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LIMITATIONS ON THE ENFORCEMENT OF NOTICE REQUIREMENTS

Construction contracts typically contain notice requirements. In order for a party to obtain certain remedies or enforce certain rights under the contract, formal written notice must be provided to the other party.

Parties to a contract should always assume that notice requirements will be enforced against them. Competent project administration includes familiarity with and adherence to the notice requirements of the contract. And this information must be possessed by personnel in the field who are in a position to detect occurrences that might trigger an obligation to provide notice in order to preserve rights under the contract.

Even on well managed projects, however, notification obligations are not always met. And while this can be detrimental to a party's interest, there are limitations on the enforceability of notice requirements.

Requirement Narrowly Construed

The failure to comply with a notice requirement can have serious consequences – the forfeiture of rights under the contract. For this reason, courts will narrowly construe notice provisions, applying them only to the occurrences expressly delineated in the contract.

A 20-day notice of claim provision in the AIA General Conditions applied only to claims for extra work. It did not apply to claims for compensable delay because the clause entitled "Delays and Extensions of Time" did not contain a notice requirement. *Osolo School Buildings, Inc. v. Thorleif Larsen & Son of Indiana, Inc.*, 473 N.E.2d 643 (Ind.App. 1985); **CCM** May 1985, p. 2.

Another written notice requirement in the AIA General Conditions, the owner's notification to the contractor of defective work within one year of substantial completion, was also limited to the warranty clause in which it was found. The notice applied to owner demands that the contractor return to the site and perform corrective work. But failure to give notice did not bar the owner's suit for monetary damages for defective construction. *John W. Cowper Co., Inc. v. Buffalo Hotel Development Venture*, 496 N.Y.S.2d 127 (N.Y.A.D. 1985); **CCM** March 1986, p. 3.

A subcontract requirement for written notice of increased costs within 20 days of an event or occurrence applied to changes in the work, but did not apply to delay claims. *U.S. for Use of Yonker Construction Co. v. Western Contracting Corp.*, 935 F.2d 936 (8th Cir. 1991); **CCM** October 1991, p. 2.

Formality Not Required

Construction contracts frequently specify the form and method of delivery of notices. Courts will not always enforce these requirements, focusing on the substance of the message rather than its form.

A contractor's letter complaining of unanticipated subsurface conditions was a sufficient notice of claim even though it was not labeled as such and did not state

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the intent to seek additional compensation. "Form should not be made superior to substance." *Clark-Fitzpatrick, Inc./Franki Foundation Co., J.V. v. Gill*, 652 A.2d 440 (R.I. 1994); **CCM** May 1995, p. 2.

Similarly, a project owner's letter to its architect stating that the owner "would seek redress from those parties responsible" was a sufficient notice of claim against the architect. *First National Bank of Akron v. Cann*, 669 F.2d 415 (6th Cir. 1982); **CCM** May 1982, p. 7.

A lower-tier subcontractor's Miller Act payment bond notice was deemed sufficient even though it did not include an express demand for payment. It should be noted, however, that not all the federal circuits are in accord with this ruling. *U.S. ex rel. S & G Excavating, Inc. v. Seaboard Surety Co.*, 236 F.3d 883 (7th Cir. 2001); **CCM** April 2001, p. 3.

A contractor's notice of delay was adequate despite the failure to itemize increased costs. The contractor could not be expected to forecast costs it had not yet incurred. *Eagle's Nest Limited Partnership v. S. M. Brunzell*, 669 P.2d 714 (Nev. 1983); **CCM** December 1983, p. 4.

A contractor's proposed alternative design informed the government of a differing site condition and satisfied the written notice requirement of the contract. *Appeal of Roger J. Au & Sons, Inc.*, IBCA No. 1303-9-79 (September 14, 1983); **CCM** November 1983, p. 5.

A lower-tier subcontractor's payment bond claim notification was sufficient even though it was mailed by first class mail instead of the "registered or certified mail" required by a state public works payment bond statute. *Vacuum Systems, Inc. v. Washburn*, 651 A.2d 377 (Me. 1994); **CCM** April 1995, p. 3.

And in a case that defines the outer limit of substance over form, the Virginia Supreme Court ruled that meeting minutes maintained by the project owner's representative could possibly satisfy a statutory requirement for written notice of claim by the contractor. *Welding, Inc. v. Bland County Service Authority*, 541 S.E.2d 909 (Va. 2001); **CCM** May 2001, p. 2.

Actual Knowledge

If a party entitled to notification has actual knowledge of a condition or occurrence, courts sometimes hold that formal notice under the contract would be redundant and is therefore not required.

A contractor failed to give timely written notice of unanticipated subsurface conditions. But the project owner's representative was present at the site and observed the conditions. "There is no reason to deny the claim for lack of written notice...as the purpose of the formal notice would thereby have been fulfilled." *Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer District*, 504 N.E.2d 1209 (Ohio App. 1986); **CCM** May 1987, p. 2.

Similarly, when a project owner's on-site engineer observed a contractor struggling with unexpected soil conditions, the contractor's failure to give timely written notice did not bar the contractor's claim for a differing site condition. *Ronald Adams Contractor, Inc. v. Mississippi Transportation Commission*, 777 So.2d 649 (Miss. 2000); **CCM** May 2001, p. 2.

And when government inspectors observed the actual condition of existing utility lines as soon as the contractor commenced work, the contractor's failure to give written notice did not defeat the contractor's differing site condition claim. *Appeal of Pat Wagner*, IBCA No. 1612-8-82 (May 14, 1985); **CCM** July 1985, p. 5.

Lack of Prejudice

A party with actual knowledge of a condition suffers no harm as a result of lack of formal written notice. There are other situations where, despite lack of actual knowledge, a party is not prejudiced by failure to receive notice

A contractor failed to give notice of a differing site condition and removed the soil in question before the government had actual knowledge of the situation. But expert testimony established that there had been no alternative to removing the soil. The government had not been deprived of other options and had suffered no prejudice. The contractor was allowed to recover despite the failure to adhere to the notice requirement. *Appeal of M & M Builders, Inc.*, PSBCA No. 2886 (May 29, 1991); **CCM** August 1991, p. 4.

A public works payment bond statute required a lower-tier subcontractor to provide timely written notice to the prime contractor of the amount the lower-tier sub was owed by a subcontractor. The notice said the amount was $200,000, but the lower-tier sub later claimed $335,000. The lower-tier sub was allowed to recover the full amount. After being notified of the $200,000 nonpayment, the prime contractor had taken no steps to withhold payment or demand indemnification from the subcontractor. The prime therefore suffered no prejudice as a result of the understated notice. *Blair Excavators, Inc. v. Paschen Contractors, Inc.*, 12 Cal.Rptr.2d 420 (Cal.App. 1992); **CCM** January 1993, p. 8.

Waiver

A party, through its conduct, can sometimes waive the right to enforce a notice requirement. A contract required the contractor to give written notice within seven days of the commencement of any delay. The project owner granted one request for an extension of time despite the contractor's failure to give timely notice. The owner could not subsequently rely on lack of notice to deny another request for an extension of time. *Chaney Building Co., Inc. v. Sunnyside School District No. 12*, 709 P.2d 904 (Ariz.App. 1985); **CCM** March 1986, p. 2.

Finally, a New York court ruled that if a project owner violated the terms of a Changes clause by rescinding written change orders, the owner waived the right to enforce a notice requirement in that clause. *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 661 N.Y.S.2d 213 (N.Y.A.D. 1997); **CCM** November 1997, p. 3.