CONSTRUCTION WORK FOR THE GOVERNMENT AFTER MIORELLI

-- HAS ANYTHING REALLY CHANGED?

Stuart H. Sobel, February, 1999

By now you have probably heard the horror stories: The Florida Supreme Court decided a case, in 1997, that prevents you from getting paid for expenses that the government made you incur as a result of their delays, interferences and other problems, but for which they did not actually sign any change order. Well, it's not really that bad. County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997) (hereinafter AMiorelli) does not actually change the law. It simply clarifies what the law has been for some time. Miorelli merely emphasizes that you should get a change order before doing work that is beyond the scope of your contract. For work that is not beyond the scope of your contract, but is necessitated by the actions of the government during the performance of your contract, the lack of a change order will not defeat your right of recovery. Even if you do not get a change order, if the work or expense results from the government's breach of the written contract, you can still file a claim for damages. And, the written contract includes implied covenants that are not actually in writing.

Heres a situation that is not at all uncommon. Your general contracting company has been building the new library for the city. Of course, there have been some conflicts in the plans, delays in the owner supplied items that extend your time on the project and some other cost impacts from other trades working under separate direct contracts with the city.

One day, the City's Project Manager mentions that the library needs better landscaping than what is specified and, the city lot across the street should be graded, paved, striped and car-stopped to serve as a parking lot for the new library. You mention that the contract requires written changes orders. The project manager responds: ADon't worry about the change order. We'll just take care of it at contract close out. Get the work done. Not given a very good alternative, you build the parking lot. You also hold off documenting the expenses you incur resulting from the plan conflicts and the city's delays and interferences.

When the time comes for "contract close-out" however, the City says: "Sorry, you don't have a written change order. The contract requires a written change order. We're not paying for the plan conflicts, delays, interferences, extra landscaping or the parking lot." Where does that leave you?

Sovereign immunity, the doctrine that AThe King Can Do No Wrong@, serves to immunize governments, including cities and counties from suits. Only where this

immunity has been waived may one injured by the government go to court. Courts have long recognized, though, in a construction context, that governments waive their immunity to the extent by which they enter into contracts. The promises made in written contracts can be enforced against governments in courts of law. Pan Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984) (hereinafter APan Am@). These promises may be written or implied. Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988) (hereinafter AChampagne-Webber@). Equally well established, however, is the fact that sovereign immunity does bar claims for payment for additional or extra work not covered by the contract or subsequent change order. Southern Roadbuilders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2nd DCA 1986).

The continued validity of a sovereign's immunity from claims for extra work, not covered by a written change order was underscored

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recently by the Florida Supreme Court in Miorelli. There, the Court denied a contractor's claim for payment in connection with extra work it had performed in connection with the construction of the spring training facility for the Florida Marlins. Since the work which was the subject of Miorelli Engineering's claims was "totally outside the terms of the contract," sovereign immunity insulated Brevard County from having to pay. Miorelli was left without payment for work it performed on the verbal authorization of County officials, even though the County had paid for other work that was also verbally authorized and not formalized in a written change order.

Despite the urgings of government, the ruling does not create new law or expand the shadow of sovereign immunity. Contractors still are entitled to recover damages from the government for claims that arise out of governmental breaches of covenants, which, while not necessarily in writing, are implied from the written contract. Miorelli expressly approves the rationale of the Fourth District Court of Appeal, set forth in Champagne-Webber:

Pan-Am did not preclude a contractor from recovering additional expenses based on a claim of breach of implied covenants or conditions contained within the scope of an express written contract...Virtually every contract contains implied covenants...In construction contract law, an owner has a) an implied obligation not to do anything to hinder or obstruct [the contractor], not to knowingly delay [contractor's performance]...and an implied obligation not to furnish [misleading] information...703 So.2d at 1050-1.

Thus, every contract imposes on the parties a duty of good faith and cooperation, even though the contract may not say so. Therefore, a claim for expenses incurred by a contractor because the owner breaches its covenants of cooperation and good faith, is fundamentally different than seeking payment for "extra work" outside the scope of your contract. The claim for expenses resulting from the government's breach of an implied covenant of the written contract is not barred by sovereign immunity, while claims for extra work done on a verbal say-so, would be.

You must also keep in mind that work you were verbally directed to do, and did, without a written change order, may be compensable as a claim. The failure or refusal to sign a change order may be viewed as a breach of the express provision in many contracts that the owner will sign an appropriate change order for extra work it orders or is required by appropriate circumstance. Additionally, even if not a breach of an express term of the contract, the refusal to sign a change order may be a violation of the covenants of good faith and fair dealing. If a

proper claim is filed, you can prevent the government from being unjustly enriched at your expense.

What does all this mean for the situation at the city library? The plan conflicts, delays in owner supplied items and the government's failure to properly coordinate multiple prime contractors cost your company money. You were on the project longer than you anticipated in negotiating the contract and incurred extra general conditions, extended main office overhead, and perhaps, additional direct job related costs to work around the problems. These expenses resulted from the government's breach of their implied covenants. Even without a change order, if you follow the claim procedure likely set forth in the written contract, sovereign immunity will not defeat your claim. These expenses are not for work beyond the scope of the contract. Therefore, the change order requirement is not applicable. The change order requirement would apply, however, for the work that was not contemplated by the contract, such as building the parking lot or changing the specified landscaping. For this work, you had better promptly (when the work is done) file a claim for compensation. The City's project manager's admission that he ordered the work will not be deemed a waiver of the contractual requirement of a written change order. Sovereign immunity may defeat this portion of your claim:

We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the contract. Otherwise, the requirements of Pan Am that there first be an express written contract before there can be a waiver of sovereign immunity would be an empty one. An unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability. Miorelli at 1051.

Miorelli has not changed the way contractors do business with governments. It has not expanded the scope of sovereign immunity, nor has it altered the nature of the sovereign's implied obligations which arise from written construction contracts. Care must still be exercised whenever contracting to perform construction work for a government agency. Not only must one recognize that liens may not attach to government property as security for non-payment,[1] concepts of waiver and estoppel which might excuse the absence of a change order in the private sector are not available in the public sector. Nevertheless, contrary to the position asserted by many governments in their attempt to defeat proper claims, sovereign immunity is not a bar to a contractor's claim arising out of the government's breach of an implied covenant arising out of a written contract.

[1]Public construction generally requires the posting of appropriate payment bonds under `255.05 Fla.Stat. This is beyond the scope of the present article.