The Importance Of Knowing and Complying With Your Contract’s Notice Provisions

Notice provisions can vary; it’s critical you review for every contract

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When times are good and projects are going smoothly, everyone is happy, but the situation can change quickly on construction projects. Owner directives, schedule changes, weather issues, supplier problems and unforeseen site conditions can rapidly develop into issues that cause significant delays and increased costs. Knowing how to deal with these issues, including when and what notice your contract requires, can be critical to later pursuing recovery for contractual entitlements. However, the time to familiarize yourself with your contract’s specific notice requirements should be well before you are affected by any of these problems at your job site. Understanding the requirements of your contract’s notice provision before problems arise is vital to preserving your rights for unforeseen impacts that may affect your work.

While it may seem simple, many contractors fail to comply with contractual notice requirements or to provide any notice of potential claims when they arise, putting recovery for valid claims at risk. This article serves to outline key contract notice issues, describes how differently courts sometimes decide notice-related disputes and provides suggestions for best practices when dealing with contractual notice issues.

Key issues related to notice provisions
Contract provisions regarding notice are key parts of construction contracts that generally require notice from the contractor to the owner or higher-tier contractor when the lower-tier contractor believes there is an entitlement for a change order, extra costs or an extension of time. However, contracts can require different forms of notice and have different timing requirements for notice on different issues. Notice provisions, and compliance with these provisions, are frequently a basis for disputes. As such, particular attention should be paid to notice provisions regarding changes to work, potential claims and relief from delays. Compliance with notice requirements is often a threshold condition that must be fulfilled in order to preserve potentially meritorious claims.

Generally, the more that can be gained or lost, the greater the contractual requirements relating to notice. The most stringent notice requirements often relate to notice of potential claims for additional time, additional money or other contract adjustments. Notice provisions will vary from contract to contract, and it is important to review both form and customized contracts for the following details:

- **Time limits for providing the notice.** The time in which notice must be provided can vary, but commonly contracts require notice within seven to 21 days, and sometimes as many as 30 days, or as short as 48 hours. Knowing the notice deadlines for each project is critical. Disputes often arise as to when a contractor was aware of a potential claim and when the time limit for giving notice began to run.

- **Details for the form and required content of the notice.** Contracts can vary on the level of detail that is required for a claim and whether notice is a single or multi-step process. Some notice provisions initially require only bare bones notice, with details and supporting documentation provided within a specified time period after the original notice. Other contracts can require much more specific information in the initial notice. Details regarding what supporting information is required, and when, may be key to a later determination that the contractual requirements were met. While it may be onerous, knowledge that detailed information must be compiled and provided in a short time period is critical before a problem arises so that the contractor is prepared to meet the requirement (by having heightened record keeping processes, etc.).
Who the notice must be sent to. It is common in construction contracts for a specific person or representative to be designated as the recipient of any formal notice required by the contract. Be aware of who that person is and the process for changing the designated recipient.

How the notice can or must be sent (certified mail, courier, fax, email, or personal delivery). Generally, most contracts require that notice be in writing; however, disputes have arisen over how “in writing” is defined. Arguments have been made, at times successfully, that project documentation (such as meeting minutes and project schedule updates) were sufficient written notice of a claim versus a more typical formal claim letter. Additionally, in this era of electronic communication such as emails and text messages, it is important to avoid disputes over what “in writing” means and whether notice can be given electronically, by physical mailing or both. For example, to address the realization of the impact of electronic correspondence between modern construction stakeholders, the American Institute of Architects recently updated many of their form contract documents to allow for certain notices to be sent electronically, if the parties agree at the time the contract is drafted. For example, the A401 – Standard Form of Agreement Between Contractor and Subcontractor, included these changes in Section 14.4, but maintained the requirement that a “Notice of Claims” was only effective if sent by certified or registered mail, or by courier with proof of delivery.

Jurisdictional differences in notice disputes
For contractors that work in multiple states, it is not safe to assume that the manner in which notice provisions are applied by one state’s courts will be the same as in other jurisdictions (or at times other courts in the same state). Decisions on compliance with notice provisions are often fact specific and some states are stricter than others when it comes to enforcing contractual requirements.

Courts in Florida, New York, Washington, Ohio, Massachusetts and New Jersey have at times found that contractors can be completely barred from recovery if the contractor failed to exactly comply with every requirement of the operable notice provision. For example, in the recent Massachusetts case of Endicott Constructors Corp. v. E. Amanti & Sons, Inc., when Endicott could not provide evidence it had given proper notice within seven days as required by the contract for an extended time claim, the court confirmed that generally a failure to strictly comply with the notice provision should preclude all relief sought by the claim. As a result, the court granted summary judgment against Endicott and denied the extended time claim. If working in states that adopt this strict approach to compliance, extra care should be taken to avoid a similarly harsh result.

On the other hand, in states like California, Alaska, Pennsylvania, Rhode Island, Virginia and Connecticut, courts often take a more nuanced approach and apply standards based on prejudice, fairness and equity. In these states, a contractor’s substantial compliance with the notice provisions will often be enough to avoid a claim being barred, if the contractor can show
the other party is not prejudiced and had actual or constructive notice of the claim and the facts underlying the claim. However, even in these states, a complete failure to give notice can be fatal.

**Best practices and key takeaways**

Because of the harsh results that can follow a failure to comply with your contract’s notice provisions, it is very important that these provisions are reviewed before contracts are signed. Many contractual notice provisions are complex, confusing and poorly drafted. Later disputes can be avoided if the parties agree to reasonable and clear notice provisions when entering into the contract.

Additionally, procedures should be put in place to ensure timely compliance with notice requirements. For contractors working on multiple projects simultaneously, the project personnel responsible for tracking and giving notice for potential claims must be aware of what the notice requirements are for each project and not just assume that notice requirements are the same across projects or contracts. If your contract does not have a specific timeline for giving notice of claims, it is best to serve notice as soon as the claim or impact is realized. This reduces the chances for later argument by the other side that a delayed notice somehow prejudiced them and impaired the ability to resolve a problem in real-time.

If unsure whether an incident is a claim or triggers a valid change that requires notice, it is best to give notice of the potential impact. While one does not want to be overly aggressive and constantly providing notice, if the basis for a claim or change is discovered to be wrong, the notice may be withdrawn. However, if notice was not given, and the issue becomes significant, the possibility of a valid claim being rejected for failure to give notice is a real risk.

Notice should be given by formal writing, although an electronic writing may be sufficient if agreed upon by the parties. If you prefer a certain form and method for giving notice, make sure it’s incorporated into your contract. It is much easier to later assert that a formal notice was valid when pursuing a claim rather than trying to rely on other project documents (meeting minutes, dailies, RFIs) to prove that the other party was on notice of your claim. A formal, well-documented, contemporaneous paper trail increases the likelihood of prevailing down the road.

Finally, if all else fails and a significant dispute of sufficient value arises, consultation with an experienced construction attorney can assist with pursuing a claim that includes a dispute about the adequacy of notice to a more successful resolution. ▼

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**References**


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