



Contractual Notice Provisions: Why Timing Is Everything



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Changes happen on every construction project. When these changes occur, contractual notice provisions require contractors to take affirmative steps to preserve a claim for additional time or money related to the project. Contractual notice provisions can vary greatly, and failure to strictly comply with a contractual notice provision can result in a waiver of claims and nonpayment. Notice provisions are intended to give owners the opportunity to decide how to cost-effectively deal with unplanned conditions on a project, but all too frequently they become a technical defense against payment to contractors.

There are various timing, form, and substance considerations to be aware of with notice provisions:

How Soon Must Notice Be Provided?

Understanding the timing of when notice has to be provided is the first step in preserving a claim. Some contracts require notice be provided in as short as a 48-hour window after the event impacting the project occurs. Other contracts allow for 30-day notice. The AIA A201 standard form contract strikes a balance and requires notice of a claim to be provided within 21 days of the event giving rise to the claim or discovery of the claim. Some contracts, particularly on road projects, have multiple levels of notice requirements.

What Type of Notice Is Required?

The form of notice varies depending on the terms of the contract. Many contracts require notice to be provided formally or in writing, but what constitutes “in writing” can vary. Submission via certified mail may be required. Email is not always sufficient for written notice. Discussion of a claim with an owner or general contractor may not satisfy the notice provisions in these circumstances. Certain contracts may require specific information to be submitted with a claim, such as the amount of the claim.

This is yet another potential trap in the claim submission process. Judges and arbitrators can strictly enforce notice provisions with harsh results. A contractor may be denied payment for a legitimate changed condition, of which the owner was fully aware, simply because notice was not provided in the proper form.

Who Receives Notice?

To whom notice must be provided varies depending on the contract. For example, in an AIA contract, notice may need to be provided to the owner, the architect, and the initial decision-maker, as these individuals are defined in the contract. Other contracts may only require submission to the owner or general contractor. The contract should outline the submission process, including the name of the individual or individuals to whom notice must be provided.

Conclusion

The time to become familiar with the contractual notice provisions is not after a claim arises — waiting too long to provide notice can lead to waiver of a claim. Consider having your attorney review your contracts before execution to propose amendments to the notice provisions if they are unduly restrictive or impose obligations that cannot be followed in the field. Being familiar with notice provisions at the beginning of the construction season is a best practice that helps contractors get paid fairly for their work.

If you have questions related to contractual notice provisions, please contact your Moss & Barnett attorney.