

Contractor cannot Recover
Without Written Change Order

by

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The Southern District Court of Appeals for Missouri recently affirmed a jury verdict that found against a contractor whose work deviated from the contract without a written change order. In doing so, the appellate court supports—from a strictly legal point of view—the importance of following the contract even if the contractor believed that the owner’s representative (in this case its engineer and architect) had orally directed otherwise.

This result underscores the continued difficulty a contractor often faces in deciding when to follow the letter of the contract and when to do otherwise as field circumstances may seem to dictate. The case is *Reiss & Goodness Engineers, Inc. v. City of Goodman, Mo.*, 2010 WL 447902 (Mo. App. S.D.), decided February 10.

The project was the replacement of the City of Goodman’s dilapidated water distribution system with new water lines and accoutrements. The City awarded the contract to Lynnsion, Inc. with Reiss & Goodness, as architect and engineer, providing the plans and specifications for the project to the City.

The contract called for Lynnsion to bury all mains and service lines at least 36 inches. Departures from this required a written change order.

Reiss & Goodness had contract responsibility for interpreting the intent of the plans and overseeing construction. Throughout the project there were complaints about the quality of Lynnsion’s workmanship, the depths of the mains and lines and general cleanup.

Lynnsion submitted monthly pay estimates with descriptions of the work performed and material used. Reiss & Goodness approved all seventeen of them. The City paid all of the pay requests except the last one, which requested final payment of \$92,757.83. Reiss & Goodness already had certified final completion but the City refused to pay this one.

Lynnsion sued for breach of contract. The City counterclaimed, alleging that Lynnsion failed to install the water system in accordance with the specifications, failed to install lines to proper depths and failed to repair road and yard cuts.

At trial, Robert Persons, the president of Lynnsion, admitted that the plans called for 36 inches of backfill over all lines including the mains and that the mains were buried to a

depth of only 24 inches. He also admitted that Lynnson did not receive any written field orders to change the contractually specified depth of 36 inches.

The jury decided for the City and awarded the City \$318,669 in damages. On appeal, Lynnson argued that the trial evidence showed that Reiss & Goodness instructed Lynnson to install service lines at depths shallower than 36 inches and to connect to existing service lines that were buried at depths between 8 and 18 inches.

Al Reiss of Reiss & Goodness testified to the contrary by saying he thought he had told the foreman for Lynnson “what he needed to do to keep those meters down.” The appellate court decided that this testimony plus Lynnson’s obligation to complete the project pursuant to the written specifications fully supported the jury’s verdict.

The court decided that Lynnson’s failure to follow the contract trumped the responsibility of Reiss & Goodness to interpret the contract documents and inspect and approve Lynnson’s construction.

The court also rejected Lynnson’s argument that it completed the project in accordance with the plans since Reiss & Goodness, as the City’s agent, had actual authority to interpret and deviate from the plans. In addition, the City’s architect and engineer signed off on the work by approving the request for final payment. This was not enough to overcome proceeding with work that differed from the contract without a written change order.

The Southern District commented almost in passing that Reiss & Goodness breached its contract with the City (apparently, but it is not entirely clear from the opinion, by recommending final payment). Thus, the court noted: “Lynnson may not shield itself from its breach by Reiss & Goodness’s breach.” *Id.* At 5.

Since there was no written change order, there could be no permissible change in the work. Thus, the City was able to prevail on its counterclaim.

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