Scribbles Squibs #56[1] (May 5, 2017):

MASSACHUSETTS LAW WITH REGARD TO CLAIMS FOR DIFFERING SITE CONDITIONS, CHANGES AND DELAYS IN 2017

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I. INTRODUCTION

This is one of the more 'legal' Squibs because of the nature of the subject matter and its complexity. That means that this article has a lot of legal 'mumbo jumbo'. (In New Orleans, possibly due to regional differences, this is sometimes referred to as 'mumbo gumbo.' Other differences include that Louisiana's legal system is based on the civil law while the Massachusetts system is based on the common law.)[3]

You might wonder why this is so long[4], this, our first real 'Moby Squib' of thirty-five pages or so of actual text.[5] This is long because most of the law that deals with these subjects in detail is from appellate judicial decisions and very few judges ever get tired of listening to themselves speak.

Most non-lawyers are not familiar with how lawyers 'find the law'. It's not in any form of encyclopedia that one can simply look up and get a quick answer as to a particular matter. It involves looking at many potential sources of the law, such as statutes and appellate decisions. If a reader truly wishes to understand this material, some minimum review of these cases is necessary. Think of appellate legal cases not as 'legal' things but simply as stories about situations which have happened to other subcontractors and general contractors and which may have already affected your business or which might affect your business in the future. Forewarned is forearmed! Dear Reader, other than estimating well and entering into favorable contracts and practicing good project management, the topics of this Squib are where the money is. And isn't being at that place the primary goal of your business? Of *anyone's* business?[6] I can almost promise you that if you read and incorporate into your business some of the ideas and suggestions included within this article, this will help you make money. In that sanguine event, please contact me and we can then discuss my contingency fee for your success. This might be partially satisfied by my being offered a position as a part-time in house counsel for a contractor in the greater Boston area.

Also, this is because in olden times - pre-Great Recession - lawyers, like writers of pulp fiction, were paid a penny per word. There was tremendous incentive to make simple things look more complex, short things inordinately long. Legal memoranda were called 'briefs' solely because this would tickle the fancy of the legal mind. Also, while not widely-known, it was

during this same period of time that the word 'whereas' was invented, precisely to effectuate these goals and to make legal writing even more impossible to be understood by normal human beings.

Ah, a penny per word! Or, as is now seen with such fond nostalgia, the *good old days* when an enterprising young lad might make some money!

If you want to be as smart as I am - some would say the bar is not set very high[7] - read the whole thing. But, if you want to read only the parts that might be most useful to you without all of the in-depth discussion of cases, here's what you will want to read. (The specific page numbers may be slightly off due to the fact that this Squib has gone through several edits. Also, those of you familiar with Word know that it has its own opinions as to how documents should look and what words should be used, even after documents have been saved. Every time I open one of my Word documents, I always seem to get something different! Something I'd like to discuss with Billy Gates if our paths ever cross!)

I. The definition of 'waiver' to be found on page 9.
II. How to protect your change order rights when the party ordering you to perform extra work puts little into writing, to be found on page 10.
III. The practical things to do to protect yourself with regard to a differing site condition, found on page 13.
IV. A discussion about the Farina case as found on page 19. This specific case is important to know about as it provides a way to get delay-type damages in situations where there is a no damage for delay provision and the other side refuses to give you a justified time extension.
V. The discussion of lien waivers and releases, to be found on page 23.
VI. The six things to except from partial lien waivers and releases you might be asked to sign, to be found on page 25.
VII. Ways of sometimes getting around notice provisions in contracts when they haven't been complied with, to be found on page 28.

But, here's - as is said on the other side of the Pond - the whole *bloomin'* thing, every single word of which will be eagerly read by The Platinum Group Of Squib Readers (PGSR).[8] (More on them, including how a reader might inquire as to membership, in the endnotes.)[9]

II. MASSACHUSETTS LAW APPLICABLE TO CHANGES

The following three things should always be done by your company when reading contract documents for the purposes of estimating, before executing your contract and <u>before</u> and <u>when</u> a change comes up.

1. Read the disputes clause and the changes and claims clauses and commit the same to memory.
2. Same as number 1, but more so!

3. Same as number 2, except twice as much!

Keep in mind that the disputes clause and the changes clause/claims clause may be 'upstream' from you. Thus, if you are a subcontractor, these clauses may be in the general conditions of the general contract, which are usually incorporated by reference into your subcontract. Even if you never see these documents, if your subcontract references them, they are "incorporated by reference" and you are bound by them, in the ordinary course. And, particularly for public construction and larger private construction projects, there may be supplementary general conditions and/or special conditions. Any of these documents might reference changed conditions, claims and disputes.

I recommend that at least the project manager - and, preferably, also the super - have a good understanding of what these clauses contain *before* changed conditions arise. Thus, knowing what the contract requires may temper your enthusiasm to do a paperless or less than fully-papered change order. While it is easier and more convenient to 'keep things oral', when you come to play in my sandbox, we have entirely different rules, rules that I didn't make and can not, in the short term, change.

But, contractors, frequently, are in situations where either they have not read and/or have not complied with the changes clause/claims clause and/or the disputes clause in their construction contract and are still hopeful of protecting and enforcing their rights. What does one do when more than air has hit the fan?[10]

There are two things to keep in mind when approaching a construction project which involves, in some fashion, either a public building or a public work.

First of all, generally speaking, the law applicable to public contracts is the same as that applicable to private contracts. School Committee of Boston vs. Board of Education, 363 Mass. 20 (1973).

At the same time, there are numerous things which separate public construction projects from private construction projects, including, without limitation, some of the various statutes which bear on differing site conditions, changes and delays. There are also numerous regulations which bear on public construction. Also, procurement is highly-regulated with issues such as prequalification and debarment, prevailing wages and project labor agreements which are absent in private construction. Moreover, there are certain payment guarantees applicable to public work, which are not applicable to private work. For example, there is a statutorily-prescribed payment bond which all general contractors on all but the smallest of Massachusetts public projects must have. Similarly, there are mechanisms for some subcontractors to be paid directly by awarding authorities on public projects under certain circumstances.

In the case of Glynn v. Gloucester, 9 Mass. App. Ct. 454, 460-462 (1980), the Appeals Court provides a kind of handy summary of some of the things to keep in mind when one gets involved with a contract modification for public work:

"On a public construction contract, if actions or requirements of the public agency necessitate changes in the work as it progresses, thereby causing the contractor to perform extra work or incur added expense, or if the contractor encounters materially different conditions from those predicted by the plans, specifications, preliminary borings and estimates, the contractor must follow the procedures spelled out in the contract and in the Blue Book, if incorporated in the contract, to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or quantum meruit theories. (Cases cited) . . . The public authority is expected to address the contractor's legitimate problems in good faith in an effort to formulate an adjustment of the price which will equitably compensate the contractor for bona fide extras. Generally, a failure by the contractor to invoke its remedies under the agreement and Blue Book will preclude all relief (cases cited) . . . unless the contractor can demonstrate that the particular claim falls outside the contract, and because of the agency's conduct, constitutes a true breach (case cited). If any claim arises from the contractor's willful and substantial deviation from the plans and specifications, there can be no recovery without a showing of compliance with the requirements of G.L. c. 30, s. 391 (cases cited). This statute establishes a clear legislative policy that "those who engage in public contracts . . . [must] act in strict accord with their undertakings. . . " (case cited). To the degree, however, that the claim does not arise from such a willful and substantial deviation, the contractor may recover if he can show that the public agency has waived or excused compliance with the terms of the contract (cases cited). If the claims are found to involve changes in or additions to the work under the contract, inquiry must also be made whether the appropriation requirements of G.L. c. 44, s. 31 have been complied with (cases cited).

Moreover, if the contractor argues (as it does here) that the agency waived compliance with the contract's provisions, it is incumbent on it to show not only that G.L. c. 30, s. 391 is inapplicable, but also that there was clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the agreement (cases cited) . . . ."

One of the biggest problems with changes is that one or both parties act in derogation of provisions of the contract which say that only changes which have been executed in writing before the work is performed will be honored and recognized.

What happens when "everything is oral"?

Fortunately, there is *some* common sense - believe it or not - in the law.[11]

In the case of M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, Inc., 348 Mass. 682 (1965), one of the issues involved was what would be the result when there was a provision in the plaintiff's subcontract that: "no extra work . . . under this contract will be recognized or paid for, unless agreed to in writing before the work is done . . . ."

The Supreme Judicial Court commented on the fact that either the general contractor (the defendant) or the owner's architect directed the plaintiff subcontractor to do each of the first four items of extra work and that the general contractor knew of such extra work.

As stated by the Supreme Judicial Court of page 685 of the decision:

"Paragraph Fifth of the subcontract "obviously could not prevent oral contracts for extra work, for the parties had power to waive or alter that provision orally at any time."

Contracts are viewed in the law as living, breathing organisms, which are expected to expand or contract during the course of construction. Almost all contractual provisions can be waived if they don't contain public bid law requirements or don't affect public policy. There are judicial decisions that have said that a provision in a written contract that says that there can be no oral modifications to that contract, can be waived or modified and even orally. When faced with a difficult contractual provision – i.e. there will be no change orders under this contract or you 'agree' to give up the right to file a mechanic's lien – keep in mind that this provision may not necessarily be enforceable under the circumstances.

The Appeals Court essentially held the same thing nine years later in the case of General Electric Company v. Brady Electrical Co., Inc., 2 Mass. App. Ct. 522 (1974).

As stated by the Appeals Court:

"The trial judge found that on three occasions Brady performed extra work on oral orders from Rugo and credited Brady in the amount of $3,439.28 by reason thereof. Rugo and Maryland do not question the amount of this credit, but rather contest it on the ground that the contract between Rugo and the Authority, as incorporated by reference in Brady's subcontract, permitted payment for extra work only when authorized by written change order. Their argument overlooks the fact that such formalities may be waived (cases cited) . . . The judge found that Rugo did waive the requirement that extra work be the subject of a written order in these instances, and that finding is not contested in this appeal."

The same result obtained some eight years later in the Appeals Court case of Worcester Air Conditioning Co., Inc. vs. Commercial Union Insurance Company, 14 Mass. App. Ct. 352 (1982). This was an action by a plaintiff sub-subcontractor against a general contractor's statutory payment bond. The defendant in this case was the general contractor's payment bond surety. The dealings between the plaintiff sub-subcontractor and its contracting party, a subcontractor, were often oral; although there was one written change order, there were two oral change orders. The judge trying the case found that it was the practice of the subcontractor and the plaintiff sub-subcontractor to proceed on extra work requests "without the benefit of a written change order where things had to be done in a hurry."

As stated by the Appeals Court on page 357 of the decision;

"Finally, the defendant contends that the performance of extra work at the request of the subcontractor was not within the protective scope of the payment bond because contract documents required that change orders be in writing. However, as between the parties to the sub-subcontract, such a provision obviously could not prevent oral contracts for extra work, for the parties had power to waive or alter that provision orally at any time. (authorities cited) The judge's finding that it was the practice of the subcontractor and plaintiff to proceed without a written change order where something had to be done quickly justifies the conclusion that they impliedly waived the requirement of a written change order. The surety's argument that there was no finding that the contractor and the owner varied the requirement does not affect the surety's liability on the bond to the plaintiff . . . . "

These helpful cases notwithstanding, please follow in sequential order cardinal rules number 1, 2 and 3 set forth above! They are cardinal rules for a reason.

Also, keep in mind that construction contracts which necessarily can be performed within one year can be oral and enforceable at the same time, as provided for by Massachusetts' 'Statute of Frauds'. But, when the pedal hits the metal, how are you going to prove what the 'agreed' terms are to an oral contract, particularly when the parties are not getting along too well? Also, some remedies, such as mechanic's liens, are *only* enforceable when there is a written contract. (This is a statutory requirement.) I have often said that you always have to be concerned about the fact that maybe the other side in court can lie better than you can tell the truth. This is not a perfect situation. But, then again, it is rare in human relationships and involvements that anything is.

I have included some cases to show that a failure to comply with a written change order procedure can be fatal in certain circumstances. Massachusetts has any number of cases which have said that a failure to comply with the notice provision of a contract can bar even a claim that is otherwise valid.

For instance, in the case of Chiappisi v. Granger Contracting Co., Inc., 352 Mass. 174 (1967), the plaintiff brought an action against the defendant general contractor and against the general contractor's surety.

It became clear fairly quickly that the plaintiff would need to provide more materials than had been estimated due to an arguable error in the drawings. The plaintiff's principal went to the school in question and told Granger's job superintendent that as to the additional materials "this is an extra." The superintendent - a wise and sagacious individual who, doubtlessly, would become a future project manager - told the plaintiff that this would have to be taken up with "the office." The plaintiff subcontractor put more material on the project and after the work was done wrote to Granger seeking additional monies. This was the first notice to Granger other than to the job superintendent that the plaintiff intended to make a claim for the extra materials.

Under Article 16 of the general conditions, written notice must be given to the architect "within a reasonable time" after receipt of "instructions by drawing or otherwise" concerning

work claimed to constitute extra work. The Supreme Judicial Court held on page 178 that: "There was no emergency requiring Chiappisi to proceed at once without giving written notice. Because Chiappisi proceeded without such notice and postponed until after the work was completed all written mention of any claim for extra work, there can be no recovery."

Perhaps a telling part of the Court's decision was that if notice had been given by the plaintiff subcontractor, Granger might have taken steps to protect itself by seeking an extra in its own right from the owner, which opportunity apparently was lost to Granger.

Therefore, a word of warning to subcontractors. In situations where there is an error in the drawings and/or additional materials or labor or both are required not due to the fault of the subcontractor, in many circumstances a general contractor would like to see the subcontractor get a change order, as the general contractor will be entitled to at least a markup. In the Chiappisi case, I am making the inference that at least part of the rationale for denying recovery to the subcontractor was that by the subcontractor's failure to comply with the changes requirements, this effectively precluded the general contractor itself from seeking an extra to the general contract, which would not only have provided the general contractor a markup, but which would have indemnified the general contractor for an error in the drawings which was not the general contractor's responsibility, but which could be a legal liability to the general contractor under the public payment bond statute. In other words, by giving late notice, the general contractor was prejudiced and because this was caused by the subcontractor's acts and omissions, the subcontractor loses and, frankly, fairly so.

A similar result obtained in a case where a general contractor brought a claim against the Commonwealth of Massachusetts in the case of D. Federico Co., Inc. v. Commonwealth, 11 Mass. App. Ct. 248 (1981).

In this case, the Commonwealth's designer substantially underestimated the amount of excavation and replacement fill that would be required to lay a proper base for roads to be constructed within this project. The contract documents seem to preclude any warranty as to quantities required by saying, *inter alia*, that: "estimated quantities shown for unit price items . . . are not guaranteed."

The Court pointed out that Massachusetts cases have recognized the possibility of an implied warranty of estimates in some possible circumstances but not where the contract terms specifically precluded a warranty of or reliance on furnished estimates.

The Appeals Court affirmed the judgment against the plaintiff, stating on pages 252-253:

"There is a further reason that the plaintiff may not recover. It is a general rule in public construction contracts that, "if the contractor encounters materially different conditions from those predicted by the plans, specifications, preliminary borings and estimates, the contractor must follow the procedures spelled out in the contract . . . to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or quantum meruit theories." (Case

cited) The present contract is not an exception. No timely claim for extra compensation was made, and the master found that there was no justification for the failure. In these circumstances any right the plaintiff may have had to extra compensation was not perfected, and the subsequent claim was barred. (Cases cited) The master's finding that unspecified "representatives of the commonwealth agreed that 'additional compensation would be agreed to where necessary'" fell short of finding a clear, decisive and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the [extra compensation provisions of the] agreement" (case cited). Moreover, the contract provided that "no oral . . . conversations with any officer, agent or employee of the Commonwealth . . . before or after the execution of the contract shall effect [sic] or modify any of the terms or conditions of the contract. . . . "

Article 16 of the contract in question requires a contractor if he planned on making any claim for compensation for a change not ordered or for any damages sustained to submit on or before the first working day to the architect, the clerk of the works and the owner a written statement of the nature of such work or damage sustained: any work performed prior to the time specified above will not be considered in warranting compensation. The master found that no claim for extra compensation was submitted.

It appears in the Federico case that the contract, taken as a whole, was not a unit price contract, although there were unit prices for excavation and for borrow. A contractor's burden would appear to be lighter in the case of a pure unit price contract.

In the case of J. D'Amico, Inc. v. Town of Saugus, 9 Mass. App. Ct. 809 (1980), the parties had a unit price contract with estimated approximate quantities with a provision that the defendant town reserved the right to increase or decrease the amount of any item of work as might be desirable or necessary. The master found that the actual quantity used was determined by the field conditions found to be desirable or necessary during the carrying out of the construction work. As stated by the Appeals in its decision, "In these circumstances written change orders were neither contemplated nor required to authorize the use of materials in quantities greater than those amounts initially estimated for the construction of the facility; provision for such additional quantities and the unit price to be paid for them was incorporated in the work plan by the contract documents."

Important to the Appeal Court's holding in the D'Amico case is the finding that the item increases were not deviations from the contract specifications but were consistent with them.

It is also important to keep in mind that if a contract to which you are a party has unit price elements, increases or decreases in the units will not necessarily require a change order because the terms of what the change order would be are already set forth in the unit price except, possibly, for the issue of time. Keep in the back of your mind, however, that when there are significant changes in the number of units required in the contract, one or both of the parties may seek to renegotiate the unit price rate. The rationale for this is that in such a case with a very large increase in units or a very large decrease in units, the difference is significant enough

that it could not be said that this was something contemplated by the parties when they entered into the contract. This is, perhaps, of greater importance with a very large decrease in units for contracts composed solely of unit price elements because the contractor has figured its overhead and profit on the basis of a certain number of units. Therefore, a decrease in units necessarily means that the overhead and profit he needs to do the job is lessened which, in extreme cases, can threaten the continued viability of his performance. In such a case, a change order might be required. Various regulations, particularly federal regulations, have been issued on this point. Numbers that are often used as thresholds for renegotiation are when the units fall below 85% of the number of units indicated by the contract documents or are in excess of 115% of the number of units indicated by the contract documents. Your contract and any applicable regulations will tell you if this might be applicable to your particular situation. With a drastic change in units – a so-called 'cardinal change' in the contract - this might be presented as a proposed change even when your contract is silent on this point.

Other than performing oral change order work and not giving the appropriate notices, another key issue in this area is who has the authority to authorize extra work. What individuals have the right to increase the amount of work in your contract? And, who doesn't?

The following comments are within the context of a public works project. But, the principle of law in question may apply equally to a private construction project. Be very sure that the person authorizing or directing extra work in the field is recognized/will be recognized by his office as having the authority to direct a subcontractor (when you are dealing with a general contractor) or the general contractor (when you are the general contractor). Remember, that the Glynn decision referenced above requires a waiver of compliance with the contract's provision with: "clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency." (Emphasis added)

What is a waiver, as defined for use in legal situations?

In Data Concepts International, Inc. v. Continental Insurance Company, (United States Bankruptcy Court, District of Massachusetts) 73 B.R. 406, 413 (1987) the Court said this concerning waiver:

"A waiver is the unconditional relinquishment of a known right. In re Idak Corp., 19 B.R. 765, 770 n. 7 (Bankr.D.Mass.1982) Niagara Fire Insurance Co. v. Lowell Trucking Corp., 316 Mass. 652, 657, 56 N.E.2d 28 (1964). The determination of whether a waiver has taken place involves resolution of factual questions. Mayer v. Boston Metropolitan Airport, Inc., 355 Mass. 344, 353, 244 N.E.2d 568 (1969)."

For example, in the case of Lawrence-Lynch Corp. v. Department of Environmental Management, 17 Mass. App. Ct. 901 (1983), the Appeals Court affirmed a judgment for the plaintiff general contractor. The engineer for the project orally authorized the plaintiff to obtain necessary fill from a site approximately 600 yards from the area specified in the contract, which contract provided in several places that approval for extra work must be obtained from the

defendant in writing. The contract at issue provided that the architect had the right to decide "all questions which may arise as to the interpretation of the plans and specifications and as to the fulfillment of the contract on the part of the contractor." The contract also stated that the word 'architect' is used as synonymous with the word 'engineer'. And, where Lang was designated by the defendant as the project engineer under the contract, he had authority to waive that provision of the contract which stated that authority for extra work must be in writing.

Apart from issues pertaining to the 'common law' issues discussed above, there are certain statutes to be aware of relative to change orders for public work.

One of the principal such statutes is Chapter 30, section 391 of the General Laws.

That statutory section provides as follows as might apply to change orders:

". . . No willful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations. In order to avoid delays in the prosecution of the work required by such contract, such deviation from the plans or specifications may be authorized by a written order of the awarding authority or such engineer or architect so authorized to approve such deviations. Within thirty days thereafter, such written order shall be confirmed by a certificate of the awarding authority stating: (1) If such deviation involves any substitution or elimination of materials, fixtures or equipment, the reasons why such materials, fixtures or equipment were included in the first instance and the reasons for substitution or elimination, and, if the deviation is of any other nature, the reasons for such deviation, giving justification therefore; (2) that the specified deviation does not materially injure the project as a whole; (3) that either the work substituted for the work specified is of the same cost and quality, or that an equitable adjustment has been agreed upon between the contracting agency and the contractor and the amount in dollars of said adjustment; and (4) that the deviation is in the best interest of the contracting authority . . . ."

Until 2012, there were also extensive requirements under projects having to deal with 'capital facility projects', such as were included in Chapter 7, section 42F of the General Laws. That statute was repealed, however, in 2012.

From a legal standpoint, it is hard to conceive of a situation where a subcontractor should perform changed work of any significance without having, at minimum, written direction from the general contractor to do so. If there is no written direction to do what the subcontractor considers as extra work, there might be a difference of opinion at some later point in the job between the general and the subcontractor as to whether or not that piece of work was extra work or not. If at all possible, there should be a fundamental written agreement on price and any extra conditions involved with performing the changed work - <u>including any extension of time made necessary to complete the subcontract work because of the change</u> - before the work is actually performed.

I recognize, after saying this, that the realities of construction are going to dictate in many instances - probably the majority of instances - against having the proper paperwork in place prior to doing the extra work. In my view, simply having a general contractor's superintendent sign a so-called "extra work order" indicating the names of individuals, times of performance and materials used in performing an alleged extra item of work is not sufficient for these purposes. General contractors may later argue that a superintendent in signing these types of documents is simply acknowledging or verifying that labor and materials were performed by a subcontractor on the date indicated. And, that such signature does not constitute an acknowledgment by the general contractor that the performance of such labor and materials was extra work and/or that the prices added on to the labor and materials (whether in the field or, as more usually happens, later in the office) represents a changed condition. Also, keep in mind that if there is an issue that will have to be litigated with regards to a claimed extra piece of work, experience has demonstrated to me that at least 75% of the effort (and expense) in proving that point goes to the issue of liability. Namely, is this piece of work truly extra work? Once liability for a changed condition has been established, the numbers are much easier to deal with. So, at bare minimum, in such situations, try to get at least a written acknowledgement by your upstream party that the item of work in question is extra work, a change to the contract. In many situations, the fact that your contracting party has issued to you a 'construction change directive' is an acknowledgement that the item of work in question is, in fact, extra work.

What do you do? If it's major money, my best advice is to do what the contract (or the general conditions) says. Get at least an acknowledgment from the general contractor that the item of work is an extra, which is what a construction change directive under the AIA contracts provides for. If you are going to begin supplying extra work and materials and you don't have either a change order or some written acknowledgment that this is a changed condition, *for any significant amount of money* don't do the work. Consult with an attorney of your choosing and get some advice. At least, get a written direction from your contracting party to do the work, to which you respond in writing that you are doing the item of work under protest. This, to help resist the defense, down the road, that you acted as a 'volunteer' and/or that you didn't contest the allegation that this was contract work, not extra work.

If, for whatever reason, you feel you have to do the item of work and you have neither a change order or a written directive to do the work, then at least send a letter or an email to the general (or owner, if you are the general) prior to doing the work stating:

(a) that you are doing the item of work under protest and with full reservation of your rights to seek an equitable adjustment, if you have been directed to proceed;
(b) if this is a new item of work, advise them of the nature of the change and of any relevant contract references you may have to indicate it is not part of the contract work;
(c) that the item of work in question has a value of approximately (whatever it might be);
(d) that you will be performing the item of work in the next several days on this basis, unless you are directed in writing not to.

Give your contracting party enough time to receive and process this letter. Three business days is probably enough time in most circumstances but be sure to comply with any specific contractual provision on this point.

There is some evidentiary value in silence inasmuch as under certain circumstances silence is seen as acquiescence under the law:

> "The principle that a party may be bound by silence "stands on the general principle that conduct which imports acceptance or assent is acceptance or assent, in the view of the law." *Wood v. Gunther*, 89 Cal.App.2d 718, 731, 201 P.2d 874 (1949), quoting from *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 197, 33 N.E. 495 (1893) (Holmes, J.)"

Further, account for the extra piece of work separately from other logs, diaries and daily reports. This is so you can better argue that this was changed work and not contract work and the contemporaneous documents separating contract work from extra work support the amount of your claim. If the record is a contemporaneous document, such as a daily report, this may go into evidence as a 'business record', which has a variety of evidentiary benefits for you down the road.

Whether you are contractually required to do this or not, try to get the general contractor or the owner or the owner's architect or clerk to verify time and materials used in this effort.

Some other ideas. Keep in mind that unless your contract says who can authorize extra work and to what value - and the better ones do - if you are directed to do the extra work by a superintendent, try to confirm that direction by the project manager because of a Massachusetts court decision that says a superintendent does not ordinarily have inherent authority to order extra work.

In summary, in a "changes" situation, always follow the three cardinal rules set forth at the beginning of this section. I'm sorry for being pedantic but, in the ordinary situation, this is the only way to negotiate a changed condition while fully maintaining the possibility for recovery after the fact. As stated above - and elsewhere - there are some exceptions and get away free cards but they are, after all, *exceptions.* Meaning, *maybe* these will help you but just as probably as not, they might not. I sometimes tell contractors that my job is to throw snowballs but they are the only ones supplying the snow. More snow helps. Less snow, not so good.

Remember, you can always disregard a letter you sent which proved to be unnecessary. You can't, on the other hand, legally (in terms of someone's believing in it) put it in the file after the fact.

The three most important kinds of documents in this type of litigation are notice letters, pictures and daily reports. Keep in mind that an email is generally considered to be a writing. I know that increasingly contractors work from their phones and text. I have never seen in my legal research travels any authority providing that a text is a substitute for a writing. I admit,

however, that I have not thoroughly researched this point, as it has yet to become an issue in any matter I have been involved with.

Ironically, the *better* your paperwork is, the less likely that you will actually have to put it to the (complete) test of an entire trial. So, a little more work on the go-in has the potential for reaping a significant reward down the road. This includes minimizing your legal fees and maximizing your chances for earlier success with the issue. It is always a good idea to keep in mind that whether in an arbitration or in a litigation, half of the parties lose. It is also important to keep in mind that most judges and almost all juries will not really understand the issues in a construction dispute, particularly if this is as to a technical point, such as whether or not a proposed substitution of materials or systems is 'an equal'.

If, for some reason, it is not possible to follow one or more of these cardinal rules, try to establish facts which would justify a court finding waiver of any contractual provision requiring advance written authorization. Try to avoid dealing exclusively with oral change orders. If the other party requests the work orally, confirm it in writing. Also, if at all possible, ascertain in advance of performing the extra work the authority of the person in question to order or authorize extra work. In other words, dealing with project managers is better than dealing with job superintendents on issues involving proposed changes. Dealing with the principals of a company is even better.

Try to create evidence of 'waiver', meaning that either for the purposes of this change order or for other issues in the job, the parties didn't follow closely the contract documents by agreement. This is especially important when your contracting party says 'we'll worry about additional time at the end of the job." Change orders, unless they say differently, are generally seen as contract amendments on all issues pertaining to the change order, including time. If you both agree to defer on decisions on time until the end of the job, you really need to establish a written record to this effect. Remember that these rules are relaxed significantly when dealing with emergency situations.

Also, if you are a subcontractor, make sure you know what the general contractor's changes, claims and disputes clauses in the general contract say and provide for. More likely than not, they are 'incorporated by reference' into your subcontract as a matter of contract or, when dealing with public construction, as a matter of law. As a *practical* matter for subcontractors, since general contractors don't usual warrant to subcontractors the sufficiency of the plans and specifications, complying with the general's requirements is as important - maybe, *more* important - as complying with those provisions in the subcontract because of the fact that one way or another, the money will be coming from the owner to fund the change on a true general contractor pass-through claim.

Lastly, neither the architect nor the general contractor - or his super - is your friend or is *supposed* to be your friend. You are a contractor and the root word of this word is 'contract'. Do what the contract says. *Don't* leave the paperwork until the end because there is no reason to and you put yourself in a position of jeopardy when someone else's recollection gets 'vague'.

It's no secret that there are some general contractors who might just make sure "Mr. Nice" is replaced ninety to ninety-five percent of the way through the job by "Mr. Pit Bull", who neither knows nor cares about the 'oral deals' and, perhaps, intentionally so.

III. MASSACHUSETTS LAW APPLICABLE TO DIFFERING SITE CONDITIONS

Initially, there is a statutory provision which is applicable to public jobs involving either public buildings or public works. This is Chapter 30, section 39N of the General Laws, which provides, in pertinent part, as follows:

> "Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:
>
> If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly."

An important thing to note in looking at section 39N is that a request for an equitable adjustment based on a differing site condition shall be delivered "as soon as possible after such conditions are discovered."

The case of Skopek Bros., Inc. v. Webster Housing Authority, 11 Mass. App. Ct. 947 (1981) considered the import of this statute within the context of that case.

The plaintiff encountered a differing site condition as early as January of 1974. However, the only writing seeking additional compensation was submitted in May of 1975, some sixteen months after the plaintiff encountered the condition.

It is important to note, much as in our discussion of changes, the court made an effort to see whether or not there was any finding by the master (ED: a lawyer sitting as a judge, usually by agreement of the parties) which would demonstrate that the defendant waived or excused compliance with the "written request' requirement as contained in Chapter 30, s. 39N. There was no such finding. Therefore, there could be no recovery by the plaintiff for having failed to comply with this statute. Indeed, the Appeals Court pointed out that the purpose of this statute is so there could be: "resolution of disputes such as the present by the architect (with the approval of the Department of Community Affairs) rather than by a court."

Still, under the case law, a differing site condition claim is not exactly the same thing as a claim for changed conditions. That is because, among other things, a claim for a differing site condition is not necessarily the same thing as a claim for extra work, as pointed out by the next case.

In Sutton Corporation v. Metropolitan District Commission, 667 N.E.2d 838, 423 Mass. 200, 207 (1996) the Supreme Judicial Court of Massachusetts considered what a contractor's obligations are for notice on public work for a differing site condition. As stated by the Court:

> "The master's subsidiary findings support the conclusion that subsurface conditions at the construction site differed substantially from those "ordinarily encountered and generally recognized as inherent" in the installation of sand drains by the methods specified in the contract. G.L. c. 30, § 39N. The difference in the conditions caused "a change in the construction methods required for the performance of the work which result[ed] in an increase ... in the cost of the work," see id., a conclusion also supported by the master's findings.
>
> The Appeals Court concluded that Sutton forfeited its claim for an equitable adjustment by failing to follow the procedures for an extra work claim under Article XVIII of the contract. We disagree. Section 39N mandates that its provisions be included in public works construction contracts. It provides a specific procedure and remedy for the contractor encountering differing subsurface or latent physical conditions. Article XVIII, on the other hand, applies to "extra work," rather than work required by the contract. The unexpected soil condition encountered by Sutton required it to modify its construction methods and incur significant additional expense in order to complete the contractually required work. Such modifications and additional expense do not constitute "extra work" within the meaning of Article XVIII. Cf. Lawrence-Lynch Corp. v. Department of Envtl. Management, 392 Mass. 681, 682-683, 467 N.E.2d 838 (1984). (FN14)
>
> The cases cited by the MDC are not to the contrary. It is true that contractors seeking to recover payment in excess of the contract price must follow the procedures set out in the contract. See Lawrence-Lynch Corp. v. Department of Envtl. Management, supra at 684-685, 686, 467 N.E.2d 838; State Line Contractors, Inc. v. Commonwealth, 356

Mass. 306, 317-319, 249 N.E.2d 619 (1969); Marinucci Bros. & Co. v. Commonwealth, 354 Mass. 141, 144-145, 235 N.E.2d 783 (1968); Chiappisi v. Granger Contracting Co., 352 Mass. 174, 177-178, 223 N.E.2d 924 (1967); Lewis v. Commonwealth, 332 Mass. 4, 5-7, 122 N.E.2d 888 (1954); Glynn II, supra at 394-395, 487 N.E.2d 230; Skopek Bros. v. Webster Hous. Auth., 11 Mass.App.Ct. 947, 416 N.E.2d 1006 (1981); D. Federico Co. v. Commonwealth, 11 Mass.App.Ct. 248, 252-253, 415 N.E.2d 855 (1981). In those cases, recovery was denied when the contractor failed to give timely notice of its claim to the public agency. Without such notice, the contracting authority was unable to monitor the additional expenses incurred by the contractor. Here, on the contrary, Sutton met the procedural requirements for a claim under § 39N: it provided timely written notice of its claim to the MDC. As the master found, the MDC was aware throughout the project of Sutton's additional expense. Furthermore, there was no evidence or finding that the MDC was prejudiced in any way by the lack of an itemized statement of damages. Therefore, we conclude that the MDC's refusal to pay Sutton's additional sand drain installation expenses was improper." (Emphasis added)

Apart from Chapter 30, s. 39N of the General Laws, essentially a differing site condition relative to private work should be handled much as any other change order/equitable adjustment matter should be handled. Attention should be given - preferably, before any additional work commences - to the changes, claims and disputes clauses as well as any particular differing site conditions clause of the general contract. These clauses should be complied with to the letter.

As is discussed earlier in the presentation relative to changes seeking equitable adjustments, in many instances changes, including differing site conditions, can be presented even with an absence of strict compliance with these conditions. Whether or not one will have a compensable differing site condition on a private job - assuming entitlement from a factual standpoint - will depend on a number of factors. Has your contracting party waived strict compliance with formal procedures, if they were not followed? Did any person who orally authorized and/or implicitly or explicitly waived more formal contractual requirements have the appropriate authority to do so? Keep in mind that the higher you go in your contracting party's organization, the better off you are in terms of having agreements with that individual be applicable to his/her company as a whole. Put another way, the greater the 'boss' you deal with, the less likely you will need another boss to approve his/her decisions.

Whether or not the differing site condition is on a public project or not, here are the key ideas for the handling of a differing site condition:

- (1) Give **notice** of the differing site condition prior to disturbing what is there to your contracting party or as directed by the terms of your contract.

- (2) Give your contracting party an opportunity to **measure** (especially important with horizontal construction) dirt, peat, clay, unsuitable materials, ledge and any other subsurface condition that will either hinder your construction activity or cost you more money.

· (3) Find some way to **make a record** both of what you found and how this was corrected. Invariably, this is going to involve pictures and possibly videos. If you are dealing with an expensive extra brought about by a differing site condition that will be hard to measure or identify when the job is over - because the physical area has changed or will be covered up - consider getting a **third party** to measure and monitor quantities and conditions. This might be, in certain cases, an engineer, architect or other specialist. The fact that this person is a third party - not directly profiting from the change, other than being paid a fee to perform a service - will likely help you in further negotiations and litigation.

Also, since a differing site condition is, in reality, only a particular form of a changed condition, review the suggestions for changes indicated earlier in this paper and employ those elements that appear to apply. And, please keep in mind that with regard to any change order having to do with extra work of whatever nature, unless your contract says different, any extension of time that is being requested must be figured into the change order. Put another way, getting only scope and money on a change order now might mean that getting additional time at some point in the future may not be possible.

IV. MASSACHUSETTS LAW APPLICABLE TO DELAYS

The purpose of this section will be to talk about compensation issues involving delays.

As stated in the case of Resnic v. Toleas, 56 Mass. App. Dec. 54, 60-61 (1975):

". . . Unless expressly stipulated, time is normally not of the essence in building or other contracts. 6 Williston S846, 849. Here, there was a time stipulated for the completion of the painting but there was nothing indicating that this was essential to the contract. We are of the opinion, therefore, because of his general finding and logical inferences that may be drawn therefrom, that by implication the trial justice found that time was not of the essence."

But cases like this one are exceptions to the rule and not the rule itself.

As a practical matter, as we all know, "time is money and money is time." It will be a rare construction contract that does not contain the words "time is of the essence" or otherwise have a fixed completion date.

The words "time is of the essence" are frequently tied into the provision for liquidated damages. If you see one, you'll usually see the other. If you find this phrase in your contract or general conditions, more likely than not, you will find a provision somewhere else in the contract that says there are liquidated damages.

When are liquidated damages (which are damages agreed up-front as to the consequences of a party's delay) enforceable?

This issue is discussed in the case of A-Z Servicenter, Inc. v. Harry Segall, Trustee, 334 Mass. 672, 675 (1956) by the Supreme Judicial Court:

"Whether a provision of a contract for the payment of a sum upon a breach is rendered unenforceable by reason of its being a penalty depends upon the circumstances of each case. (Cases cited) Where actual damages are difficult to ascertain and where the sum agreed upon by the parties at the time of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced. (Cases cited) But where the actual damages are easily ascertainable and the stipulated sum is unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive, the court will award the aggrieved party no more than his actual damages. (Cases cited) The words "liquidated damages and not as a penalty" in the instant note are not decisive. If from the nature of the transaction and the attending circumstances it appears that the contract is a cloak to hide a sum of money out of proportion to and differing greatly from the actual damages ordinarily arising from a breach, then the sum named as in the case at bar is not a penalty. This is true even if it may be designated in the contract as liquidated damages."

A factor which the Supreme Judicial Court takes into consideration as to whether or not a certain sum represented enforceable liquidated damages is whether or not the disputed provision (on liquidated damages) is: " . . . negotiated on an arms-length basis between two substantial business firms."[12] Graves Equipment, Inc. v. M. DeMatteo Construction Co. & another, 397 Mass. 110, 112 (1986). More likely than not, a subcontractor's or a general contractor's bidding on a project is probably tantamount to being an 'arms length negotiation' because of the fact that if one strongly objects to any particular bid document or general contract provision, one can always *not* bid. Put another way, the law - whatever *that* is - is not big on trying to figure out the subjective intent of parties in entering into a contract after the smoke has cleared. In the vast majority of circumstances, the contract is going to be enforced as written. To do otherwise would only increase fraud and uncertainty in the interpretation of contracts.

As to actual damages for delay to be sought by a contractor, one of the important earlier cases discussing this is Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 499-503 (1939). In this particular case, the Supreme Judicial Court discussed some of the issues involved with making a delay claim.

As stated on pages 499-500:

"A party to a contract, who is not precluded by its terms from asserting a claim for damages due to delay in commencing or in completing performance, may recover if he can show that the delay was a breach of some express provision of the contract or of an implied obligation imposed upon the other party to the contract not to interrupt or hinder the progress of the first party."

In the Hosmer case, there was a provision in the contract that, essentially, there would be 'no damages for delay' but that the contractor would be entitled to additional time to complete the work.

As stated by the Supreme Judicial Court on page 502: "Such a provision negatives any pecuniary compensation for delay."

Further, some ideas which might become prophetic in later years (and cases) were discussed by the Court on page 503:

"The petitioner did not introduce any evidence showing the reasons or causes of any of the delays alleged in its petition. The characterization of the action of the Department of Public Works as negligent, unreasonable or due to indecision is not enough to avoid the pertinent provisions of the contract. The respondent or the officials in charge of the work are not charged with arbitrary, capricious or fraudulent action, nor with acting in bad faith or under such a gross mistake as to be tantamount to fraud."

A more recent case on this issue is the case of Wes-Julian Construction Corporation v. Commonwealth, 351 Mass. 588 (1967).

The contract in question had essentially a "no damage for delay" clause.

The Court stated on page 594:

> "In the absence of a specific contract provision to the contrary, the respondent would be bound to refrain from causing delay in the petitioner's commencement or performance of the contract, and the petitioner could recover for breach of contract for such delays."

> Later, there was some argument by the contractor that the contractor might be entitled to recover for delay damages even in the presence of a no damages for delay clause in the presence of "arbitrary, capricious or fraudulent actions . . . (or action) in bad faith or under such a gross mistake as to be tantamount to fraud."

The Court stated on pages 596-597:

> "Even if we assume that the judge was warranted in finding that the conduct of the respondent was 'arbitrary and capricious,' the petitioner is not entitled under this contract to recover damages for delay caused by the respondent in view of the specific provisions of the contract regarding delay."

In 1990, the Appeals Court "chipped away" at this type of holding. The case in question was the case of Fred J. Findlen v. Winchendon Housing Authority, 28 Mass. App. Ct. 977 (1990).

The construction contract in question had a sweeping provision disclaiming any liability by the owner for job delays. There would be no payment for unavoidable delays, although there would be a time extension.

As stated by the Appeals Court on page 978:

> ". . . a clause which exculpates the awarding authority from liability for damages arising out of delay is enforceable. (Cases cited) The general rule is subject to an exception if arbitrary and capricious conduct on the part of the awarding authority produces the delay and the authority declines even to extend the time for contract completion."

In this particular case, although the awarding authority did give time extensions, the authority paid some monies on account of delay and the Court found that this constituted a waiver of the "no delay damages" clause. Moreover, by the authority paying delay damages to the contractor, the awarding authority would have an obligation to indemnify the general contractor for monies it had to pay a subcontractor for delay damages in a separate action.

The rationale for this decision was that, as stated on page 978:

> "Parties to a written contract may, of course, alter it subsequently, by oral modification, by their joint conduct, or, ideally, by a writing subscribed to by the persons to be bound."

One of the best cases to be familiar with in this area is the case of Farina Brothers Co., Inc. v. Commonwealth, 357 Mass. 131 (1970), a decision of the Supreme Judicial Court. The Supreme Judicial Court confirmed an auditor's (another term for a 'master', which is a lawyer who acts like a judge in hearing certain cases) finding for the contractor for delay damages against the Commonwealth of Massachusetts. Article 68 of the contract provided that there would be no damages for delay but that the contractor would be entitled to a time extension in the event of delay.

In discussing the testimony, the auditor had found that the contractor was repelled and insulted by the chief construction engineer who blatantly informed him that he did not care about what was happening and would do nothing to carry out the obligations of the department.

Also, there was no time extensions granted, even though the facts warranted a time extension.

As stated by the Supreme Judicial Court on pages 138-139:

> "In circumstances such as here appear, however, the Commonwealth in effect has used the delay provisions to whipsaw the contractor. So employed, they cannot absolve the Commonwealth of liability. If, as may be the case, delay is to occur during performance of the contract the collateral provisions relating to appropriate extensions should come

promptly into play. In the present instance their application was unconscionably delayed in a manner to deprive the contractor of such protections as the Blue Book afforded to it. Adherence to these standards by both parties is required. The evidence supports the conclusion that agents of the Commonwealth by intentionally obstructing the application of those standards caused damage to the contractor . . . "

On page 140 of the decision, the Court continued in this vein:

"In sum, we hold that the Commonwealth cannot hide behind the specifications of its contract dealing with delay and, in the circumstances of this case, deny recovery to a contractor who has been put upon to the extent here shown. We have dealt not with the question of damages caused by delay itself which was the main subject of the Wes-Julian case. We have dealt rather with damages caused the contractor by failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling work. It remains only to say that the Commonwealth cannot expect unfailing and honest performance by contractors when it administers its contracts as this one appears to have been administered."

Thus, it appears that under particularly egregious circumstances, a court might allow a contractor delay damages even in the presence of a 'no damage for delay' clause.

For public work, one should be aware of Chapter 30, s. 390 of the General Laws. This provision applies to both public buildings and to public work and provides as follows:

"Every contract subject to the provisions of section thirty-nine M of this chapter or subject to section forty-four A of chapter one hundred forty-nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor, that subcontractor shall have the same rights against the general contractor for payment for an increase in the cost of his performance as provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.

(a) The awarding authority may order the general contractor **in writing** to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act

to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim." (Emphasis added)

Case law interpreting this statute seems fairly consistent that the owner issues something that constitutes a 'written order' before the remedies of this statute are invoked. Furthermore, the statute provides that subcontractors shall have the same rights against the general contractor for payment for an increase in the cost of performance as a general contractor has against the awarding authority for suspensions, delays or interruptions but this statutorily-granted right "shall in no way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other." As always, read the subcontract!

A warning for subcontractors: always look to see what the general conditions of the general contract provide as to whether or not damages are recoverable for delay by the general contractor. Again, this type of provision - like most provisions in a subcontract - usually will be 'incorporated by reference' into your subcontract from some other contract document, unless you specifically exclude it in the subcontract, which most likely is not legally possible with most public building/public works subcontracts. This is especially so as to filed subbidders and trade contractors, the terms of whose contracts are set forth by statute.

In the case of B.J. Harland Electrical Co., Inc. v. Granger Brothers, Inc. 24 Mass. App. Ct. 506 (1987), the plaintiff subcontractor brought an action against the defendant general contractor and its surety for what were essentially delay damages.

Under Article 23 of the general conditions of the prime contract, there was a provision that the general contractor would not be entitled to damages on account of any hindrances or delays but would be entitled only to a time extension.

The Appeals Court appears to say that inasmuch as the subcontract incorporates by reference the general conditions of the general contract, Harland's claim for delay is precluded.

The Court stated on page 514 of the decision that:

"The right to recover damages for hindrances or delays is comprehensively provided for by Art. XXIII (and, perhaps Art. XXII, see note 6, supra), subject to the limitations therein contained and agreed to by Harland when it signed the contract. That article is enforceable and binding upon Harland."

As has been discussed at great length in another ***Scribbles*** seminar on subcontracts, in very many instances - indeed, in the majority of instances and as to probably the majority of issues - matters which are dealt with in the general contract and general conditions of the general contract will be binding and enforceable against the subcontractor, such as has occurred relative to the subcontractor's delay damage claim in the Harland case. This will be true even if you never got to see or read all of the contract documents.

It is interesting to note that the Appeals Court in 1982 has allowed a subcontractor to recover against a general contractor and the general contractor's surety so-called "Eichleay" damages which, as described by the Appeals Court in the case of PDM Plumbing & Heating, Inc. v. Fred J. Findlen, 13 Mass. App. Ct. 950 (1982), is a method which:

> ". . . utilizes a formula designed to determine office overhead expenses resulting from a breach of contract where such expenses are not capable of precise measurement. The formula attempts to establish a daily overhead expense rate chargeable to a particular contract by allocating total overhead among all contracts based upon the percentage the dollar volume of any one contract bears to the dollar volume of all contracts over the same period . . . "

In summary as to delay issues, there are a number of things to keep in mind. Generally speaking, the courts of this Commonwealth have enforced fairly uniformly no damage for delay clauses, providing there is a correlative provision for time extensions in the event of delay. Several cases have hinted that there might be a different result if the behavior of the awarding authority is arbitrary, capricious and/or in bad faith. Indeed, the Farina court so-held, but attempted to do so on the artifice that damages were not being awarded on the basis of delay damages but as consequential damages for the failure to provide time extensions. I would defy anyone to explain what the actual differences would be between these two ostensible forms of damages. I don't think there is any. In other words, it appears as if our court "wimped out."

Subcontractors have to be very careful to make sure they understand whether or not there are no damage for delay provisions in the general conditions of the general contractor's contract, which will most likely be enforceable against the subcontractor. Indeed, if there are such provisions, in certain types of cases where the subcontractor runs a risk of suffering great money damages in the event of a delay, the subcontractor may wish to negotiate a provision to its subcontract specifically providing that either there can be delay damages only under appropriate circumstances and/or that the provision in the general conditions as applicable to the general contract will not be binding on the subcontractor. Experience suggests this is and would be a tough sell.

Here's a tantalizing idea, that I can not quote you a case on presently. I have represented an experienced general contractor client who argues vigorously that a claim for 'general conditions' - trailer, project manager's time as applicable to job, superintendent, phone, fax, etc. - is not the same thing as a strict 'delay claim'. Thus, it is not necessarily precluded by

a 'no damage for delay' clause because of the fact that it is not, strictly speaking, a *delay* claim. There would seem to be some intellectual argument to this claim because a 'delay claim', strictly speaking, is an "Eichleay" type claim and deals with general and administrative home office expenses: officers' salaries, rent, secretarial salaries, the copier, vehicles. In other words, a classic delay claim deals with non-job costable expenses whereas a 'general conditions' claims deals with expenses which are eminently and properly job-costable. I was able to convince a state agency of this approach for some fairly significant (six figure) dollars. As a nod to the ironies of life, shortly thereafter this same state agency gave my guy an award for the job he had done! (This was converting an elementary school into a very modern state police lab. *Huh?*)

A final note. I have had two six figure recoveries for delay damages in the presence of 'no damage for delay' clauses, one which was negotiated during litigation and one which was negotiated within two or three months of submitting the claim. Both jobs were with major state agencies. If you have been delayed to a significant extent, run it by someone who does this type of work to see if there might be some way of getting a recovery. In other words, if there is a significant amount of dollars involved, don't assume that your claim may not have viability due to the presence of a no damage for delay clause. Be mindful of the fact that there are a fair number of cases that come down on this subject and exceptions are made.

V. PROTECT YOUR CLAIMS FOR CHANGES AND DIFFERING SITE CONDITIONS AND DELAYS BY READING AND UNDERSTANDING THE LIEN WAIVERS AND RELEASES YOU SIGN

I have seen many good claims lost by one hand not knowing what the other is doing. In other words, someone in the office might sign lien waivers and partial releases as part of the requisitioning process without being aware of what claims the project manager and superintendent are watching (and, perhaps, nurturing).

Here's what the case law says:

In the absence of fraud, a person who signs written agreement is bound by its terms regardless of whether person reads and understands those terms. Tiffany v. Sturbridge Camping Club, Inc., 32 Mass.App.Ct. 173, 587 N.E.2d 238 (Mass.App.,1992). In absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not, or whether he can read or not. Cohen v. Santoianni, 330 Mass. 187, 112 N.E.2d 267 (Mass.,1953) Where what is given by one to another purports on its face to set forth terms of a contract, one who receives it, whether he reads it or not, by accepting it assents to its terms and is bound by any limitation of liability therein contained, in the absence of fraud. Kergald v. Armstrong Transfer Exp. Co., 330 Mass. 254, 113 N.E.2d 53 (Mass.,1953) Ignorance through negligence does not relieve a party from his contractual obligations, unless the negligence is not inexcusable. Century Plastic Corp. v. Tupper Corp., 333 Mass. 531, 131 N.E.2d 740 (Mass.,1956). Where what is given to a person purports on its face to set forth terms of a contract, a person assents to its terms by accepting it, whether he reads it or not, and is bound by

any limitation of liability therein contained, in the absence of fraud; but where what is received does not purport to be a contract the person receiving it is not bound by limitation of liability unless actually known to him. Polonsky v. Union Federal Sav. & Loan Ass'n, 334 Mass. 697, 60 A.L.R.2d 702, 138 N.E.2d 115 (Mass.,1956).

Therefore, if you sign something in a language you don't understand, you're probably bound. If you don't read what you sign, you're probably bound. And, if someone (wanting you to sign it) explains to you what the document means - or what he or she wants you to *believe* it means – which is at variance with the correct legal interpretation of its meaning, this won't excuse your signing the document in the ordinary case and you will be bound by the provisions the document contains.[13]

Now, what are the issues?

A. What is a 'lien waiver'?

A lien waiver is simply a document giving up the right to file a mechanic's lien. Now, in Massachusetts, that right exists only as to private land. This is because of the specific statutory provision contained within the Massachusetts General Laws:

CHAPTER 254, 6. Public property; exemption

"No lien shall attach to any land, building or structure thereon owned by the commonwealth, or by a county, city, town, water or fire district."

As statutes go, this provision is short. However, it is clear and unassailable and is not capable of being understood other than what the plain meaning of these words say. As a matter of statute and of public policy in Massachusetts, there are no mechanic's lien rights on public lands. (In some states, that may be different. New Hampshire, for example, was - perhaps still is - an exception.) Therefore, when someone attempts to get you to sign a lien waiver on a public job, this is an act that has no legal significance, at least in terms of the mechanic's lien law. For, you can not release a lien that you never could have filed in the first place!

Therefore, to the extent that documents/contracts pertaining to public jobs discuss/describe/require lien waivers, what is really being required - to one extent or another - is a *release.* And, the execution of any release is to be handled very carefully, much as in the handling of a pit viper, a scorpion, alligators over fourteen feet and most Democrats.

Now, a lien waiver - reduced to its bare minimum - is *only* a document in which the releasing party releases *mechanic's lien* rights. Therefore, if you have carefully qualified your lien waiver, you have still reserved whatever contractual and bond rights that may be available to you. Also, in a carefully-worded lien waiver, you have not foreclosed other rights that may be available to you to collect your debt such as, for example, trustee process (bank account

attachment to fund your expected recovery, if the matter goes to suit) or reach and apply actions (attaching your contracting party's other contract receivables to fund your expected recovery, if the matter goes to suit).

B. Common issues with regard to lien waivers.

Initially, inasmuch as lien waivers frequently overlap with releases (and their issues) and where sometimes through inadvertence or intentionally the party giving you a lien waiver to sign *really* intends for you to execute a release, to fully understand lien waivers, you have to understand the differences between releases and lien waivers.

Make sure the lien waiver is specifically limited to time and lists its consideration
One of the biggest problems with lien waivers is that they are too broadly written. And why not? Since they are prepared by either the Owner or the general contractor, each party is interested in getting the maximum amount of protection that is possible, the biggest bang for parting with the fewest possible bucks. When you are executing a lien waiver, make sure that it is limited to whatever requisition period you are currently involved with. To the extent that the lien waiver is given in advance of the payment – the usual situation - make sure that there is language in the lien waiver to the effect that this lien waiver is given "in consideration of a future payment in the amount of X" and that said lien waiver will only take effect on the actual receipt of said payment.

C. Specific things to keep in mind when reviewing a lien waiver as to what must be excepted or kept out of the lien waiver.

These are the basic six exceptions to be considered with each partial lien waiver:

1. The lien waiver should always say 'in consideration of the payment of _____'. With this language, this would cause this lien waiver to be specifically conditioned upon your receiving the amount indicated. Thus, it would be in the nature of a conditional release. Otherwise, and without this information, the document might be an unconditional release, meaning that irrespective of your understanding you would be receiving a check in exchange for the lien waiver, if you don't get one, the document is probably still effective.
2. Retention should be explicitly reserved in each partial lien waiver, if the lien waiver doesn't specifically do so.
3. If there are previously-submitted requisitions, some of which are not presently paid, then you have to reserve your rights to payment as to them or they could be released.
This issue is particularly important with jobs where there will be a series of requisitions, which would generally be the case on probably most of your larger jobs.
4. Work performed of an extra nature but not reduced to change order up to the effective date of the lien waiver.
5. Any claims you have as of the effective date of the lien waiver - either the date stated as the effective date in the document or the date you sign it - must be explicitly

(in writing) reserved. This would include pending change orders, even claims you have not even asserted yet but plan on asserting, the activities underlying which are covered by the time period included within the effective date of the lien waiver.
6. Never agree to the following last sentence to be found in many lien waivers/releases: "This document is to take effect as a sealed instrument." This limits a court's inquiry into what the 'consideration' (money, mostly) was given for the execution of the document.

I won't say that this last exception is a mere throw away: it's not. However, from a practical standpoint, it is far less important than the five exceptions preceding it.

D. What is a 'release'?

A release is, to one extent or another, a sale of your possible claims. In other words, think of a release as a bill of sale of whatever claim is contained therein. (In fact, when you sign a bonding company release, that form usually is titled "Release and Assignment" in that the claim you are releasing against the principal is sold to - or 'assigned' - to the bonding company.) A release is more global in nature than a lien waiver, when each document is tightly and narrowly drafted. A lien waiver, at bare minimum, only indicates that you give up your lien rights, partially or fully. A release indicates that you have given up the underlying cause of action, partially or fully, which could mean that you have given up *all* of your rights. Therefore, a release is far more serious than a pure lien waiver, keeping in mind that savvy generals and owners often include release language in a lien waiver or simply title their releases as lien waivers. Please keep in mind that when a court construes the import or legal significance of a document, it is more concerned with its content than with its title. Therefore, you may be executing a release even though the document is titled 'lien waiver' and the document will be construed by the Court as a release.

E. Issues with regard to releases

1. Is it a complete release? First of all, is it a complete release of any and all claims and not just those limited to a specific job? It is common that many forms for releases indicate that the release is a release of all claims "from the beginning of the word to the date executed". While this may seem somewhat hyperbolic, the key to good legal drafting of this kind of document is to leave *no wiggle room.* Therefore, if you are looking for a 'final release' of any and all possible conceivable claims the party you are paying may have, make sure the release has this type of language in it.

2. *Is the release authorized/ratified by the company giving it?* Remember that as a matter of corporation law, the authority of a corporation is vested in the board of directors only. The corporate seals that many of you may have in your 'corporation kit' are evidence of the authority of the board of directors in that the board of directors is presumed to only make the seal available to those acting on its behalf and with its authority. Therefore, and particularly on larger/more troublesome matters, make sure that the release is embossed with the corporate seal

of the corporation giving you the release. Otherwise, if something 'new' comes up and the party signing the release attempts to wiggle out of it, you don't want to give the corporation the possibility of raising the argument that the execution of the release was not an authorized act of the corporation - a so-called '*ultra vires*' act. If the party giving you the release claims not to have a corporate seal or that it isn't available, insist on a "corporate vote", which would be a document evidencing a meeting of the board of directors, signed by the secretary or clerk of the corporation, authorizing the signatory to sign such a document.

3. Don't release too many parties. Many times, releases include a whole kitchen sink worth of people: owners, architects, consultants, lawyers, etc. Check to see *who* you're releasing and be sure that you intend on releasing all those indicated. Remember, that a release executed as "a sealed instrument" may deprive any court considering the legal effect of the release from looking into the fact of whether or not there was adequate - or any - consideration flowing from the parties released. (A sealed instrument is a document bearing language such as 'witness my hand and seal' or 'executed as a sealed instrument (or contract)'.)

4. If the release is given with regard to a litigation - a lawsuit - make sure that there is language in the release to indicate that the release covers all claims (or counterclaims) that are contained within a certain case in whatever county bearing whatever docket number (court file number) associated with the name of the case.

*5. If the release is **partial** only, make sure it is titled that way and that the claims not released are specifically identified and **excepted** from the release.*

Having written the prior sentence it is nonetheless important to understand that when a court interprets the meaning of a document, it evaluates the substance of the document first and then, as a distant second, the title. The fact that something is labelled as 'partial' doesn't mean that it might not actually be something that is 'full', at least in terms of the date of the execution of the document.

Many times releases may not contemplate situations where retention has not been paid and may not be paid for a period of time *after* the giving of the release. In that case, the release should clearly indicate that "specifically exempted from this release is undersigned's claim for retention in the amount of X". Or, there may be a claim (for example, for an extra or equitable adjustment) pending or to be asserted later. To the extent that some claim is not resolved - or may even be asserted after the release is given - this claim or right to make a claim should be reserved and clearly identified. Otherwise, it may be lost. So, if you play it too coy and don't want to telegraph that you have a claim coming - especially around requisition time - *not doing so* might cause you to lose the opportunity to do so later. And, generally speaking, you do not want to sign releases and lien waivers that don't indicate the specific sum they are given in exchange for, which would typically be the current amount being requisitioned. *Don't* sign lien waivers and releases which don't reference what that sum is. In the first instance, if you don't get paid the amount indicated, then your lien waiver or release is probably not enforceable due to a failure of consideration. On the other hand, if you simply sign a lien waiver or release that just

references a specific date - no amount indicated - then you don't have the pendency of a payment to be made, which could turn this document into being something conditional.

This stuff is important! If someone gives you something to sign and you don't know what it means, get someone to explain it to you. This isn't something you can count on being able to undo once it's done. Too often, clients go to lawyers to try to salvage Mrs. O'Leary's empty barn, when the cows have clearly already gone on to better - possibly unreachable - pastures. Put another way, you don't have to cry over spilled milk, if it doesn't get spilled in the first place! An ounce of prevention is worth a pound of cure.[14]

How can you to determine whether a document is a lien waiver or whether it is a release? A release is a sale of a claim and is, generally speaking, much broader in scope than a lien waiver and it will have language like this:

"In consideration of one hundred dollars ($100.00), to be paid by Good Guy General Contractors, a corporation (hereinafter referenced as RELEASEE) and for other valuable consideration, the receipt whereof is hereby acknowledged, Leaks Less Plumbing**,** a corporation, (RELEASOR) hereby remises, releases and forever discharges the said RELEASEE from all debts, demands, actions, causes of action, suits, dues, sum and sums of money, accounts, reckonings, bonds, specialties, covenants, contracts, controversies, agreements, promises, doings, omissions, variances, damages, extents, executions and liabilities and any and all other claims of every kind, nature and description whatsoever, both in LAW and in EQUITY, which against the said RELEASEE or its heirs, executors, administrators, bonding companies, banks, successors or assigns RELEASOR now has or ever had from the beginning of the world to this date on account of RELEASOR's having supplied labor, equipment and materials for a certain project known as Dunkin' Donuts Coffee Museum, Snack Bar and Shoe Emporium (Project)."

This type of language is very broad and all-encompassing. If you sign something like this, the only thing you may have left after you sign the thing is the pen you signed it with, this assuming that they actually let you keep the pen.

VI. WAYS OF (SOMETIMES) GETTING AROUND 'NOTICE' PROVISIONS

In my business, when contractors give us lemons, we try to make lemonade. And, when we are given broken eggs, we try to make omelets. But, other than dealing with those contractors who are perspicacious enough to involve lawyers before situations become truly messy, we are often brought into situations where we have to begin our work starting with a sink full of burned pots and dirty dishes.[15]

Recognizing that no one is perfect, here are some ideas for trying to maintain and prosecute claims when not everything was done (or can be done) according to Hoyle.[16]

1. Try to prove that giving notice would be (would have been) futile.

A failure to comply with notice provisions is not fatal when giving the notice would only be an empty exercise. In other words, if you can convince a court that even if you had given some notice the result wouldn't have been any different, then your failure to not give notice in any particular case might be excused. So held the Appeals Court in the case of D. Federico Company, Inc. v. New Bedford Redevelopment Authority, 9 Mass. App. Ct. 141 (1980). As stated by the Court on pages 143-144 of the decision:

> "Thus, the dispute concerning payment of line item 36 did not mature until the job was finished, and the NBRA had made it abundantly clear that it was going to resist paying for traffic protection and maintenance. . . . At that point, it was an exercise in futility by the plaintiff to file notice of a dispute with the NBRA. "Although performance of a particular act by one party is contractually specified to be precedent to the arising of any obligation in another, the prior act need not be performed where it would be a hollow gesture sure to be disregarded by the other party." Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Authy., 367 Mass. 57, 61-62, 323 N.E. 2d 870, 873 n.3 (1975) and cases cited. See by analogy Pupecki v. James Madison Corp., 382 N.E.2d 1030 (1978), which states the familiar rule that although, in order to maintain a derivative suit, a shareholder must make a demand on the directors that they cause the corporation to file the action, the requirement does not apply if it appears that demand would be futile."

This case was cited with approval or recognition of this principle in Sutton Corporation v. Metropolitan District Commission, 38 Mass.App.Ct. 764, 652 N.E.2d 627 (1995).

In the case of Cheschi v. Boston Edison Company, 39 Mass. App. Ct. 133, 142, 654 N.E.2d 48 (1995), the Appeals Court considered the issue of whether or not the failure to give notice as a condition precedent can be excused:

> "A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract [citations omitted]. If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced. See generally 5 S . Williston, Contracts S 663 (3d ed. 1961 & Supp.1990); Restatement (Second) of Contracts S 225 (1981)." Id. at 45, 577 N.E.2d 283.. . . A party may be excused from complying with a condition precedent if it has proven that performance of the condition would be futile: "The law does not require useless acts." Fortune v. National Cash Register Co., 373 Mass. 96, 107-108, 364 N.E.2d 1251 (1977), and cases cited. See also D. Federico Co. v. New Bedford Redev. Authy., 9 Mass. App. Ct. 141, 143-144, 399 N.E.2d 1103 (1980)." (Emphasis added)Fortune, supra, on page 107 cites a wide variety of cases supporting this provision; See Leigh v. Rule, 331 Mass. 664, 668, 121 N.E.2d 854 (1954); Nevins v. Ward, 320 Mass. 70, 73, 67 N.E.2d 673 (1946); Schayer v. Commonwealth Loan Co., 163 Mass. 322, 324, 39 N.E. 1110 (1895); Restatement of Contracts s 306 Comment a (1932); 5 S. Williston,

Contracts ss 676, 699 (3d ed. 1961). A refusal to pay a sum due under a contract excuses performance of a condition requiring notice. Jackson & Co. v. Great Am. Indem. Co., 282 Mass. 337, 342, 185 N.E. 359 (1933) (proof of loss to insurance company). United States v. Conti, 64 F.Supp. 187 (D.Mass.), aff'd 158 F.2d 581 (1st Cir. 1946) (notice of contract termination). Where an employer repudiates or nullifies procedures established by the contract, the employee is excused from performance of the conditions imposed on him. Balsavich v. Local 170, International Bhd. of Teamsters, --- Mass. ---, --- [FNe], 356 N.E.2d 1217 (1976). See Restatement of Contracts s 302 (1932); 3A A. Corbin, Contracts s 759 (1960)."

2. Try to prove that your contracting party waived the change order notice requirements.

A claim for a changed condition might be possible when the notice provision has not been complied with when there is a demonstrable waiver of that provision or of the contract provisions dealing with changed work or other notice provisions by someone authorized to waive that provision (i.e. a project manager rather than a superintendent). "Waiver", discussed elsewhere in this Squib, is defined as the 'intentional relinquishment of a known legal right'. Thus, for example, if you could demonstrate a course of dealing or custom or usage for a particular job to be that various prior change order work was done with no paperwork which was subsequently recognized and paid for without complying with the 'changes' clause, this might justify a contractor in not providing prior notice and submitting appropriate paperwork for later change order requests of a similar nature. A big problem in this situation is that waiver will not ordinarily be found unless it can be attributed to one in a position of authority. For example, there is some case law in Massachusetts to suggest that a superintendent for a general contractor does not have inherent authority to even order change order work. Thus, the person who 'waives' the compliance had better be someone with contractual significance, such as an architect (in certain situations), a project manager or a corporate officer. There is also some law to suggest that with regards to public contracts, issues such as waiver and related concepts such as implied contracts may have little practical application, certainly less than they would have with private construction.

3. Try to get (at least) something like a construction change directive before performing the extra work.

A 'construction change directive' is a change order mechanism, largely found in the AIA documents, which allows there to be an issuance of a direction to perform work with an acknowledgment that this is a changed condition but without an advance agreement as to the price. Typically, this will issue under the following conditions: (a) the plans and specifications have changed, perhaps dramatically, and with the press of time constraints, there is insufficient time to price the work and negotiate a change order, particularly where the changes are being designed as the project proceeds and it is not clearly understood at the go-in exactly what units of labor and material are likely to be required; (b) there is no dispute that there is a 'changed condition' but the owner or general contractor is unwilling or unable or both to take the time and effort to price it at this time.

The advantage of getting this is, at least, you have an acknowledgment on the part of your contracting party that there is or has been a changed condition. In trying to prove any civil case, a plaintiff needs to prove that it is entitled to recover (the issue of the defendant's liability) and what the amount of the recoverable damages are (the issues of damages). Having a construction change directive is a help in establishing (at least) that there is liability for the changed condition, as opposed to having to possibly deal with the issue down the road that the claimed 'changed work' is nothing other than contractually-required work or is otherwise non-compensable. And, realistically speaking, proving liability is about three-quarters of the battle in terms of effort and cost.

War stories on this one, however. One of our best general contractors helped a public authority out with a serious problem. This company had the obligation of building an emergency building and police station addition for a municipality, which required building locker rooms and other usable facilities in the basement. Once construction was started, however, it was discovered that the basement would be under water because of a high water table. By various letters between the parties - and by the issuance of a construction change directive - it was agreed to take this space out of the basement and install these rooms in the attic, which was originally going to be for future expansion only. Of course, when the architect drew the attic, he changed the slope of the roof, added dormers, expensive windows - you know this tune.[17] The contractor went ahead, in good faith, and did this work without a change order - which had a fair market value of somewhere between forty-five and ninety thousand dollars - only to have the owner contend once the job was successfully concluded that because of the deletion of the work in the basement - which would have to be given as a credit to the owner - the value of the new work was only three thousand dollars. Further, the owner essentially accused of the contractor of fraud in submitting this change. An arbitrator saw this completely the contractor's way after a few days of trial. But, this kind of thing took (takes) both time and money. If the contractor here made any mistake at all, it was in not helping the owner and, especially, the architect out of their design problem until it received a complete (and healthy) change order. For, without this change, the building simply couldn't have been built. File this project under the heading that no good deed goes unpunished. Dear Reader, it is at times such as this, you have leverage. Don't give it up easily! Nice guys, unfortunately, finish last. If, at all.

4. Try to obtain some other acknowledgment that the work in question is a changed condition.

This is only common sense. If you cannot get an agreement on both liability and damages - which would be reflected by a change order, in the ordinary course - at least get something in writing as to the fact that this is changed work. Even a letter or email from your contracting party acknowledging that the condition in question is not contractual work but change order work is better - sometimes a lot better - than nothing at all. Statements between two parties to a court case are deemed as 'admissions' later on in litigation between the parties, which is tantamount to proving the point in court. Therefore, such a letter or email could very well curtail any litigation and get you paid sooner.

5. If you have been ordered to do extra or change order work orally – and you can't get any change order or other paper – create your own change order before doing the work.

Remember, that the dances between the subcontractor and the general contractor and between the general contractor and owner are eternal but, at the same time, confusing. The party to a contract who prepares and gives you a contract which says that you can't do change order work without a signed change order before doing the work will also be the party who will try to get you to do the change order work without having anything in writing and then throw this in your face at the appropriate time, which would be – from their perspective - after the work is done and you then discover you've got *bupkis* for paperwork.

An example. You are ordered to put an extra few windows in a building by the superintendent for the general. Nothing in writing. Before doing the work, send the project manager an email or letter to the following effect: (a) that you have been directed by the superintendent to do the work; (b) that it is extra work; (c) that you will bill for the windows at the contract rate, if there is one, or at a fair and reasonable price reflecting market conditions; and (d) that you will proceed with the work in three business days unless you tell me not to do so in writing. The law requires parties in certain circumstances to take action or to suffer the consequences of remaining silent, which can be seen as an acceptance or acquiescence. (This is discussed in greater detail *supra*).You have to give the project manager a reasonable amount of time within which to respond to this. If you receive nothing back, you have something down the road in the nature of an implicit acquiescence or authorization to do the work under the specified circumstances. Sending an email to the PM on the morning you start the work is not likely to do you much good, as a court wouldn't consider this as having been 'reasonable' in that it didn't afford the other side a reasonable amount of time within which to object or respond.

6. If you are ordered to do some work which you don't consider to be contract work, send them a letter back that this is being done 'under protest' and that you reserve your rights to seek extra compensation for this changed condition.

Again, if you are ordered to do work and don't object to doing so prior to doing the work, an inference can and may be taken that you didn't object to the work because you realized that it is contract work for which you would not be entitled to any additional compensation or additional time. If you tell someone that you are doing this under protest, the other side will have less of an ability to claim that: "Geez, we didn't know that you considered that to be an extra. Had we known, we might have been able to work something out or might have withdrawn the request."

7. In certain circumstances, refuse to do the changed work without a change order.

Life becomes very 'nail-biting' in these types of circumstances because, under some circumstances, a refusal to do change order work consistent with the scope and amount of your existing contract might be considered to constitute grounds for your termination or to support a claim that you materially breached the contract. There are no absolutes in these situations. A lot

will depend on the wording of your contract and some contractors may depend on the prior course of dealing between them and their contracting party on this and other contracts. Recognizing that there are no absolutes, there are, at least, a couple of ideas. The greater the percentage is in comparing the proposed change order with the contract scope and amount, the greater the justification is to refuse to do the work without something in writing. Conversely, the smaller the percentage is of the proposed change as compared with the scope and amount of your contract, the less justification there might be for such a refusal.

Example. You have a three hundred thousand dollar plumbing contract to modernize one hundred and fifty bathrooms, which contract is a lump sum contract and not a unit price contract. You are ordered to modernize another fifteen bathrooms, using the same plans and specifications. There might be less justification in refusing to do that level of extra work in these circumstances. However, if the owner attempts to add another one hundred bathrooms to the job with the same scope and price, this could amount to what would be a new contract. The amount of the work is greatly dissimilar from what might reasonably be expected to be a change order to the original contract. This would tend to justify refusing to do it without having the change order in writing first. And, while the payable prevailing wage may not change during the course of contract performance, the skilled trades tend to get two wage increases every year in accordance with their collective bargaining agreement (CBA). An open shop's labor costs will not go up during the period of contract performance but a union contractor's labor costs will definitely go up if a job is significantly extended. The more time it will take a contractor to do this extra work, the less he will be paid for it, as his labor prices will definitely go up, as might his material costs.

Parenthetically, there is some law pertaining to pure unit price contracts that an ordering of increased units may not require an actual change order where the contract contemplates some variation in quantities and the contract, of course, establishes the price. Earlier in this Squib we discussed situations under which the unit price might have to be adjusted.

VII. A FEW OTHER IDEAS

1. Keep in mind that virtually any contractual clause can be waived or amended.

For example, a provision in a contract that says "All change orders have to be in writing" can be modified and modified orally. (When it is only oral, thought, this can create certain proof problems.) As we have discussed earlier, a waiver is a 'relinquishment of a known legal right'. The idea has to be that the party against whom a waiver is claimed has to know that it has a specific legal right to insist on something but decides to proceed in a different manner notwithstanding.

2. Extra work items originating with owner.

Notice is probably not as essential here as the purpose behind the notice requirement has already been served. Since the owner generated the extra work item, it knows that this is extra work.

3. In situations where you can prove that the owner knew you were doing extra work, then a failure to give written notice might be excused.

4. Despite your contract being very specific on how written notice is to be given, there is an increasing body of law that says that electronic transmissions (i.e. emails) are generally an acceptable substitute for writings.

5. You probably don't need a change order with regard to unit price items unless there is a substantial variation in units.

6. Notice provisions can be excused - at least for a period of time - in emergency situations.

7. Customs and usage on the job.

Your contract says in at least one place that custom and usage cannot take the place of an actual required notice. This may not be completely enforceable, as there are legal precedents that would seem to hold otherwise and, as we discussed above, provisions for written contractual changes can be orally modified. So, if you can establish that in prior circumstances the owner waived appropriate contractual notice, this might be of some assistance as to other changes in the job that are consistent with the prior custom and usage for the job.

In 12 Williston on Contracts §34:3. Incorporation of usage into contract (4th ed.), the authors state the following as to the incorporation into contracts of customs and usage:

"However, if two individual parties within a group or community contract with one another with reference to a matter to which a well-known habit or usage applies, and if the common law does not forbid the application of the customary rule if parties agree to it, a different issue arises. The question then becomes whether the parties to the contract have expressly or impliedly agreed to be bound by the usage as an integral term of their bargain. Generally, absent an express statement or implication to the contrary, the rule is that when parties undertake to conclude a contract, the formation of which is governed by a general usage, the implication is that they intend to proceed according to the usage in question. In such cases, unless the contrary appears, it is considered that the parties proceeded on the tacit assumption of the usages, but reduced into writing only the particulars of the agreement, omitting to specify those known usages which are routinely included by mutual understanding."

As stated by the Court in Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 416 Mass. 839, 626 N.E.2d 878, 881-882 (1994)

"Where, as here, the contract language is ambiguous, evidence of trade usage is admissible to determine the meaning of the agreement. See Restatement (Second) of Contracts § 222 comment (b) (1981). "The argument that a contract may not be 'varied' by evidence of pertinent custom and usage misconceives the role played by such evidence. 'Valid usages known to contracting parties, respecting the subject matter of an agreement, are by implication incorporated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect to contradict or vary a contract, but upon the theory that the usage forms a part of the contract.' " Hardware Specialties, Inc. v. Mishara Constr. Co., 2 Mass.App.Ct. 277, 280, 311 N.E.2d 564 (1974), quoting Baccari v. B. Perini & Sons, Inc., 293 Mass. 297, 303, 199 N.E. 912 (1936). See A.J. Cunningham Packing Corp. v. Florence Beef Co., 785 F.2d 348, 351 (1st Cir.1986). See also 3 A. Corbin, Contracts § 555, at 232-233 (1960)."

As stated by the Court in Baccari v. B. Perini & Sons, 293 Mass. 297, 303, 199 N.E. 912, 915-916 (1936):

"Valid usages known to contracting parties, respecting the subject matter of an agreement, are by implication incorporated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect to contradict or vary a contract, but upon the theory that the usage forms a part of the contract. Macy v. Whaling Ins. Co., 9 Metc. 354, 362; Florence Machine Co. v. Daggett, 135 Mass. 582, 583; Hutchins v. Webster, 165 Mass. 439, 441, 43 N.E. 186; American Law Institute, Restatement, Contracts, §§ 246, 248(2)."

8. Remember that any necessary additional time because of a changed condition should usually be part of a change order and may be waived if it isn't a term in a change order, unless the parties agree otherwise..

> Particularly where you have liquidated damages - but not limited to this - extra time is similar to extra money: it's the appropriate subject of a change order. It is critical in situations where you run out of time that you have at least asked for additional time prior to your running out of time. The law infers that in situations where you don't ask for additional time, you must not have asked for it because you didn't think you were entitled to it.

9. A change order should carry with it the time necessary to perform it unless both parties agree in writing to defer time issues until a later period of time.

10. Ambiguities in a document drafted by only one of the parties may be construed in favor of the non-drafting party.

Any ambiguity in a contract document must be construed against the drafter of the agreement. Beal v. Stimpson Terminal Co., 1 Mass. App. Ct. 656 , 305 N.E.2d 863 (1974).

As stated by the Authors in Volume 14 of the Massachusetts Practice Series, Chapter Seven:

"§ 7.37 Interpretation Against Drafter

An ambiguous contract should be construed against the drafting party. "

In accord, see Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 146, 439 N.E.2d 234, 237 (1982): (" But, if the contract is ambiguous, "doubts as to the meaning of the words must be resolved against the insurance company that employed them and in favor of the insured.")

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] If you happen to be travelling on Route One in the Walpole-Foxboro area in the next week or two, you might find looking at the north-facing billboard at Applebees (on the left, if you are facing south) and also the north-facing billboard just before Gillette Stadium (on the right, if you are facing south) a bit interesting. My accountant initially thought that this might be cool until he saw the bill. John Hancock, however, would understand the 'why' of it. So might, also, King George III. Reluctantly. If he weren't such a sore sport. After all, as the record currently stands, it is US 2 and UK 0, which is how this record has stood for more than two hundred years. Maybe the third time will be the charm.

[3] A bit of trivia. New Orleans created the 'po boy' out of sympathy for an unfortunate who spent too long at his lawyer's office. Or, was it at the House of the Rising Sun? Is there always a difference?

[4] Because of the length of this Squib, it stands to reason that the endnotes will also be of greater length. And, of a high level of erudition. At least, maybe, one or two of them.

[5] You think this is long? When we were sending out the full Scribbles magazine – could come back any day now – we had one issue over one hundred pages in length. But, when I started regularly taking my medicine, as the nice man in the white coat wanted me to, the issue length was reduced.

[6] Even at thirty-five pages or so in length, since Squibs only go out once per month, that would mean having to read only a bit more than one page per day. There are no members of the Platinum Group Of Squib Readers who are not millionaires. By age 25. Who, in the summer, read Squibs mostly from the owner's cabin of their rather large yachts. It did take AS somewhat longer to get there. But he did. And, he now has the largest yacht. Remember that "Reading a Squib page per day keeps the lawyer away". Does that make this Squib sound like medicine? Not to forget, that around Halloween time, a clove of garlic has also been known to help. For personal injury lawyers, only one-third of a clove of garlic is necessary.

[7] This standard has already been surpassed by sixteen primates of various kinds, including one who, for some reason, insists on showing those unfortunate enough to be looking that they have a very red butt. And, very definitely, by one very energetic gerbil. This gerbil impressed us so much that we're checking with the Board of Bar Overseers with this question: Would it violate some lawyer ethical rule if we offered him a job as a paralegal? Reading the voluminous lawyer rules, it seems that the only prohibition against gerbils in the law applies to judges. (When one has practiced as long as I have, one does tend to know of some exceptions. They were probably grandfathered in.) Does this then become a mixed metaphor if we say that the practice of law sometimes seems like a rat race? Is construction any better? It becomes increasingly easy to see that getting rid of the penny per word system was probably a good thing. But, some of those writers will have their revenge. For, next Halloween, maybe a reader or two will forget their clove of garlic (or one-third of a clove of garlic, as the case might be.) And, then the fun and games will *really* begin.

[8] Actually, The Platinum Group Of Squib Readers get this article as originally written, which is over six hundred and fifty pages. Written in Latin. The annotated footnotes alone exceed forty pages. This is a pretty sharp bunch of people. They really keep me on my toes. That's not especially due to the fact that they tend to be quite tall. It has more to do with the fact that I tend to run a little short. Especially on Fridays.

[9] For an application, please send us your email request with your check in the non-refundable amount of $100,000 made payable to 'cash'. Eighteen references are required, seven of which must be architects. But, how well does that speak of a contractor who is *that* chummy with seven architects?

[10] The first thing to do in such situations is to face the fan *away* from you. Or, unplug it. As you wish. With certain consistencies of effluent – no further details will be provided as to that in the interests of good taste – a large umbrella strategically orientated towards the source of emission has proved, in the past, to meet with some level of success.

[11] The Bar Association has three standing committees hard at work to eliminate this unnecessary part of the law. Brevity in legal writing is something definitely to be avoided. There is a rule in Wills & Trusts called the Rule Against Perpetuities. This deals with what are the time periods applicable to a transfer of title to a subsequent generation. It is thirty-one words long. As I recall the class, the professor stated that there was a definitive six volume set of books explaining this Rule. And, some writer said that only two people in history actually understood the Rule. Confusion? Chaos? The practice of mayhem, orderly or otherwise? Where would the law be without them?

[12] One has to keep in mind that from a judicial standpoint, there is no concern that the terms of the contract were completely dictated to you and you didn't have a chance to change even a single word. Since you had the right to either sign the contract or not sign the contract, it is the act of signing the contract that creates the purported arms length transaction.

[13] The authors of some of these decisions may have been grandfathered in, if you catch my drift. Irrespective, no one has ever said that gerbils are not tough. This, for a mammal which is only between six and twelve inches long, including the tail. This is just my speculation but possibly the gerbil prohibition as affects judges may have been based, in part, on the fact that they would not be able to wear the traditional black robes (because they don't come in sizes that small) and, even if they sat on top of the judicial bench, it would be very difficult to even see them. Irrespective of specie, judicial presence requires both of these elements. The fact that a gerbil is a form of rat suggests that inclusion of the same in the active bar has enjoyed a significant and, seemingly, increasing presence, prohibition or not.

[14] 'A stitch in time saves nine' is also another famous aphorism that has some application to this situation. However, this has more application for those who practice the art and science of being a tailor. Frankly, this trade appeals to me, as I am often involved with suits.

[15] On the plus side, in the law business in Massachusetts, we are not required to take various legal courses and seminars periodically so that we can have a certain number of continuing education credits in order to maintain our law licenses. On the negative side, all lawyers are required to watch a minimum of six weekly shows from the Food Network and periodically pass tests administered by the Culinary Institute of America (CIA). The essay questions are graded by Simon Majumdar and he is notoriously hard marker, although he does have a weakness for dishes made with Indian spices. Me? I have five of the Iron Chefs on speed dial. That's not to say or imply, however, that they actually return my calls after I have made them. We're working on that. Still, the prima donnas better learn to be more helpful or I might begin beating Bobby Flay. With a stick. Of butter. Possibly brown butter. A lot will depend on the recipe, you see. As I was taught during my years with the CIA, brown butter is a good sauce as it is

both easy and quick to make. But, this has to be watched very carefully when it is on the heat (to a layperson, this means when it is 'on the stove'), as it can go to a rather unappetizing black butter very quickly. When that happens, you can get chopped. Which is the cooking equivalent to of having your bid rejected for not being low. Except in Nevada, in which case all low bidders are shot. Or, hung. Their choice. For further information on this topic, see the next endnote.

[16] Some believe that changes in the Massachusetts public construction laws and procedures resulted from apparent corruption in the construction industry as reported on by the Ward Commission. Actually, these changes resulted from the fact that certain of the more successful contractors tended to deal from the bottom of the deck, which tends to penalize other contractors who are burdened with a lower level of hand-eye coordination or, possibly, as described by DT, individual who have low energy. Such skills, when not sufficiently rewarded in the construction industry, have allowed many of its most skillful of practitioners to go to Vegas and become wildly successful as dealers at the casinos. It is a little known fact that one of the principal reasons that Vegas has been so successful is because there is a Nevada general law that holds that all those who claim to be the lowest responsible, responsive and eligible bidders for any project over $5,000.00 have committed a capital crime and may, therefore, be shot on sight. This law was first enacted in 1961 and has been revised six times since. Some governors have attempted to change this law, but to no avail. Those attempting to do so always come in with a lower voter count. And, we've already discussed what happens to those who are low in Nevada. Not a pretty sight.

[17] Some say that architects are spawn of the devil. I would never say anything like this. Although, I might think it every now and again. When it came time to design Noah's Ark, God took on the design responsibilities Himself. Now, there was one project that worked, one where there was perfect harmony between the owner and the architect. There is no written record as to whether or not Noah sought any change orders. Even if he was right, to what court could he have brought that dispute? And, to whom would he appeal? Although this was a successful project, the Bible contains no other record where He did any further nautical design. In the Gospels, boats did frequently figure into the various stories and lessons. This was due, in part, to at least four of the twelve apostles being fishermen. And, Jesus considered Capernaum, which is located on the Sea of Galilee, to be his principal base of operations during his three year ministry.

[18] Too many endnotes? You've previously been warned to pay no attention to the man behind the curtain. But, as another way of looking at this, I am reminded of one of the most famous and oft-repeated sayings of Confucius: "When it is time to form, manage and modify construction contracts, maybe it's time to put your big boy pants on."