Please Take Notice

Failure to adhere to contractual notice provisions could be devastating.

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Most litigation attorneys familiar with New York Civil Practice are familiar with the phrase, "Please take notice." These words appear at the beginning of many standard legal filings as a formality. They have no special significance and are arguably superfluous. In standard construction contract documents, however, notice provisions are **not** a formality, and they are anything but superfluous. This month we take a closer look at contractual notice requirements, as well as the consequences of failing to abide by them.

AIA Document A401-2017

We begin our analysis with a look at the AIA Document A401-2017, Standard Form of Agreement Between Contractor and Subcontractor. This AIA Document was just released in April 2017 as the latest form subcontract issued by the AIA in series of decennial updates. Section 5.3 (in Article 5, "Changes in the Work,") provides:

The Subcontractor shall make all Claims promptly to the Contractor for additional cost, extensions of time and damages for delays, or other causes in accordance with the Subcontract Documents. A Claim which will affect or become part of a Claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such Claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's Claim must be made. Failure of the Subcontractor to make such a timely Claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

This provision is all about time. It is critical to the subcontractor since it includes temporal requirements that must be satisfied to prosecute claims – typically for extra work via change orders – for additional compensation.

Tucked away in the middle of these requirements is the all-important notice provision: "Such Claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's Claim must be made." This sentence has a number of implications.

First, it acknowledges that any claims made by a subcontractor against a general contractor will be passed through by the general contractor in a claim made against the owner. Therefore, the subcontractor must be familiar with the prime contract, including, among other things, its notice provisions for changes in the work and claims.

Second, this notice provision urges diligence by the subcontractor that wishes to submit a claim: check when the general contractor's claim is due to the owner and be sure that your claim under the subcontract is received by the general contractor not less than two working days before that deadline. Thus, the subcontractor must ensure that its claim is received by the authorized representative of the general contractor (identified in the subcontract) in the manner provided by the subcontract (e.g., fax, mail, e-mail, hand delivery, etc.).

If the subcontractor fails to meet the foregoing notice requirements, the subcontractor shall be bound "to the same consequences as those to which the Contractor is bound" (as set forth in the prime contract). These consequences could very well include forfeiture of the entire claim for extra work.

An example of failing to give notice

None of this is speculation; it is the real deal as evidenced by a recent decision from New York's intermediate appellate court. *See Ridley Electric Company, Inc. v. Dormitory Authority* of the State of New York, No. 524214, 2017 WL 3175980 (N.Y. App. Div. July 27, 2017).

In May 2006, Ridley Electric Company Inc. ("Ridley") entered into a $5 million contract with the Dormitory Authority of the state of New York ("DASNY") to act as the prime contractor for electrical work in the construction of the New York State Veteran's Home. Ridley had trouble finishing its work due to ceiling design issues. Ridley's work was substantially complete by September 2008, and the entire project was substantially complete by October 2008. In March 2009, Ridley sought additional compensation for extra work that it allegedly performed relating to the ceiling. Eleven months later, DASNY agreed to compensate Ridley a small amount for labor and denied the remainder of Ridley's claims.

Ridley brought a breach of contract lawsuit against DASNY seeking damages for the unpaid contract balance as well as delay damages. DASNY answered the Complaint, asserting, among other things, that Ridley failed to comply with the contractual notice and reporting requirements. Ridley moved for summary judgment on liability; DASNY cross-moved for summary judgment. The trial court denied Ridley's motion, granted DASNY's cross-motion and dismissed the Complaint. Ridley filed an appeal with the Appellate Division.

Significance of notice provisions

The Appellate Division made quick work of Ridley's claims. First, it emphasized the importance of notice and reporting requirements. They are "'common in public work projects, provide public agencies with timely notice of deviations from budgeted expenditures ... and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds.'"

Ridley, 2017 WL 3175980, at *2. In furtherance of these "important public policy considerations," contractual notice provisions "'must be literally performed,' and a party who has failed to do so cannot prevail on a breach of contract claim."

Under the parties' contract, if Ridley believes that it has been ordered to perform a task that should be considered extra work (i.e., outside the scope of work of the parties' agreement), Ridley is required to notify DASNY of its extra work claim in writing within 15 days after being ordered to perform the work or beginning performance, whichever is earlier, and to submit documentation, of, amount other things the anticipated cost of the extra work within 30 days. *Id.* at *1.

The parties' contract further provides that failure to comply with these notice and reporting requirements is deemed to be "[a] conclusive and binding determination on the part of [Ridley that the work in question] does not involve extra work and is not contrary to the terms and provisions of the [c]ontract" and, also, "[a] waiver … of all claims for additional compensation or damages as a result of [the work]." *Id.*

Ridley sought additional compensation for the "extra work" that it performed in connection with the ceilings. Both parties agree that Ridley became aware of the ceiling issue soon after it commenced work in May 2007. Ridley concedes that it did not provide DASNY with timely notice of its claims as required by the parties' contract. However, Ridley argues that DASNY waived the notice and reporting requirement because DASNY knew that Ridley was performing the extra work and DASNY offered to make partial payment of the extra work (11 months after Ridley made a claim).

The Appellate Division rejected both waiver arguments, stating a fundamental rule of waiver: "A party's intention to relinquish a known contractual right must be 'explicit, unmistakable, and ambiguous." *Id.* at *3

Examining all the documents on the record before it, the Appellate Division found that DASNY did not waive the notice and reporting requirements in the parties' agreement. As a result, the Court affirmed the dismissal of Ridley's lawsuit.

Takeaways

The concepts presented here are straightforward: (1) know your notice requirements; (2) know the prime contractor's notice requirements; and (3) be sure to comply with Nos. 1 and 2. While nothing presented here is complicated in theory, things often take a very different turn in practice. Among other things, subcontractors fail to obtain, read and understand the prime contract; subcontractors fail to take action within the time requirements of the subcontract; and/or subcontractors fail to submit claims for extra work properly – in the required format, to the proper person and/or on time. These are just a sampling of the "wrong turns" that subcontractors could take during a construction project – wrong turns that could have very expensive consequences (i.e. unpaid claims) at the end of the day. In short, don't be a wayward subcontractor. Please take notice and more importantly, follow your notice provisions! ●

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