

# Know (and Don't Waive!) Your Rights on a Construction Project

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The most well-written contract can be rendered useless by one act or failure to act. Even though the owner and contractor have a contract that sets out their rights and responsibilities, if a project manager or other owner representative acts in a certain way, those rights could be rendered unenforceable through a course of conduct.

Thus, it is important for owners and their representatives to be familiar with the owner's rights under the contract. Otherwise, they could create a course of conduct that is contrary to those rights. The owner's rights can include

notice provisions, potential recovery of liquidated damages, the right to receive updated schedules, rights regarding personnel, and change order rights. If the owner's representative does not know what the owner's rights are, or knows but fails to enforce them, then those rights can easily be waived.

## Know your contract

Course of conduct refers to how the parties to a contract act after the contract is signed. As a general rule, a party can waive its express contractual rights in a construction contract or be stopped from asserting those rights if it acts in a manner inconsistent with those rights, at least in certain circumstances.<sup>1</sup>

For example, if an owner makes an oral request for additional out-of-scope work and promises to pay or actually pays the contractor, then this could be deemed a waiver of a contractual requirement that change order requests and approvals be in writing.<sup>2</sup> This may

be the case even if the contract contains a no-oral-modification clause.<sup>3</sup> Notably, however, if a contract contains a no-oral-modification clause, some courts have found that waiving contractual change order requirements in particular instances does not waive the requirements for future change orders based on a course of conduct.<sup>4</sup>

In addition to potentially waiving contractual rights, the course of conduct may be used to interpret the contract to the extent terms are vague, ambiguous, or open to interpretation.<sup>5</sup> For example, if a contract says an owner must be given notice of the event leading to the change order within a reasonable time, then when an owner's representative accepts a change order, he or she may have just inadvertently defined what constitutes a reasonable time on this project. Regardless of the duration, a court may find the contractual timing requirement has been satisfied for future change orders that take a similar amount of time.



By being aware of what the contract says, owners and their representatives can avoid inadvertently changing the interpretation.

### Know your provisions

There are a number of provisions with which project owners should be familiar. These include notice provisions, liquidated damages rights, the right to receive updated schedules, rights regarding personnel, and change order rights.

**Notice:** There are different types of notice provisions. For example, certain notice provisions will say the contractor must notify the owner of certain events within a certain amount of time. If possible, these time periods should be specifically set (e.g., seven days). If the contract says the contractor must notify the owner in a “reasonable” amount of time, then that vague term could be defined through the parties’ course of conduct. In those situations, the owner’s representative should be aware that his or her performance may set the standard for future notices.

Another type of notice provision provides the manner in which notices must be sent. If there is a force majeure event, and the contract says notices should be sent electronically “or as the parties may agree,” then accepting a paper submission could render paper submittals acceptable for the rest of the project. Because it may be difficult to evaluate claims that are on paper, accepting a paper submission could be costly for an owner going forward. Thus, an owner must know what the contract says to enforce the contractual requirements.

While some courts will find notice ineffective if it does not comply with the contract, other jurisdictions will consider whether the owner (or party for whom notice is intended to protect) has been prejudiced as a result.<sup>6</sup> Under either scenario, an owner can waive notice requirements in certain circumstances and must exercise caution not to do so.<sup>7</sup>

**Liquidated damages:** Many construction contracts contain liquidated damages provisions that require a certain amount to be paid if a milestone is not achieved on time. If that milestone is

missed by only a few days, then an owner’s representative may just want to move on with the project. At a minimum, however, the owner should preserve its rights by sending an email noting the date the milestone was reached and advising that any issues regarding the delay will be discussed later. Because liquidated damages rarely have to be sought within a certain amount of time, an owner generally has the flexibility, and leverage, to assess such damages later if desired.

**Updated schedules:** Contractors are often obligated to provide the owner with updated schedules on a regular basis. However, if the contract says, “as needed,” or “as requested,” and the owner fails to request them, then the owner will not receive them. Not only does this present a problem in litigation later if there is a delay claim, but also, without schedules, the owner will not know what is happening during the project. The owner should regularly request updated schedules (in native electronic format), or it runs the risk of waiving that important right entirely.

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**Personnel:** If an owner sees unsafe or otherwise unacceptable behavior on the project, then he or she may inform the contractor and leave it to the contractor to address. In this situation, the owner should insist that the employee be removed. Even if the contract is silent on this point, a failure by the owner to require that the person be ejected from the site could set the standard for future issues.

**Change orders:** Similarly, if the change order provision has certain requirements, those requirements should be enforced. Often change order provisions will require that formal notice

of the change be provided within a certain number of days, that certain information be included with the change order, and that it be submitted in a certain way. By failing to enforce these requirements, the owner may not timely receive the information it needs to make an informed decision regarding changes on the project, which may result in cost overruns.

Like the closely related notice requirements, whether parties must strictly comply with contractual change order procedures varies from jurisdiction to jurisdiction. For example, for contracts with the United States government, federal courts have found that if government representatives have actual or constructive knowledge of a claimed change, or receive notice of the claimed change before final payment, the government generally has not been prejudiced by the failure to comply with contractual requirements.<sup>8</sup> In contrast, New York courts tend to find the failure to strictly comply with the contract precludes a contractor from recovering from out-of-scope work without regard to prejudice.<sup>9</sup> Even in New York, however, contractual change order requirements may be waived by a “clear relinquishment of the right to rely on the contractual provision by an indisputable departure based on a course of conduct or oral agreement.”<sup>10</sup>

### Conclusion

While an owner should enforce its rights under the contract as much as possible, the owner should not necessarily reject a change order because one form was not signed correctly or was 15 minutes late. There is nothing wrong with allowing late notice, electing not to enforce liquidated damages, or accepting less information than contractually required due to the practical business considerations of the project.

However, owners should make these choices consciously with full knowledge of the potential consequences under the governing law, ideally after consulting with counsel. They should also make clear to the contractor in writing that waiver or accepting a particular interpretation in one instance is not intended to create a course of conduct or to waive rights in the future. Contracts

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should be drafted to afford protections in this regard, including with no-oral-modification clauses, provisions expressly stating a deviation from the terms is not intended to waive those terms in the future, and language providing that a contractor's compliance with contractual change order requirements is a condition precedent to recovery.

It is important for owners' representatives to be familiar with their rights to avoid unintentionally waiving those rights or interpreting vague or ambiguous clauses in a way that has unintended consequences.

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## References

1. *E.g., DHE Homes, Ltd. v. Jamnik*, 994 N.Y.S.2d 349, 351-52 (App. Div. 2d Dep't 2014) (where owner accepted and paid over 50 unsigned change orders, it waived a claim that change orders had to be signed to be valid).
2. *Peter Scalandre & Sons, Inc. v. FC 80 Dekalb Assocs., LLC*, 12 N.Y.S.3d 133, 136 (App. Div. 2d Dep't 2015) (“[u]nder New York law, oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claims.” (internal quotation marks and citations omitted)); *Austin v. Barber*, 642 N.Y.S.2d 972, 974 (App. Div. 3d Dep't 1996) (stating that provisions requiring written authorization for additional work are waived if “the conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by [the owner] and executed by [the contractor]” (citations omitted)); see also *Reebaa Constr. Co., Inc. v. Chang Sop Chong*, 657 S.E.2d 826, 829 (Ga. 2008) (owner waived its right to object to allegedly invalid change orders where it requested the changes and indicated it would pay).
3. *Penava Mech. Corp. v. Afgo Mech. Servs., Inc.*, 896 N.Y.S.2d 349, 351 (App. Div. 1st Dep't 2010) (holding that notwithstanding effective no-oral-modification clause, “oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorizations or notice of claims” (internal quotation marks and citation omitted)).
4. *MAFCO Elec. Contractors, Inc. v. Turner Constr. Co.*, 357 F. App'x 395, 397-98 (2d Cir. 2009) (general contractor's willingness to settle claims through a change order could not be deemed a course of conduct that barred contractual defenses to future claims; because there was a non-waiver provision incorporated by reference into the change order, subcontractor had to present evidence that general contractor expressly waived its contractual rights and not just that it engaged in an alleged course of dealing) (applying Connecticut law) (unpublished opinion).
5. *C.R. Pittman Constr. Co., Inc. v. U.S.*, 92 Fed. Cl. 20, 28 (2010) (“In general, course of performance evidence is relevant to contract interpretation only when the terms of the contract are ambiguous. Therefore, absent any ambiguity, the ordinary meaning will control unless the parties intended otherwise and agreed upon it, either explicitly or implicitly.” (citations omitted)).
6. *Compare Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 366 (Minn. 2009) (claims were barred as a matter of law because party “failed to provide the written notice that the contract required as a precondition to terminating the agreement”) with *Sutton Corp. v. Metro. Dist. Comm'n*, 667 N.E.2d 838, 843 (Mass. 1996) (contractor could recover for differing site condition claim even though it failed to provide itemized list of damages as required because court found no prejudice to owner).
7. *E.g., Pitt-Des Moines, Inc. v. Metro. Pier & Exposition Auth.*, No. 96 C 2873, 1999 WL 14491, at \*6 (N.D. Ill. Jan. 6, 1999) (denying summary judgment due to “numerous unresolved questions of fact about which contract provisions apply and whether the notice provisions were waived by the parties' conduct and course of performance”).
8. *Miller Elevator Co., Inc. v. U.S.*, 30 Fed. Cl. 662, 699 (1994), dismissed by 36 F.3d 1111 (Fed. Cir. 1994).
9. *A.H.A. Gen. Constr., Inc. v. New York City Hous. Auth.*, 699 N.E.2d 368, 374 (N.Y. 1998).
10. *Morelli Masons, Inc. v. Peter Scalandre & Sons, Inc.*, 742 N.Y.S.2d 6, 7 (App. Div. 1st Dep't 2002) (citation omitted).

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