BEST PRACTICES

Contractor Beware

do not let notice provisions doom your next project

By Chris Hoskins and Danielle Waltz

Timely and effective communications among the project owner, contractors, and others are hallmarks of successful construction projects. Nearly every contract will be amended to reflect some changes in work and schedule. Construction contracts have long required timely notice of claims so the project participants can efficiently mitigate and resolve changes. The terms of these notice and waiver provisions vary and contractors must pay careful attention to them to avoid a bad result. Owners, especially in public projects, may impose rigid and arduous notice provisions on contractors that require strict compliance. In addition, even when notice and waiver claims are reasonable, they sometimes do not apply to all change request (e.g., owner-issued changes). Courts vary greatly in how they handle notice requirements in these instances.

ENFORCEMENT NUANCES

Some jurisdictions enforce notice and waiver provisions strictly. For example, in Kentucky, the Supreme Court held that that Kentucky's Fairness in Construction Act permits parties to enforce formal claims notice provisions that void claims not submitted in strict conformance with contract requirements. *Louisville and Jefferson Cnty. Metropolitan Sewer District v. T+C Contracting, Inc.*, 570 S.W.3d 551 (Ky. 2018). In T+C, Kentucky's highest court required strict compliance even though the owner knew the work was being done because the owner ordered it (the issue was who damaged the pipes that the contractor had to repair). The owner did not claim that it was unable to document the costs incurred to perform the work or that contractor had sought recovery of costs not incurred. The owner presumably could document the dispute and the work performed before the work ever began, because the owner ordered the work. Kentucky is not the only state to put the equities aside and hold that one who prays for rain should be ready to deal with the mud. *See e.g., Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wash. 2d 375, 380, 78 P.3d 161, 163 (2003) (Washington state court held that failure of "[f]ull compliance by the Contractor" of the notice provision resulted in waiver of claims and that 'actual notice' is not an exception to contract compliance").

Other jurisdictions limit strict enforcement, honoring substance over form. Although there are some nuances, the federal government and certain states have held that strict enforcement may be excused if the owner cannot prove lack of actual notice or that the delay in notice prejudiced its rights. For example, a federal court has held that strict compliance was too "severe and narrow" and that it would be "out of tune with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses are not applied too technically and illiberally where the Government is quite aware of the operative facts" *Hoel-Steffen Const. Co. v. U.S.*, 456 F.2d 760, 767–68 (Ct. Cl. 1972). Some state courts have also held that the strict compliance requirement is not appropriate in circumstances that would lead to an absurd result. For example, a Pennsylvania court held that a provision requiring a contractor to make a claim for damages "within 21 days after the event giving rise to the claim or after the claimant first recognizes the condition" was not required because damages could only be quantified at the end of the project and the owner had notice of claims. *James Corp. v. N Allegheny Sch. Dist.*, 938 A.2d 474, 485 (Pa. Commw. Ct. 2007); see also City of Meridian v. Petra Inc., 154 Idaho 425, 299 P.3d 232 (2013) (lack of timely notice and pre-approval of additional work did not bar claim "where the city specifically requested a change, it is obvious that it approves of the change"); *H.E. Contracting v. Franklin Pierce Coll.*, 360 F. Supp. 2d 289, (D.N.H. 2005) (contractor may recover costs for additional work where "the owner has actual knowledge of the additional work and is not prejudiced by the contractor's failure to comply with the writing requirement.").

Even in jurisdictions that limit strict enforcement, strict compliance may still be required where the notice provision is a

"condition-precedent type" that expressly sets forth the consequences of failing to strictly comply with the notice provisions. *A.H.A. Gen. Constr., Inc. v. New York City Hous. Auth.*, 92 N.Y.2d 20, 31, 699 N.E.2d 368, 374 (1998). Further, any unreasonable delay in providing notice may result in not recovering because it provides the owner with a strong argument that the claim would be prejudicial regardless of the state's approach on compliance of notice terms. *Weigand Constr. Co., Inc. v. Stephens Fabrication, Inc.*, 929 N.E.2d 220 (Ind. Ct. App. 2010) (extra work claim untimely because written notice of claim was submitted 11 months after the subcontractor received drawings).

CLOSING THOUGHT

So, what should contractors do to avoid a potential mess caused by arduous notice and waiver provisions?

- Consult with an attorney on the terms of the contract, including the notice provisions, and the applicable current law. The law is ever evolving.
- Allow an attorney to negotiate any unfair or unenforceable provisions. One accepted revision to the contract could open the door for others.
- Assuming lack of leverage to negotiate the terms, analyze whether the risks are worth it.
- Upon accepting a project, put a protocol in place that conforms with the notice requirements in the contract, even if not in a strict compliance state.
- Ensure that, in addition to conforming to the notice requirements, these issues are also addressed in meeting minutes and other written correspondence with the owner to establish an appropriate paper trail.
- Follow that protocol for the duration of work on the project.
- Consult with an attorney and evaluate the notice provisions in any subcontracts. ■

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