What Makes a Good Notice of Claims Under a Construction Contract?

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We always stress and counsel our construction clients to send timely notice of claims as required under the Contract. Notice requirements may seem rather pedestrian, but they can be outcome-determinative on large impact items. Therefore, read the general conditions, and know time limits and circumstances when notice is required. Knowing when to send notice is half the battle; knowing what to say can be equally impactful.

There are two important "rules" to follow whenever notice is required under your contract.

1.) Regardless of the issue triggering the notice requirement, send *written* notice. Some provisions require "written" notice, but often the contract is silent as to the form. There can be no argument whether you gave notice if it is in writing. Give some thought to proving delivery of the notice. Consider mailing the notice by certified or registered mail return receipt requested. If sending the notice electronically, ask the recipient to acknowledge receipt of the email, or "tag" your email by selecting the "delivery receipt" and "confirm read" options before hitting send.

2.) Follow the contractually required manner of service of notices. Electronic notice may not be sufficient. Surprisingly, many form contracts are silent on whether electronically submitted notices are permitted. For instance, A201 General Conditions § 1.6.1 expressly allows for electronic notice. However, if a contractor is submitting a claim for additional costs or time then § 1.6.2 provides a Notice of Claim must be delivered by certified or registered mail or courier. It does not reference electronic notice of claims. Before you sign a contract, be certain the agreement contains communication protocols appropriate for the project. If the agreement is silent on electronic notice, and such delivery

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method is desired, then draft a modification that clearly defines how notices may be given and to whom they must be sent.

The AIA A201 General Conditions, the most commonly-used construction contract document, contain numerous notice requirements. For illustration purposes, we focus here on the instances where notice is required by A201 General Conditions. These provisions may not be the same for your contract, so be certain to review your contract. Yet, this discussion will hopefully make you aware of situations which are likely to arise on your project.

Notice of Concealed or Unknown Conditions

On a public works project, a contractor who encounters a differing site condition ("DSC") must give the Engineer written notice before disturbing the conditions, stop work, and allow the Engineer to investigate. A private project using A201 General Conditions requires in § 3.7.4 that the contractor promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. Apparently, a contractor may disturb the conditions for no more than 14 days and still have a DSC claim if it provides notice within that period.

Be certain site superintendents understand the importance of providing prompt written notice under these circumstances. The written notice should identify the location of the suspected DSC and request the Architect investigate and determine that the conditions differ materially from those indicated in the contract, and materially impact the contractor's cost of, or time required for, performance of any part of the Work. Your superintendent should also independently gather and preserve documentation and information concerning the DSC in the event that you need to submit a claim and supporting documentation for the same. They should photograph the condition up close, and from an angle that includes location and proximity references, which may be included with the notice.

Minor Changes in the Work

§ 7.4 authorizes the Architect to order minor changes in the Work provided the changes do not impact the Contract Sum or Contract Time. If the Contractor believes the proposed change will affect the Contract Sum or Contract Time, the Contractor "shall notify" the Architect and "shall not proceed" to perform the change in the work. Presumably, the issue would then be submitted under the Dispute Resolution provisions, or the Owner could issue a Construction Change Directive, albeit by doing so the Owner acknowledges the Contractor is entitled to an adjustment in the Contract Sum or an extension of the Contract Time under § 7.3. The "do not proceed" requirement gives the Contractor leverage and the Owner incentive to agree upon any impacts the change has upon the work. Many contractors are hesitant to stop working, feeling the need to maintain progress according to the project schedule, particularly if there are liquidated damages attached to late completion. However, if the Contractor fails to give the required notice to the Architect before proceeding with the ordered change, the Contractor waives any adjustment to the Contract Sum or extension of the Contract Time.

Notice of Claims for Additional Costs or Time

The Owner or the Contractor may assert a claim against the other under § 15.1.3 of the A201 General Conditions. A claim is initiated by "notice" to the other party and the Initial Decision Maker within 21 days after the event giving rise to the claim, or within 21 days after the claimant first recognizes the condition giving rise to the claim. Note, however, that if the contractor is making a claim to increase the Contract Sum, § 15.1.5 requires the contractor to provide notice before proceeding to perform the work that is the subject of the claim. There is no "prior notice" requirement for a time extension, yet prudence dictates notice should be given as soon as an impact on the schedule is recognized.

What should be included in a good written notice?

Let's examine a typical notice to the Owner's field representative:

> *We confirm our site discussions of yesterday, when we notified you that we cannot commence our installation of drywall due to lack of readiness by other trades and subsequent stacking of trades in the work area. This may affect our schedule, and will certainly cause disruption for which we reserve the right to seek costs if necessary.*

Looks good, right? It is a writing documenting what the contractor and field representative just talked about. But imagine having to rely on this notice a year later, as one of the reasons why you finished your work late. The questions which then arise would be:

> *Discussions with whom? What other trades exactly? What is 'not ready'? Which scheduled activity is affected? Is it a controlling work item? What is the actual effect? What is the disruption? "Reserve rights" is a useless term — is the subcontractor asserting a claim or not?*

When viewed through the prism of these questions, you can easily see just how "bad" an apparently "good" written notice can actually be. What seems like a clear and meaningful communication when the daily events are fresh in everyone's minds can prove almost useless when trying to prove your case for delay at the end of an over-run job. What happens if the author of the notice is unavailable during a Dispute Resolution proceeding to provide context and answer these questions? The key to a good notice is a written communication which stands on its own merits to protect you now and in the future.

It is easy to write a good notice letter. Here are guidelines to help craft that letter:

- Each letter should be "self-contained," and therefore, "make sense" to some stranger in two years' time, with little, if any, expensive detective work. Provide the details concerning the event and the contractual section and the factual basis entitling you to the relief that you seek.
- Each letter should confine itself to the simple facts and the concise arguments necessary to comply with the notice provision of the contract, without any expressions of emotion or references to irrelevant side issues.

- Put the “subject heading” at the top of every letter, which will save time “searching files” both during the job and thereafter.
- The letter should be written when this problem is “hot” or “fresh.”
- Emphasize the letter or memo is a “notice.”

Remember, a notice is to advise the Owner of a situation which requires its attention before the budget is exhausted. No one likes last minute surprises, particularly because the Owner likely has several options to resolve the issue if timely advised of the problem. The Owner is entitled to be told the exact nature of the problem and how it came about; the immediate effect on schedule and progress, explaining how the issue affects the critical path of the project; the likely effect on overall completion and any probable cost implications. Let the Owner know of any actual cost effects, if incurred at the time you send the notice. The tone need not be confrontational. Just the opposite. You are providing the Owner or your customer with critical information about a problem which has arisen on the project – a problem it may not be aware of or have considered. In this way, all players will have an opportunity to do something about the problem when it arises. Indeed, this “problem solving” approach is in everyone’s interest.

Should you have questions or comments concerning notice requirements or any other inquiries, please contact the author of this article or your Butzel attorney.

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