

4.30B BUILDING CONTRACTS — EXTRAS (Approved 5/98)

A. Where the Contract is Silent as to the Changes or Extras

Where “extras” are claimed by the builder the first issue to be resolved is whether the items claimed as extras were included within the terms of the basic contract between the owner and the builder. If they were, the builder is not entitled to additional compensation. If they were not included within the basic contract the builder is entitled to additional compensation only if the extras were requested or authorized by the owner.

If the extras were requested or authorized by the owner, and if there was an agreement between the parties as to the price to be paid for such extras, the builder is entitled to receive the agreed price.

If the extras were requested or authorized by the owner, and there was no agreement as to price, the builder is entitled to be paid the reasonable value of the extras.

Cases and Commentary:

Whether a builder is entitled to compensation for extras is determined by basic contract principles. The issue is whether there was an agreement express or implied that the builder be paid. If what the builder did was comprehended within the construction contract, there are no extras. *See Terminal Construction Corp. v. Bergen County, etc., District Authority*, 18 N.J. 294 (1955). *Moses v. Ed-*

ward H. Ellis, Inc., 4 N.J. 315 (1950) is an illustration of the rule. The controversy there was between contractor and sub-contractor. The issue was whether the sub-contractor was entitled to payment for pouring concrete into uneven rock in order to bring it to “pay” lines [lines set out in drawings]. He/She was held entitled to payment, but as specified in the contract, although this was in a sense “extra work”. If the work was performed without the owner’s request or authorization, and the owner has not agreed to pay, he/she is not liable. 17A C.J.S., *Contracts*, Sec. 371 (1), p. 401. If the owner has requested or authorized the work, he/she is liable. 3 *Corbin on Contracts*, Sec. 564, p. 296 (1965).

If there has been an agreement as to price, that agreement would control. *Sbaraglio v. Vicarisi*, 110 N.J.L. 280 (E. & A. 1933). In the absence of agreement *quantum meruit* would be the only means for determining the amount of compensation. *Kolmetsky v. Pellicoff*, 6 N.J. Misc. 315, 141 Atl. 10 (Sup. Ct. 1928), *aff’d*, 105 N.J.L. 240 (E. & A. 1928); *see also Shapiro v. Solomon*, 42 N.J. Super. 377 (App. Div. 1956).

B. Where the Contract Prohibits Changes without Written Authority

Since this contract contains a provision that the owner shall not be liable for extra work unless he/she has authorized it in writing, the builder cannot recover for services rendered or materials supplied in addition to those specified in the contract unless the builder proves that there has been a new and subsequent contract that he/she be paid for such additional work or materials (extras). This subsequent contract may be an oral agreement or may be implied from the conduct of the parties. It must show an agreement by the parties that the extra work was to be done and an agreement by the owner to pay for it.

Cases and Commentary:

Both cases and texts have spoken in terms of waiver of the provision requiring extras to be authorized in writing. 13 *Am. Jur.*2d, Building Contracts, Sec. 22 p. 24. However, the issue involved is whether there was a subsequent contract for adequate consideration covering the work. 3A *Corbin on Contracts*, Sec. 756, p. 505 (1963). The governing rule is that, “parties to an existing contract may, by mutual consent, modify it.” *Bohlinger v. Ward & Co.*, 34 *N.J. Super.* 583, 587 (App. Div. 1955), *aff’d* 20 *N.J.* 331 (1956). The parties cannot be prevented from entering into a new contract, written or oral, by a provision that a subsequent agreement not in writing shall not be binding. *Headley v. Cavileer*, 82 *N.J.L.* 635 (E. & A. 1912); *Guizzette v. Katrek*, 124 *N.J.L.* 461 (Sup. Ct. 1940); *Lord Construction Co. v. United States*, 28 *F.2d* 340 (CA 3, 1928); *In Re Fleetwood Motel Corp.*, 335 *F.2d* 863 (CA 3, 1964); *Sheyer v. Pinkerton Construction Co.*, 59 *Atl.* 462 (N.J. E. & A. 1904); *Denoth v. Carter*, 85 *N.J.L.* 95 (Sup. Ct. 1913); *Rizzolo v. Poysher*, 89 *N.J.L.* 618 (E. & A. 1916), *Fortunato v. Cicalese*, 93 *N.J.L.* 461 (E. & A. 1919).

In *Homeowners Construction Company v. Borough of Glen Rock*, 34 *N.J.* 305, 316-17 (1961), the Court required clear and convincing proof when a party alleges oral modification of a written agreement that expressly prohibits such oral modification.