



Jenifer B. Minsky
jminsky@pecklaw.com

You Are on Notice: Failure to Comply With Contractual Notice Provisions Can Be Fatal to Your Claim

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Imagine your firm is the construction manager on a multi-million-dollar project. At the end of the project you are five million dollars out-of-pocket. You have a stack of claims for additional and extended work which led to the overrun, payment for which will easily cover the shortfall. However, the owner refuses to compensate you until you can satisfactorily answer their inquiry: “Where are the notices that are expressly required under the terms of the contract?” You had a good relationship with the owner’s field representative who was aware you were performing the work and understood that your company was compiling

claims. The once cooperative owner, now suffering financial restraints of their own, is resolute in their refusal leaving you no choice but to expend substantial sums of money to litigate the claims, the success of which is far from assured.

What Contract Language Can Be A Trap For An Unwary Contractor?

While courts are generally hesitant to order a forfeiture and some courts disfavor condition precedents, a judge’s hands may be tied by particular contract language requiring the strict enforcement of notice requirements. Such provisions may include: (1) an explicit clause that there be precise compliance with notice requirements; (2) express consequences for noncompliance (e.g., if the required notice is not provided the claim will be waived, forfeited or abandoned); (3) a statement that the notice requirements are a condition precedent to recovery; (4) language such as “if,” “provided that,” “or else” or “on condition that” (e.g., the owner shall review the claim, “provided such claim” was received within the applicable notice period) or (5) prohibition of any waiver of the notice requirement. To the extent the notice provision includes such language, a contractor can be without recourse even when the owner has actual knowledge of the claims or cannot show prejudice by the lack of notice.

In one particularly egregious federal case against the City of New York case, a contractor’s claims for approximately \$16 million were dismissed solely as a result of the contractor’s failure to strictly comply with contractual notice requirements, even though the owner had actual notice of the claims.¹ The contract at issue obligated the owner to make an equitable adjustment in the contract price if they issued a change order which caused the contractor to incur additional costs or increased the contract time. It also required that the contractor, as a prerequisite to claiming an equitable adjustment, submit a written statement of the general nature and monetary extent of each claim within thirty (30) days of receipt of a change order. After the parties were unable to agree on a lump sum for numerous change orders the contractor sued. The court examined the documents that the contractor claimed constituted the required notice and found most were untimely and none adequately informed the City of “the monetary extent” of the damages claimed. It ultimately rejected the contractor’s claims on the grounds that the court could not ignore the parties’ contractual agreement that the contractor “comply strictly” with the notice requirements of the Changes Clause.

In another New York case, a masonry subcontractor was denied over \$3 million in claims, a nearly 50% increase in their subcontract price, because they failed to provide notice of acts or omissions causing delay within five (5) days.² The court found the requirement to be a condition precedent to recovery of delay damages because the contract specifically provided that the failure to comply would constitute a waiver of the subcontractor's damages claim.

Indeed, courts in numerous states have rejected claims for additional time or money when the contractor has failed to strictly comply with notice requirements under similar circumstances. For instance, in cases before the Washington State Supreme Court and the Court of Appeals of Minnesota³, contractors lost claims for additional expenses or time because the contracts stated that by failing to follow the contractual notice procedures, the contractor waived any claim for additional work or time. The courts rejected the contractors' arguments that the owners' actual notice excused them from strict compliance with the notice provisions.

Even if a court might ultimately accept an argument that strict compliance with the notice requirements was unnecessary despite the language of the agreement, or because the owner had actual notice of the claims or was otherwise not prejudiced by the lack of required notice, success may require an expenditure of years and potentially millions of dollars litigating the matter.

How Can a Contractor Avoid a Loss Due to Noncompliance?

The answer to this question is simple in theory, but not necessarily in practice. You, as the contractor, must strictly comply with each one of the potentially significant notice and reporting requirements in your contract. For instance, a construction contract often includes different notice requirements for adjustments to the contract sum as opposed to the project schedule, including distinctly different time frames for providing notice and various reporting and follow-up obligations. For instance, you may need to give initial written notice of a claim within days of discovery or knowledge of same and then follow-up within a certain amount of time with a written supplement to the notice of claim. Just by way of example, the ConsensusDocs 200 Standard Prime Agreement and General Conditions provides at Section 8.4:

CHANGES NOTICE Except as provided in §6.3.2 and §6.4 for any claim for an increase in the Contract Price or the Contract Time, Constructor shall give Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after Constructor first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Thereafter, Constructor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. Owner shall respond in writing denying or approving Constructor's claim no later than fourteen (14) Days after receipt of Constructor's claim. Owner's failure to so respond shall be deemed a denial of the claim. Any change in the Contract Price or the Contract Time resulting from such claim shall be authorized by Change Order.

In addition, recovery for certain types of work, such as that related to the discovery of hazardous materials or differing site conditions, often has additional requirements, including notice immediately upon encountering the materials and prior to making a notice of claim. In addition to notice of changes and claims, the vast majority of construction contracts also require notices for approvals, routine events,

information and disputes, each of which may also have specific reporting requirements and which can have serious consequences for noncompliance.

While compliance may be difficult, it is far simpler and less costly than litigating the issue after the owner refuses to honor your claims. This can only be accomplished by a thorough review and understanding of each notice provision before the first shovel enters the ground and constant monitoring during the project to ensure that notice is being timely sent. In order to assist contractors with this task Peckar & Abramson has developed ProjectNotice® 3.0, a fully web based interactive tool in which attorneys that are well versed in construction law and construction administration and have an in-depth knowledge of your specific contract requirements, prepare, in advance, the notice letters required under your contract and provide instructions as to when and how to send each of the letters. With ProjectNotice 3.0® you can house all your own project documents on a dedicated website, accessible from almost anywhere, and utilize numerous features that make working with those documents and communicating among members of your project team significantly faster and easier. Contractual compliance is achieved efficiently, minimizing the time your project staff spends on project administration and reducing your company's potential exposure due to missed notice deadlines.

¹ *Perini Corp. v. City of New York*, 182 F.3d 901 (2d Cir. 1999)

² *Morelli Masons, Inc. v. Peter Scalamandre & Sons, Inc.*, 294 A.D.2d 113, 742 N.Y.S.2d 6 (2002)

³ *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wash. 2d 375, 78 P.3d 161, 169 (2003); *GEH Const., Inc. v. Suburban Hennepin Reg'l Park Dist.*, No. CX-98-1675, 1999 WL 171502, at *3 (Minn. Ct. App. Mar. 30, 1999)

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