



DID YOU CROSS YOUR t's AND DOT YOUR i's?

THE IMPORTANCE OF COMPLYING WITH CONTRACTUAL NOTICE REQUIREMENTS

By Marilyn Klinger and Andrew Harris

Deep within the general conditions of most standard construction industry contracts lies a provision holding the key to contractors' ability to recover on claims against the owner.¹ These provisions require a contractor to give "timely notice" of a claim. Unfortunately, many contractors fail to appreciate the importance of these claim requirements as they apply to their business.

The rationale behind timely notice arises out of the fundamental fairness of allowing the owner to:

- assess the implications and potential liability for the claim;
- investigate whether the claimed item truly is "extra" to the original contractual undertaking;
- document costs incurred in performance of the extra work; and
- fairly adjust the contract price before memories fade and documents are lost.²

Contractors must understand how these provisions can affect their claims and what they must do to preserve their rights.

IS A CLAIM DIFFERENT FROM A CHANGE ORDER REQUEST?

The answer to this is yes. The change order process has the effect of modifying the terms of the existing agreement. A claim, on the other hand, is a demand or assertion of rights under a contract by one of the parties seeking:

- adjustment or interpretation of contract terms;
- payment of money;
- extension of time; or
- other relief with respect to the terms of the contract.³

Of course, a claim often arises out of the denial of a change order request.

WHEN DOES A CLAIM ARISE?

Whenever a contractor receives notice that the owner has rejected a change order request, the time frame set forth in the contract commences for the assertion of a claim—entitlement to a contractual adjustment.

WHY ARE CLAIM PROCEDURES CRITICAL?

Perhaps the most fundamental principle of contract interpretation is that courts must give effect to the plain and unambiguous language of a contract. The plain language of many construction contracts attempts to establish binding obligations with respect to when the parties must give notice of their claims.

Courts throughout the nation have often held that a contractual claim procedure is a condition precedent to maintaining an

action to recover for those claims at a later time. In *Cameo Homes v. Kraus-Anderson Const. Co.*, 394 F.3d 1084 (8th Cir. 2005), the Eighth Circuit addressed this precise issue. Under the claims process in the general conditions of Cameo's subcontract, Cameo was required to present written notice of any claim to the project architect within 21 days of an event or of the discovery of an event giving rise to the demand. The subcontract stated that the architect's decision was a condition precedent to the right to litigate a dispute. During construction, numerous disagreements arose for which Cameo requested change orders to cover the additional costs. None of Cameo's change order requests was approved.

Without first giving written notice of its claims to the project architect, pursuant to the 21-day requirement, Cameo filed an action in Minnesota federal court against the owner and the general contractor. According to Cameo, the parties had amended the claims process in practice during the course of the construction project, allowing Cameo to submit its change order requests through the general contractor and then having

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them approved after performance of the changed work. Thus, Cameo argued that the submission of change order requests alone satisfied the contractual requirement outlined before that Cameo give written notice of any claims to the project architect before litigation.

The court disagreed and held that Cameo conflated the change order process, designed to modify the terms of the construction contract, with the claims process, designed for the assertion of rights under the existing terms of the contract. Cameo's failure to give written notice to the architect of its claims barred Cameo from bringing litigation on its claims.

Other courts have reached the same conclusion. For example, in *Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988), the contract contained compulsory dual notification mechanism, first to the construction manager and then to the owner; the contractor's failure to abide by the dual notice mechanism barred its claims. Another example is *Mike M. Johnson, Inc. v. County of Spokane* 150 Wash.2d 375, 78 P.2d 161 (2003), in which it was found that the owner's actual notice of a potential claim does not excuse the contractor's failure to comply with mandatory contractual protest and claim provisions, and general notice of a potential claim did not satisfy requirements for specific claims. Also, in *American Nat. Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C.App. 97, 604 S.E.2d 315 (2005), it was found that the subcontractor's 5-month delay in issuing a claim to the owner did not comply with notice provisions incorporated into the subcontract and, thus, claims were barred.

WHAT CAN A CONTRACTOR DO TO AVOID THE TRAP?

First and foremost, every contractor needs to know the notice and claims procedures included in their contract. If a subcontract incorporates the terms and conditions of the prime contract, subcontractors must familiarize themselves with the notice and claims procedures encompassed in the prime contract. From the outset, contractors need to understand what the contract requires. They must establish clear lines of communication to the entities to whom they are to submit change order requests. They must know the time frames for responses to change order requests, claims submittals, responses to claims submittals, and any other notice requirements. Once the project begins, documentation becomes a contractor's greatest ally. Keeping detailed records and logs of change order requests allows a contractor to track when deadlines are approaching for the submission of claims.

With everything occurring on a project, more paperwork is probably the last thing a contractor wants to incur. But when the paperwork makes the difference in a contractor's ability to recover for claims, it pays to take the time to cross the t's and dot the i's of the contractual claim procedure. ♦

1. See, e.g., F.A.R. §52.243-4(b) and (d), AIA A201-1997, Subparagraph 4.3.2.
2. See Bruner & O'Connor on Construction Law (2002), §4.35 Contract "Changes" and "Extras."
3. See, e.g., AIA A201-1997.

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