



Notice Provisions May Stand Between Contractors and Their Damage Claims

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Picture this: An owner hires a contractor to provide construction and engineering services for its upcoming project. The project progresses, and the contractor realizes the flooring specified for the project will not be conducive to the owner's use of the building. At the owner's direction, the contractor substitutes another flooring for the project, more compatible with the owner's use. As a result of this substitution, the project is delayed, and the contractor suffers damages. Later, when the owner refuses to pay the contractor's damages, the contractor is forced to seek retribution from the owner in court.

Importantly, the owner-contractor agreement requires the contractor to give the owner written notice of any delay that could affect the contract price. The contractor has 15 days after it becomes aware of a changed condition to provide the written notice. Despite this provision, the contractor fails to provide the owner with any written notice of the delay. But with the owner's obvious knowledge of the delay, common sense might tell you that a court would never enforce the notice provision. This is not the case. Courts are increasingly requiring that contractors strictly comply with contractual notice provisions, even in situations like the above.

Recently in *SNC-Lavalin American, Inc. v. Alliant Techsystems, Inc.*, the Western District of Virginia faced this exact situation. The contractor strongly urged that the court award delay damages because the owner's actual notice made the contract's written notice requirement unnecessary. However, the court rejected the contractor's argument, holding that the contract's notice provisions were unambiguous. In order to receive damages for delay, the contractor had to give the owner written notice within 15 days after becoming aware of the situation. The provision did not make an exception for actual notice in its written notice requirement. Thus, despite the owner's actual notice, the contractor still should have complied with the written notice procedures.

Although this case comes from Virginia, wise construction parties would heed its warning. Recently, in both published and unpublished opinions, Ohio has upheld similar notice provisions to the detriment of non-compliant contractors. In *Dugan & Meyers Construction Co. v. Ohio Department of Administrative Services*, the Ohio Supreme Court faced a similar situation. The contract at issue required that the contractor request an extension of time in writing. The request had to come within 10 days after the occurrence of a condition necessitating an extension time. The contractor did not comply with the notice requirement, and was forced to argue that the owner had actual notice – much like the contractor in *SNC-Lavalin American*. The Ohio Supreme Court rejected this argument, upholding the unambiguous notice provision.

In summary, these cases tell us that the failure to comply with contractual notice procedures – a seemingly simple mistake – may turn detrimental. More broadly, these cases teach project participants that they cannot sign a contract and forget about it until a dispute arises. Increasingly courts are upholding sticky provisions. Therefore, project participants need to know what is in their contracts. And, more importantly, contractors need to comply with these contracts.