

Don't Let Notice Requirements in Your Construction Contracts Go Unnoticed

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Notice as a Prerequisite to Claims under Construction Contracts

Construction projects will be impacted by COVID-19. Although you might not know exactly how your project will be affected yet, you should be aware that you will likely have to give notice in accordance with your construction contract in order to be able to pursue a claim for any impacts.

Notice provisions keep parties up to date on issues affecting a construction project. A notice provision achieves this by defining the specific timelines within which a party must provide notice of a potential claim. Compliance with notice provisions allows parties to assess what is happening on the project and respond with contemporaneously developed solutions as opposed to after-the-fact justifications and (costly) remedies. Ontario courts continue to uphold the importance and value of notice provisions and of protecting parties from defending against surprise after-the-fact claims.

Most contractual notice provisions contain three basic components: timelines for compliance, substantive requirements, and the form of notice. A failure to comply with the specific requirements of any one component may eliminate the claiming party's ability to succeed on a claim.^[1]

The courts have generally treated strict compliance with each component of a notice provision as a requirement for bringing a claim in the construction context.^[2] Construction contracts often impose notice requirements on all parties. However, owners, contractors, and subcontractors may each be subject to different notice requirements depending on the language of the contract.

Despite the fact that there are limited exceptions and excuses that have allowed parties to escape the consequences of non-compliance with a notice period in the past,^[3] these situations are the exception rather than the rule. It is best to treat notice clauses as mandatory and ensure compliance at the time notice is required rather than trying to convince a court that an exception applies after the fact.

Giving Proper Notice: Complying with Timelines

The first component to consider in a notice provision is the timing to submit the notice. Contracts often stipulate a specific time in which a party intending to make a claim must submit its notice. These timelines are often fairly strict and require a party to act quickly once an event that may impact the project occurs.

In the event that a notice period does not prescribe a specific timeline for compliance, owners and contractors should be aware that courts may imply a term requiring that notice be delivered within a reasonable period of time. As a result, anyone thinking about bringing a claim for impacts experienced on a construction project should diligently pursue their contractual rights and provide notice

of their intent to do so as soon as possible.

Giving Proper Notice: Substantive Requirements

In many construction contracts the notice provision will detail exactly what information is required to constitute proper notice. For example, some notice provisions may require that the claiming party set out the cause of the delay and the anticipated time and/or costs required to remedy the delay in order to constitute proper notice.

Where the contract defines substantive requirements for providing notice it is essential that party providing notice strictly adhere to these requirements. In one decision, for example, a court found that a subcontractor failed to meet the contractual requirement of providing “detailed notice” of a claim despite raising the issue with its general contractor in on-site meetings. This was held to be the case even though the subcontractor’s attempts at providing notice were recorded in the minutes of the site meetings.^[4]

Giving Proper Notice: Form of Notice

In addition to the requirements set out above, many construction contracts will prescribe a specific form of notice which must be complied with. In some contracts, this may be as simple as requiring that the claiming party provide notice orally or in writing. In others, the formal requirements may be more onerous and may include requiring the claiming party to use a prescribed form of notice. Where the contract is not clear on how notice should be provided written notice is always better than oral.

Oftentimes construction contracts will stipulate a specific address for the delivery of notices, including a particular person to whom such notices must be addressed. This address may differ from the normal communication channels used on site, and parties providing notice should take extra care to ensure that notice is being sent to the correct location. As with the other components of a notice provision discussed above, the form of notice provided must meet the requirements of the contract to be considered proper notice.

Notice under a Standard Form CCDC 2 Construction Contract

As an example of the strict requirements often imposed by notice provisions, the CCDC 2 standard form contract requires that contractors provide notice in accordance with the following requirements:

6.5.4 No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 *Working Days* after the commencement of the delay. In the case of continuing cause of delay only one *Notice in Writing* shall be necessary.

As is the case with all notice provisions in Ontario, compliance with clause 6.5.4 requires satisfying each of its components. This means that notice must be provided in writing, within 10 working days of the discovery of the delay, and that the notice must set out the cause of the delay. Absent strict compliance with any of these components a claim may be rejected—regardless of its merit—solely on the basis of a failure to comply with the applicable notice provision.

Conclusion

Regularly review the notice provision(s) in your contract and be sure that you are aware of:

- a. When to give notice?
- b. How to give notice?

c. What is required in your notice?

You must follow the specific requirements set out in your contract and provide sufficient detail in your notice.

Do not wait for things to get worse before sending a notice. Courts strictly enforce the notice requirements from contracts.

[1] *Technicore Undergorund Inc v Toronto (City)*, 2012 ONCA 597 at paras 46-51.

[2] *Corpex (1977) Inc v Canada*, [1982] 2 SCR 643 at para 62.

[3] *Limen Structures Ltd v Brookfield Multiplex Construction Canada Limited*, 2017 ONSC 5071; *Clearway Construction Inc v The City of Toronto*, 2018 ONSC 1736.

[4] *Doyle Construction Co v Carling O’Keefe Breweries of Canada Ltd*, [1988] BCJ No 832, 10 ACWS (3d) 266 (BC CA) at para 78.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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