



## Stone Crafters, Inc. v. Safeco Insurance: A Reminder of the Importance of Lien Waivers and Change Order Provisions

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A recent decision from a federal court applying Virginia law underscores the legal significance of lien waivers and the importance of following change order provisions in a contract. In *Artistic Stone Crafters, Inc. v. Safeco Ins. Co.*, et al., a subcontractor signed a subcontract requiring (1) that it submit a lien waiver to the general contractor as a condition of receiving payment, and (2) that claims for extra work would not be valid unless authorized by a written change order.

The subcontractor worked for four months, then left the job because it had not received payment for extra work. At the time of the subcontractor's departure, the general contractor had issued two written change orders to the subcontractor and had paid the subcontractor the original subcontract sum and the amounts reflected on the two change orders, but had not paid for the extra work. Regarding the extra work, the subcontractor asserted that it had repeatedly requested a written change order from the general contractor but that the general had not issued a change order because of "clerical problems". Nevertheless, according to the subcontractor, the general contractor orally authorized the subcontractor to proceed with the extra work and promised that the general contractor would pay the additional costs of such work.

Prior to receiving its last payment from the general contractor, the subcontractor signed and submitted a "Subcontractor Final/Partial Waiver of All Claims for and Right of Lien" which provided that, in exchange for subcontractor's receipt of payment, "the undersigned hereby waives, releases, and relinquishes all claims for labor performed, materials furnished, equipment and/or machinery supplied..." to the project.

In defense of a suit by the subcontractor to collect payment for that extra work, the general contractor argued two points: (1) the subcontractor had waived its claim for extra work by signing the lien/claim waiver; and (2) the subcontractor had failed to obtain a written change order for the extra work. The court agreed with the contractor on both points and dismissed the case.

As to the lien/claim waiver, the court noted that the language was clear and unambiguous and held that the subcontractor had waived all claims for labor, materials, equipment and machinery provided on or before the date of signing the waiver. Because the subcontractor's claim was for extra labor and materials furnished prior to the date of the lien waiver, it was barred, even if the general contractor knew that the subcontractor contested the notion that the amount that it was being paid at the time it signed the waiver was its final payment on the project.

The court also ruled that, even if the subcontractor had not waived its claim by signing the lien/claim waiver and accepting payment, its claim would still fail because the subcontractor had not gotten a written change order for the extra work. Under Virginia law, ruled the court, contract requirements for change orders are binding and are meant to promote order and predictability in the construction process. The court rejected the subcontractor's argument that oral

promises from the general contractor to pay for the work constituted a waiver of the written change order requirement. In making this ruling, the court noted that the parties had twice followed the change order process for extra work and that the general contractor had not paid any claims for extra work without a change order. The burden was on the subcontractor to show by clear, unequivocal and convincing evidence that the parties had waived the requirement for a written change order. The court ruled that the subcontractor could not meet this burden.

This case is a useful reminder of two basic good practices. First, contractors and subcontractors must read and understand the language in form lien waivers. When signed, these forms often release not only mechanic's lien rights, but all legal claims through a certain date. If there are unresolved claims involving work performed prior to the date of a lien waiver, and such disputes are not carved out of the lien waiver, there is substantial risk that these claims will be lost if the lien waiver is signed and payment is accepted.

Second, contractors and subcontractors must read, understand and follow the change order requirements of their contracts. As this case makes clear, an oral authorization to proceed and promise to pay will usually not be enough to create a legally enforceable right to payment if there is a contractual requirement that all changes be in writing.

*For more information about this topic, please contact the author or any member of the Williams Mullen Construction Team.*

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