



*Notice Requirements in
Contracts*

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*Presented by the
Claims Avoidance & Resolution Committee*

Construction Institute
Claims Avoidance and Resolution Committee

NOTICE REQUIREMENTS

Protecting Owner, Designer and Contractor Interests
When Changes Occur

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AGENDA

- Purpose
- Contract Language
- Process
- Applicability
- Forms of Notice
- History
- Case Law
- Judicial Enforcement
- Waiver
- Recommendations

PURPOSE

- Protect Owner, Designer and Contractor Interests
- Allows Owner to Know/Control Its Liabilities
- Provide Mechanism for Contractor to Be Paid
- Ensure Cost and Time Effective Strategies are Developed and Implemented

CONTRACT LANGUAGE

AIA – A201 (1997)

- **Article 4.3.2 Time Limits on Claims.** Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

CONTRACT LANGUAGE

AIA – A201 (2007)

- **Article 15.1.2 NOTICE OF CLAIMS.** Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be **initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.**

CONTRACT LANGUAGE

EJDC – C700 (2002)

- **10.05 Claims**

B. Notice Written notice stating the general nature of each Claim, shall be delivered by the claimant to the Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim.

CONTRACT LANGUAGE

EJDC – C700 (2002) – Continued

Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim).

CONTRACT LANGUAGE

CONSENSUS DOCS

- 8.4 CLAIMS FOR ADDITIONAL COST OR TIME – Except as provided in Subparagraph 6.3.2 and 6.4 for any claim for an increase in the Contract Price or the Contract Time, the Contractor shall give the Owner **written notice of the claim within fourteen (14) days after the occurrence giving rise to the claim or within fourteen (14) days after the Contractor first recognizes the event giving rise to the claim, whichever is later.**

CONTRACT LANGUAGE

AGC-200 (2000)

- **6.3.3 NOTICE OF DELAYS** In the event delays to the Work are encountered for any reason, the Contractor shall provide prompt written notice to the Owner of the cause of such delays after Contractor first recognizes the delay.

CONTRACT LANGUAGE

Federal Acquisition Regulation (FAR) – 52.243-5b(2005)

- **The Contractor shall promptly notify the Contracting Officer**, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.

PROCESS

- DO NOT DISTURB!
- Provide Notice Per Contract
- Allow Owner Investigation
- Engage Technical Experts as Required

PROCESS (Cont'd)

- Determine Existence of Changed Conditions/Validity of Claim
- Develop Strategies to Resolve
- Mitigate Damages
- Monitor Contractor Actual Costs

PROJECT IMPACTS REQUIRING NOTICE

- Delay
- Differing Site Conditions
- Extra Work
- Acceleration
- Claims
- Any Event Involving a Change in Contract Time and/or Cost

FORMS OF NOTICE

- Written – Send to Designated Individual(s)
- Oral
- Meeting Minutes
- Schedule Updates
- E-Mail

HISTORY

- “What will constitute notice is sometimes a very difficult question. It is a general rule, that every case must rest on its own facts and circumstances.”
- *Henneberry v. Morse*, 56 Ill. 394 (1870)

1840 - New York City Public Works Contract

CROTON AQUEDUCT.

ENGINEER OF THE CITY OF NEW YORK

CONTRACT AND SPECIFICATIONS

For Extending the Masonry and Rebuilding the Embankment of the

CROTON DAM.

Articles of Agreement, made and concluded the
in the year eighteen hundred and forty *one* BETWEEN

14th day of *May*
Brown McCallough & Block

1840 - New York City Public Works Contract

And the said contractor hereby agree that _____ will perform the work under this contract as above specified ; but any alterations in the form, dimensions or materials of said work, which may be directed by the said Commissioners or the said Engineer, shall be made by said contractor as directed and required ; and to prevent all disputes, it is hereby agreed, that the said Engineer shall in all cases determine the amount and quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for, and also that the said Engineer shall in all cases decide every question which can or may arise relating to the execution of this contract on the part of the said contractor and his estimate and decision shall be final and conclusive.

It is further agreed, that when the work shall be increased by the enlargement of any part of the same, or by any contingent work, which the said Engineer may deem necessary to facilitate the execution or render the work in any particular point more secure beyond what is contemplated in this contract and the annexed specifications, such increase shall be paid for at the same rate as similar work is herein contracted for ; or if not similar to work herein contracted for, it shall be paid for as an extra item, agreeably to the estimate of said Engineer.

1888 – First AIA Form Agreement

FORM OF CONTRACT

ADOPTED BY THE JOINT COMMITTEE OF THE
AMERICAN INSTITUTE OF ARCHITECTS,
THE
WESTERN ASSOCIATION OF ARCHITECTS
AND THE
NATIONAL ASSOCIATION OF BUILDERS.

This Agreement, made the _____

1888 – First AIA Form Agreement

7th. Should the Contractor be obstructed or delayed in the prosecution or completion of the work by the neglect, delay or default of any other contractor; or by any alteration which may be required in the said work; or by any damage which may happen thereto by fire, or by the unusual action of the elements, or otherwise; or by the abandonment of the work by the employees through no default of the Contractor, then there shall be an allowance of additional time beyond the date set for the completion of the said work: but no such allowance shall be made unless a claim is presented in writing at the time of such obstruction or delay. The Architect shall award and certify the amount of additional time to be allowed; in which case the Contractor shall be released from the payment of the stipulated damages for the additional time so certified and no more. The Contractor may appeal from such award to arbitrators constituted as provided in Article 3d of this contract.

~~8th. The Contractor shall not let, assign or transfer this contract, or any interest therein, without the written consent of the Architect.~~

~~9th. The Contractor shall make no claim for additional work unless the same shall be done in pursuance of an order from the Architect, and notice of all claims shall be made to the Architect in writing within ten days of the beginning of such work.~~

CASE LAW

Owner has a right to know the extent of his liabilities before they are incurred. He has a right to be protected against a contractor voluntarily going ahead with extra work at his expense. The Owner also has a right to be in control his liabilities. Therefore, the law requires his consent be evidenced before he can be charged for an extra.

- Watson Lumber Company v. Guennwig, 226 N.E. 2d 270,276,79 Ill. App.2d.377 (1967)

CASE LAW

The position of the Contractor must be balanced against the Owner's compelling need to be notified of changed conditions or extra work and oversee the costs of this work. The notice provisions are not oppressive or unreasonable. They are dictated by considerations of accountability and sound fiscal policy. The Owner should not be obligated to pay for a claim of additional compensation unless given a reasonable opportunity to ensure there is an accurate determination of the work and cost. The notice requirements constitute a reasonable protective measure to both the Owner and Contractor.

- Blankenship Construction Company v. North Carolina State Highway Commission, 222 S.E.2d 452, 462, 28 N.C. App. 593 (1976)

CASE LAW

- Notice of claim requirements in a public improvement contract is a “condition precedent to suit or recovery.”

Court of Appeals in *A.H.A. Gen. Constr. Inc. v. New York City Housing Authority* (1998)

JUDICIAL ENFORCEMENT

- **Federal** – Owner’s actual knowledge may excuse the Contractor’s failure to comply with the contract notice provisions as it would be redundant. In these cases, the Owner has not been prejudiced by the Contractor’s failure to provide notice.
- **State/Local** – Usually strict enforcement, particularly on public contracts. Statutory requirements in addition to contract language may require filing of notice of claim

WAIVER

Course of Conduct Modifying the Contract

Examples:

- Accepting Oral Notice
- Accepting claims with no notice or after the expiration of the notice period

RECOMMENDATIONS

- Know and Follow the Contract
- Comply with the Notice Provisions
- Timely Resolution and Cost Monitoring
- Seek Legal Counsel When Appropriate



Questions?