DATE: July 7, 1987

TO: J. P. Casey, Engineering and Development Director
FROM: City Attorney
SUBJECT: Public Works Construction Contract Change Orders

The questions you raised in your March 17, 1987 memorandum (attached) are answered by Elisa Cusato's memorandum dated April 9, 1987 (also attached), which we adopt as our views on the matter.

JOHN W. WITT, City Attorney
By
C. M. Fitzpatrick
Assistant City Attorney

CMF:js:823.5(x043.2)
Attachments
ML-87-77

Office of
The City Attorney
City of San Diego
MEMORANDUM
236-6220

870409
DATE: April 9, 1987
C. M. Fitzpatrick
Assistant City Attorney
April 9, 1987
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TO: C. M. Fitzpatrick, Assistant City Attorney
FROM: Elisa Cusato, Senior Legal Intern
SUBJECT: Public Works Construction Contract Change Orders

Scope of Work

Under a "changes" clause in a public works contract, the government has no right to change the essential nature or the main purpose of the contract, but may make only changes incidental to the primary object of the contract. The change order under such a clause may not essentially alter the project contemplated by the contract.

The determination of the permissive degree of change can only be reached by considering the totality of the change in regards to its magnitude as well as its quality. The number of changes is not, in and of itself, the test by which it should be determined

whether or not alterations are outside the scope of the contract. A change order that exceeds the scope of the work amounts to a breach of contract entitling the contractor either to abandon performance and sue for damages or to proceed with performance and sue for damages on completion.

Each case is determined on its facts. In Saddler v. United States, 287 F.2d 411 (1961), the original contract permitted the contracting officer to make changes in the contract specifications provided they were within the general scope of the contract. The "change" clause provided that the United States would make an equitable adjustment in the contract price. In Saddler, the Court of Claims held that the change increasing earthwork form 7,950 yards to 13,000 yards and necessitating the bringing of equipment 100 miles back to the job site was a cardinal alteration outside the scope of the contract. The contractor recovered the resulting rental, transportation, labor, travel and engineering expenses, including a 10 percent payroll expense and 10 percent for overhead as damages.

In Boomer v. Abbett, 121 Cal.App.2d 449 (1953), the court held that the change was within the scope of the contract. In Boomer, when the prime contract was executed, there were no final plans

for the towers involved in the change order. The court held that this change was required by the nature of the work and that this change was contemplated and provided for by the contract in its "changes" clause.

The same general rule applies to additions and deletions to a contract. Additions are allowable if they do not substantially change the character of the work or unreasonably increase the cost. Work may be deleted by the public agency under the "changes" clause if it is not an integral part of the work required for proper completion of the project. Deletion of integral work may improperly terminate the contract.

Competitive Bidding Requirement

Even when the original contract includes a "changes" clause, a public entity cannot enter into a new or supplemental contract with the original contractor involving more than the statutory amount that triggers the competitive bidding requirements without a new bidding procedure.

However, in Bent Bros., Inc. v. Campbell, 101 Cal.App. 456 (1929), the City of Stockton adopted the unit price method for measuring the cost of constructing a flood control dam. Therefore the excavations to be made and the quality of material

to be used were approximated only. The court held that the making of necessary changes of the plans and specifications of a unit price contract did not require the City Council to go through the procedure of advertising for bids and of letting a contract all over again even though the added cost exceeded $1500 and the City Charter specified that no contract for work shall be let where the expenditures exceed that sum except to the lowest bidder after advertisements for sealed proposals.

Also, the competitive bidding requirements do not have to be followed where it would be useless or disadvantageous or where there is an emergency. In Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348 (1930), the court found an implied exception to the City Charter provision requiring contracts to be let to the lowest bidder where the original contractor was the only party that could enter into such an agreement with the City. In Los Angeles Dredging, two oral contracts were entered into by the company and the city after the original contract. One provided compensation to the company for cessation of dredging during the bathing season because the deposit of the dredging material was polluting the water at a public bathing place. The court held

that this was an emergency contract because of the potential hazard to public health. The other oral contract was for the payment to the company for the additional cost of transporting dredged material over longer pipelines than originally agreed in order to avoid obstruction of the street. Here, Los Angeles Dredging was the only company that could have performed this contract.

Waiver of Written Change Orders

Most contracts require that change orders be in writing. In Acoustics, Inc. v. Trepte Constr. Co., 14 Cal.App.3d 887 (1971), the court found that compliance with contractual provisions for a written change order indispensable in order to recover for extra work. However, if the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, the written change order requirement may be waived. Weeshoff Constr. Co. v. Los Angeles Flood Control District, 88 Cal.App.3d 579 (1979).

In Acoustics, the state inspector who orally ordered the changes had no authority to waive the written change order contract requirement. In addition, the Acoustics contract explicitly provided that failure to perform predefined conditions (the written change order) shall constitute a waiver of any and all

rights to additional compensation.

The Weeshoff contract had no such provisions. In Weeshoff, the contractor relied on more than just the verbal order by the site inspector in his belief that a valid change order had been issued. In Weeshoff, the contractor received correspondence from the site inspector stating that the district considered him in violation of the contract for not complying with the oral change order. Also, the contractor was informed that the district would take it upon themselves to do the work ordered by the site inspector if he did not do it and the contractor witnessed the fact that the district intended to carry out its threat. In this situation, the court held that the contractor properly concluded that a valid change order had been issued.

Changed Conditions and the
Breach of Implied Warranty Theory

In addition to waiving a written change order, there are other situations where a contractor can recover for extra work without a change order. Generally, where plans and specifications induce

a public contractor reasonably to believe that certain indicated conditions actually exist and may be relied upon in submitting the bid, he is entitled to recover the value of such extra work as was necessitated by conditions being other than represented, Gogo v. L.A. Flood Control District, 45 Cal.App.2d 334 (1941). However, there must be an affirmative misrepresentation or concealment of material facts in the plans and specifications in order for the contractor to recover. In addition, there must be actual reliance by the contractor on those misrepresentations. A public entity is not liable for extra work caused by plans and specifications that are merely incomplete. Jasper Construction, Inc. v. Foothill Junior College Dist., 91 Cal.App.3d 1 (1979). In Jasper, the contractor claimed that, as a result of inadequate and defective plans and specifications and negligence in administering the project, it suffered delays and extra expenses. The major portion of the claim was that the plans and specifications did not reveal that the contractor was required to pour concrete using a method differing from that which was customary and on which the bid was based. The contractor did not recover because he failed to prove that there was an affirmative misrepresentation or concealment of facts on which he reasonably relied. The fact that the plans or specifications were merely incomplete is insufficient to establish liability.

However in Gogo, the contractor recovered his extra expenses. In

Gogo, the resident engineer made affirmative representations of material facts to the contractor which were false and on which the contractor relied in making his bid.

Disclaimer Provisions

Most public contracts contain disclaimer provisions stating that the public entity assumes no responsibility for the accuracy of certain tests or for preliminary investigations performed by the entity. These clauses usually include a provision that the bidder must make his own examination and investigate the conditions at the proposed site. However, the responsibility of a governmental agency for a positive and material representation as to a condition within the knowledge of the government is not overcome by a general clause requiring the contractor to examine the site, to check out the plans and to assume responsibility for the work. In E. H. Morrill Co. v. State of California, 65 Cal.2d 787 (1967), the court held that the contractor justifiably relied and had a cause of action against the state when the nature of the subsurface had been flatly and positively misrepresented in

the contract's special conditions. In Morrill, these special conditions in the contract did not cross-reference an allegedly effective disclaimer in the general conditions.

However, a statement made honestly may be considered as suggestive only and expenses caused by unforeseen conditions will be placed on the contractor. Wunderlich v. State of California, 65 Cal.2d 777 (1967). In Wunderlich, the state memorandum on which the contractor chose to rely merely stated that "samples indicated" the source would be satisfactory but gave no positive representation that it would be so. The contractor in this case declined the invitation to make his own investigation of the source. In addition, the paragraphs containing the alleged warranty contained direct references to disclaimer paragraphs and to a specific disclaimer of the attributes of the source allegedly warranted. In Wunderlich, both the state and the contractor had equal access to information as to the source of the tests. Here, there was no misrepresentation of material facts within the knowledge of the state.

Concealment

Under certain circumstances, a governmental agency may be liable for failing to impart its knowledge of difficulties to be encountered in a construction project. In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least

three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead, (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff, (3) the defendant actively conceals discovery from the plaintiff. Warner Constr. Corp. v. City of Los Angeles, 2 Cal.3d 285 (1970).

The Warner court found all these instances present. In Warner, the contractor maintained a cause of action for fraudulent concealment where the nondisclosure of cave-ins and special drilling techniques used in drilling the test holes transformed the logs of the test holes into misleading half- truths. The facts concealed were exclusively available to the city. Finally, the contractor presented evidence of intentional concealment by the city.

In Welch v. State of California, 139 Cal.App.3d 546 (1983), the plaintiff contractor was hired to repair pier 11 on a certain bridge. Although similar work was done on pier 10 of that bridge, this information was not disclosed in the general note. It was the state's policy to provide information about comparable projects to bidders only if the other project was "at the same location" and not to "volunteer" any other information to the bidding contractors. Pursuant to this policy, the state's engineers would have shown the plaintiff contractor the pier 10 documents only if he had specifically asked for them. Here, the contractor asked for any information which would be helpful in preparing his bid. The state engineers did not mention the repair work on pier 10. Since the contractor did not know and was never informed about the existence of the pier 10 reconstruction, he never specifically asked for or obtained the relevant documents.

The Welch court held that the state had a legal duty to disclose the pier 10 information if to do so would have eliminated or materially qualified the misleading effect of the misrepresentation in the general note. The nondisclosure of information combined with statements of fact likely to mislead entitled the contractor to recover damages.

On the other hand, the public entity has no duty to warn if the hazards and risks of the project are readily apparent. In Wiechmann Engineers v. State of California ex rel Dept. Pub. Wks., 31 Cal.App.3d 741 (1973), the vice president and the

general manager of the contractor company visited the proposed job site on two occasions prior to the submission of their bid and noticed boulders. Prior to the call for bids, the state caused test holes to be drilled. The reports disclosed the presence of subsurface boulders. This information was not in the bid package but on file in the office of the district engineer. The contractor assumed that subsoil tests were made but didn't make any inquiry as to the existence, nature or contents of possible subsurface tests before they prepared their bid. Subsequent to completion of the job, the contractor filed a claim for additional costs due to alleged latent conditions, namely subsurface boulders uncovered.

The court denied recovery for the contractors because no false or misleading information was placed in the hands of the bidders. The court distinguished Warner in that here there was no representation of any kind. In addition, knowledge of the boulderous condition was not accessible only to the state but was reasonably discoverable by the contractors.