was not for recovery of the price of any work whatever authorized by the Contract. It was expressly brought for those things which lay outside of and beyond it. The written contract, therefore, in no manner controls the rights of the parties except for showing what things were covered by the contract price … Notwithstanding their stipulations to the contrary, the owners must pay a reasonable value for everything furnished by their order, if it clearly be established to the satisfaction of the jury that such things were ordered by them. The burden of so

> proving is, of course, upon the Plaintiff and must be clearly established by him.

Baum, 61 Miss. at 120.

Waiver has been recognized in Mississippi as an exception to the writing requirement on private projects. In Eastline Corp. v. Marion Apartments, Ltd., 524 So.2d 582 (Miss. 1988), the Court recognized that parties to a private construction contract may waive the requirement that changes must be directed in writing for the contractor to collect additional compensation. Since waiver is a question of fact, on remand the trier of fact was directed to look to:

> [T]he owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards such stipulation, and a promise to pay for extra work, orally requested by the owner and performed in reliance on that promise.

Eastline Corp., 524 So. 2d at 584.

Breach of contract may also provide an exception. In Bagwell Coatings v. Middle South Energy, Inc., 797 F.2d 1298 (5th Cir. 1986), the Court applying Mississippi law held where the owner breached the contract by failing to provide the contractor (who was to fireproof the structural steel) unobstructed access to the steel, that the clauses relating to changes and extra work were inapplicable and "never came into play." Bagwell Coatings, Inc., 797 F.2d at 1305.

On the other hand, in Citizens National Bank of Meridian v. L.L. Glascock, Inc., 243 So. 2d 67, the Mississippi Supreme Court reversed the trial Court's award to the contractor on a quantum meruit basis for the performance of extra work done at the verbal direction of the bank's engineer and held:

> The rule of the Delta Construction Company case, though relating to a public contract, nevertheless, expresses a principle of law we think equally applicable to private contracts.
>
> The written contract anticipated every contingency upon which this suit was based. Its very purpose was to forestall imposition of vague claims derivative of custom within the trade with which layman are often unfamiliar. The owner, being desirous of limiting its financial obligation, should not have its pocketbook exposed to the custom or architects and contractors unless it agrees thereto. In this instance, the owner agreed to pay for extra work only if it was authorized in writing prior to the execution. Having contracted directly upon the point, there is no leeway for the award on a quantum meruit basis.

Citizens National Bank of Meridian, 243 So.2d at 70-71.

Although the changes clause gives the owner broad authority to make reasonable changes, it does not give him absolute discretion to make excessive changes. It should be clear, however, that a contractor seeking additional compensation for extra work should meticulously follow the requirements of the changes clause. If he fails to do so, it is more likely that a court will find a way to provide relief to the contractor in a private setting than in a public setting. Absent extraordinary circumstances, courts will usually enforce the writing requirement for public contracts.

The lessons for the contractor are:

(1) Don't accept oral directives for changes.

(2) Read and follow the contract.

(a) Require a written directive.

(b) Be sure the architect/engineer has authority.

(3) Require the owner to approve written changes.

(4) Immediately give notice of extra work.

(5) Immediately give notice of breach of contract resulting from:

(a) Defective plans or specifications.

(b) Owner interference or delay.

(6) Keep accurate records.