Legally Relevant

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Authority of Officers, Employees and Consultants to Modify a Contract

Cities and water districts frequently enter into written contracts for construction projects, repairs, leases and the like. These are binding obligations on the city or the district, having been approved by the governing body and signed by the authorized representatives. In some instances, these written contracts have been approved and signed by an officer who has been expressly granted authority by the governing body to do that.

In most cases, these written contracts provide terms by which they may be amended or modified, usually in writing, and signed by properly authorized officials. Most such contracts expressly prohibit verbal modifications, or modifications by persons not expressly authorized in the contract. Most major construction project contracts use a form developed by the Engineers Joint Contract Documents Committee ("EJCDC"®), with written additions and exceptions that have been customized for the particular project. The EJCDC form contracts are extremely detailed in the ways in which they allow contracts to be modified during the course of construction, such as through formal change orders that have been put in writing, approved and signed by all parties.

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Despite these legal requirements, it is extremely common to have employees and consultants of the parties attempt to modify terms of project contracts, leases, purchase agreements, or other binding contracts without following the required contract provisions. These occur in various ways, ranging from verbal agreements to vary from project drawings or specifications in the field, extensions of time to complete work, and similar changes, to claims that one party knew of something or accepted a condition without objecting to work (or lack of work) that the other party made in response to those changed conditions. Conflicts often develop, as significant amounts of money can be affected by these informal changes. When these

conflicts cannot be resolved, the parties' lawyers become involved, and when they cannot resolve matters, the city or district may find itself in court or in front of an arbitrator to resolve the dispute.

To illustrate these problems, the following are two examples of real situations that have occurred in Kansas, the legal questions they raise, and the likely answers:

Example 1 – Variance From Plans: A city contracts for improvements to a lift station. The plans provide for the installation of a component that is found, during actual construction of the improvements, not to properly fit into the system. The engineer and contractor determine that the plans either need to be changed to make modifications to allow the component to fit, or the part can just be left out – which would reduce the cost of construction to the city. The engineer and contractor call the city superintendent to ask which should be done. The superintendent tells them to remove the part and save the money. The city superintendent never contacts the mayor or city council about the change in the project. When the final payment is due, the city balks at payment to the contractor due to the fact that the approved plans were not followed, and it was not consulted about the change.

Questions and Answers:

A). *Is the city bound by the superintendent's approval of the change?*

No. A city officer cannot bind the city to a contract or an amendment to a contract absent either direct authority to do so or later ratification by the governing body. Municipal officers are strictly limited in their ability to bind a city and this authority cannot be expanded by custom or usage. This means that a city that allows its employees significant discretion in dealing with third parties does not lose the protection of the law.

This has been so well understood that Kansas courts generally deal only with the single established exception to this rule: Ratification of the acts of the officer by the city. Persons dealing with public officers must know the nature and extent of their authority. A municipal corporation is not bound by the unauthorized act of an individual officer. However, the municipality may deal with third persons so as to justify them in assuming the existence of authority in an officer, which in fact has never been given.

A municipal officer cannot by his acts waive any right the municipality has. This is another way of saying that the actions of a municipal officer cannot result in the loss of a right under a contract. As stated by the Kansas Supreme Court, the reason for this rule is that "the courts will protect the public interest, that is, a municipality ought not to suffer on account of the laxity of public officials in doing their duty . . . "

The exception to this general rule is where the city has directly accepted the benefits of the contract and thereby acquiesced to the change in the contract. While the individual actions of an authorized officer cannot bind the city, the city can take later action in either acceptance of the benefits of the change, or other actions that ratify the contract so that it is bound. In this scenario, since the city council never approved of the change or ratified other changes in the contract, and in fact refused to accept the change when it became aware of what had happened, the city is not bound.

B). *Can the city require the contractor to comply with the approved plan and install the component for the agreed price?*

Yes. Since it is the case that city superintendent had no actual authority to modify the contract, and no ratification occurred, the city can require compliance with the contract. Ultimately as a legal matter, the city

could be forced to accept money for the contract breach, if it were found that the engineer was correct that the component was not needed. However, if that is not the case, specific performance would be an available remedy.

The city should also argue that the contract requires any changes to be in writing. Contract provisions that require that modifications be approved by a city in writing are strictly enforced by the court. An early Kansas case held that provisions of a contract requiring written approval by a city are to be strictly enforced and, absent approval in writing by the city council, any such changes are void. This rule continues to be supported as a more recent case provided for the strict interpretation of contract provisions that required a municipality to give a written consent before modification. Razorback Contractors of Kansas, Inc. v. Board of County Commissioners of Johnson County, 43 Kan. App. 2d 527, 536, 227 P. 3d 29 (2010). Thus, strict application of this rule would not allow city officers to amend contracts on their own authority, and the contract as written could be fully enforced.

Example 2 – Failure to Stop Extra Work: A city wastewater lagoon rehabilitation project requires the removal of sludge from one of the lagoons. The contract was on a standard form EJCDC ® contract, and was for a lump sum amount based upon total sludge to be removed. The city engineer conducted measurements and estimated the amount to be removed to be 35,000 cubic feet of sludge. It became clear to the contractor when the project was ongoing that the actual amount of sludge was well in excess of the measurements of the engineers, as it had already removed more than three times the amount of sludge estimated by the engineer. The contractor did not contact the city about the issue at that time. While the city superintendent and the project inspector were well aware that considerable more sludge was being removed than was expected, they were not asked to issue a change order or to modify the contract. In the end, the subcontractor removed 200,000 cubic feet of sludge to complete the project, and when the contractor was not paid for this additional removal, it sued the city for the amount it contends is due.

Issues and Answers:

A). *Does the city have to pay for the extra work based on the knowledge of the project inspector and the city employee that more sludge was being removed than was in the contract?*

No. The rules noted in the prior scenario apply to this situation as well. In a case where a city and a contractor entered into a construction contract for certain city improvements, the contractor did additional work that was not subject to any formal amendment process, but the mayor individually had agreed to it, and the city itself made partial payments to the contractor for the extra work. The court noted the general rule that the mere fact that extra work or materials have been done or furnished with the knowledge of an officer, without an objection on the part of that officer, does not establish a waiver or modification of a term requiring written change to a contract. Instead, the Court noted the following rule:

[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.

Thus, there is a two-fold requirement in order to establish an amendment without a formal change to the agreement. First, the proper officer or representative must agree to the change. This would require that the officer have the authority to make amendments and changes in a contract. Second, that there must be other circumstances showing an intention to waive terms of the contract by the public entity itself. These circumstances exist where there was partial payment for the extra work and materials.

This ratification also served to establish the proper authority of the Mayor to request the changes, and thus the additional payment may be awarded to the contractor.

In the example above, the city employee did not have any authority and no partial payment or other acts ratifying the change existed, so the contractor cannot satisfy the two part test and is not entitled to the extra payment.

B). *Is the contractor entitled to payment under the terms of the agreement?*

Doubtful. On projects of this nature, the standard EJCDC contract provisions not only provide for a clear amendment/change order process that must be followed, but also establishes the responsibility of the bidder to verify measurements on its own, and that the contractor should not rely on the data or measurements in the bidding documents. The city would likely be successful in arguing that the contract was not amended or changed just based upon the general knowledge of the employees to the conditions, as the contract provides that change orders are to be approved by the owner (city) and the engineer. Further, the contract itself is a lump sum contract and not a unit price contract. Generally, a party which agrees to complete construction for a fixed cost must absorb any losses resulting from unforeseen conditions. When a contract places the duty to inspect the site on the contractor, the contractor must use professional skill in inspecting the site and estimating the cost of work. The only way around this is if it is found that the owner impliedly warranted the plans and specifications. Since the standard contracts contain multiple instances disclaiming warranties and requiring the contractor to inspect the site, no such implied warranty is likely to exist. Lump sum contracts exist to allow public entities to know the full cost of an improvement up front, before construction begins, by placing the risk on the contractor. This is balanced by the provisions of the contract that allow for change orders, but this cannot function without notice to the owner.

Employees and consultants need to be instructed as to what they can and cannot do with regard to changes, and who to notify when the situation requires appropriate action. Likewise, the governing body needs to be conscious of the fact that when a problem is identified, it is not a good idea to delay.

Lessons learned

Some general conclusions can be drawn from the two examples above. The first is to be sure to read and understand any agreement before you sign. This includes the "fine print" or "boiler plate" terms where provisions concerning modification, amendment, waiver and the like are usually found. If you do not understand what the contract means, consult with your attorney.

The next lesson is that whenever there is to be a change in the contract, whether it concerns time for completion, plans and specifications, contract price or anything else, do not take shortcuts. If there is an engineer on the project, consult with the project engineer on all such changes. When required, make sure those changes are presented to the governing body for approval, that they are put in writing and signed by authorized representatives of all parties.

Finally, make sure that everyone involved with the contract is aware of these rules. As can be seen from the two examples above, problems most often exist when an employee, consultant or someone else, not the governing body or an officer specifically authorized by the governing body to approve these changes, takes that responsibility on himself. Employees and consultants need to be instructed as to what they can and cannot do with regard to changes, and who to notify when the situation requires appropriate action. Likewise, the governing body needs to be conscious of the fact that when a problem is identified, it is not a good idea to delay. The problem should be brought immediately to the attention of the other party and addressed as necessary, either directly or through the project engineer, consistent with the requirements of the contract.