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March 9, 2009

## Oral Waivers and Waivers by Implication Can Be Dangerous

*By Robert B. Jacobs and David W. Floren, Attorneys at Law*

Waivers can be dangerous because waivers may cancel rights that contractors would normally enjoy under a construction contract. This could be the right to receive something very useful, like the right to receive progress payments for actual work done instead of having to wait for any payment until the project is complete. Or it could be the right to take an important step, like arbitrating disputes instead of going through a more costly trial in the civil courts.

Waivers can be created by spoken words, by conduct that amounts to a waiver, or by a writing. The most clearly enforceable waivers can be those made by a writing in the contract. Oral waivers can be very difficult to prove in court. If a dispute centers on whether an enforceable waiver was ever created in the first place, the best way to rescue the waiver is for the contractor to have include a clearly described and detailed waiver clause in the contract before signing off on the contract.

The best thing to do is to avoid making or agreeing to an oral waiver. Instead, waivers should be memorialized in written form using sentences that are both easy to understand and that define how and when the waivers apply. Oral waiver agreements can be very difficult to prove, either in court or in arbitration. If a contractor wants to rely on an oral waiver, and the other side denies making such an oral agreement, the contractor will then face an uphill battle to prove that the conversation ever took place. To make matters more difficult, the court requires the party who claims the benefit of a waiver to prove that the waiver was created. Even if a contractor provides enough proof, the process of proving the case can be costly, which could make a contractor decide to settle or not even file suit after attorneys' fees and costs are taken into account.

What about waivers of progress payments? A contractor can demand that his subcontractors waive their rights to prompt payment of progress payments, so long as the underlying project is not considered a "public works project." But any agreement to waive progress payments must be in made in writing, and the law will have it no other way. An oral waiver agreement that the owner can suspend progress payments to the contractor will most likely be completely unenforceable.

Retention proceeds are a different story altogether. Prompt payment of retention proceeds is required under the law. Agreements to waive rights to retention proceeds are never enforceable, whether oral, written or implied by conduct. Retention proceeds are so important to the livelihood of most construction

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**Waivers**

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businesses that the legislature declared that public policy will not allow a contractor or subcontractor to agree to waive these important statutory rights. In fact, the only way retention proceeds can be lawfully withheld past the very short statutory deadlines for payment is if a serious dispute exists between the contracting parties. In rare cases where there is a serious dispute, retention payments can be withheld to guarantee at least some payment from the losing party at trial. Dispute-related withholding is a statutory right and is not considered part of any waiver agreement between the parties.

Contract rights are important, and courts hesitate to say that anybody has waived or released their contract rights unless such a waiver or release is in written form. Even though it's tempting to rely on "handshake" or oral agreements to do things differently from the contract, contractors who rely on "handshake" agreements can find themselves "left out in the cold" if the other party later denies making the agreement.

There are steps that can be done to help, such as the use of self-serving letters. These are letters that document a change in the written agreement. Use of such letters isn't difficult, but such letters are best used when properly written, and such letters are often best written when they are first reviewed by legal counsel. Therefore, contractors who want to increase their chances of success in any dispute about a "handshake" contract modification would be well-advised to consult with experienced legal counsel before entering into such agreements.

*The Law Office of Robert B. Jacobs provides legal services in the areas of Construction, Business, and Real Estate Law. The office is located in Pleasanton, California and can be reached at (925) 847-8680. Additional articles on construction and real estate can be viewed at [www.RBJLaw.com](http://www.RBJLaw.com). The foregoing article is not a complete discussion of the applicable law, and should not be relied on. Competent counsel should be consulted concerning any specific situation or issue.*

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