

# Delay Claim Preclusion for Failure to Meet Contractual Notice Provisions— An Ominous Trend for Contractors?

By Christopher S. Drewry



When a contractor encounters delays on a project, one of the first prerequisites in response thereto is to determine the notice requirements under the governing contract documents for providing the appropriate claim notice. In other words, what notice must be submitted, to whom must it be submitted, and when?

Typically, by express contract provision, contractors are required to give timely, written notice whenever an excusable delay occurs. Too often, however, the notice provisions are ignored or glossed over by the affected contractor. What if the contractor fails to furnish notice, or is late in doing so? How will a court view its noncompliance? Ultimately, the answer largely depends on the jurisdiction as courts generally enlist two approaches to noncompliance: (i) strict compliance; or (ii) an equitable actual knowledge/no prejudice approach.

## COURT INTERPRETATIONS

**Strict Compliance Approach:** In strict compliance jurisdictions, a contractor's failure to meet the express contractual notice requirements may

very well forfeit its entitlement to additional time and/or costs for delay. In these jurisdictions, even substantial compliance with express notice provisions (almost always asserted as a defense to claim preclusion) and/or the owner's actual knowledge of the delay may not preserve the claim. See e.g. *Razorback Contractors of Kansas, Inc. v. The Bd. of Co. Comm. of Johnson Co., Kansas*, 227 P.3d 29 (Kan. 2010) (claim barred despite the owner's/general contractor's actual knowledge of the claim events and where the owner had given more time for the same delay events); *Starks Mech., Inc. v. New Albany-Floyd County Consol. School Corp.*, 854 N.E.2d 936 (Ind. App. 2006) (claim barred despite the claimant's timely, ongoing submission of Requests for Information identifying the problem and impact to the work, and the owner's actual knowledge of the delay and consent to the remedial design work).

Further, even verbal notice of a claim and/or written notice of a possible claim have been found insufficient. See *Razorback*, 227 P.3d 29; *American Nat'l Electric Corp. v. Poythress Commercial Contractors,*

*Inc.*, 604 S.E.2d 315 (N.C. 2004). Some courts have cited the purpose of notice provisions, invoking concepts of fairness to distinguish between notice of cost impacts and notice that a claimant is expressly seeking payment of those cost impacts from the general contractor or owner. See *Associated Mech. Contractors v. Martin K. Eby Constr. Co.*, 271 F.3d 1309 (11th Cir. (Ga.) 2001).

**Actual Knowledge/No Prejudice Approach:** Other jurisdictions approach the issue of noncompliance in equitable terms—did the owner or general contractor have actual knowledge of the claim? Were they prejudiced by the lack of notice? In equitable approach jurisdictions, a contractor's failure to meet the express contractual notice requirements will only forfeit its entitlement to additional time and costs if the owner can demonstrate the lack of actual knowledge and that it is prejudiced by the noncompliance. See e.g. *James Corp. v. North Allegheny School Dist.*, 938 A.2d 474 (Pa. Commw. Ct. 2007); *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387 (Fed. Cir. 1987).

## ABOUT THE AUTHOR

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## SO WHAT ARE CONTRACTORS TO DO?

Regardless of the specific court's treatment of the notice requirements in a given jurisdiction, contractors should first identify whether the contract contains any claim notice requirements. Such requirements may be set forth in the front-end Division 1 specifications, general and supplementary conditions, and/or in scheduling, differing site condition, delay and additional cost/time provisions of the contract. They may also differentiate between claims for extra costs, delays, and acceleration. Also important is whether the contract incorporates any other contract documents and, if so, whether those documents have separate requirements for claim submissions. For instance, the flow-down provisions and order of precedence clauses may incorporate additional notice requirements.

Next, the contractor must determine the type of notice that is required and the time within which the submission must be made. At times, this can be a potential obstacle for contractors because it can quickly shift from straightforward to complicated. For example, some clauses have multi-staged notice requirements that require separate notice when the claim event occurs and when the costs are quantifiable, and/or set forth additional requirements for the subsequent claim submission. Other clauses set forth specific requirements to address ongoing delays and require regular updates, often times including regular updates as to the damages incurred.

It likewise is important to identify and comply with the contractual chain of command in order to know *to whom* the claim is to be submitted, be it the owner, architect, construction manager, or someone else. It is imperative, particularly in strict compliance states, that the proper, complete notice (or notices as may be the case) be submitted to the right people, on time. Too often, contractors are forced to rely on partial or substantial compliance arguments to defend noncompliance with notice provisions due to a simple failure to fully understand or appreciate the criticality of those requirements, or the mistaken belief that so long as the owner has actual knowledge of the claim, the notice provisions are relatively superfluous.

Finally, the notice may require a summary of the causes of the claim as

well as the estimated or actual costs, and the delay duration. To provide this information timely requires continuously updated job logs, daily reports, progress meeting minutes, schedules, job cost reports, and other relevant project documentation to properly track the delay causes and costs.

## CONCLUSION

For some jurisdictions, the cases sound a clear warning: Only by compliance with the notice requirements of the contract documents can a contractor help ensure that if (and when) delays are encountered it can secure monetary as well as schedule relief. ■

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