

A large, dark metal shield is centered on a background of riveted metal plates. Two swords are crossed behind the shield, their hilts at the top and blades pointing downwards. The shield has a metallic, weathered appearance with visible rivets around its perimeter.

CONSTRUCTION PROJECT NOTICE AND DOCUMENTATION

*The sword and
the shield*

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Almost every construction contract or subcontract contains provisions regarding the manner in which notice must be provided to the other party under the contract regarding significant issues on the construction project, including delays, unforeseen conditions or other claims. Compliance with such notice requirements, together with contemporaneous documentation during the project, is critical to successfully bringing construction project claims (the sword), and defending construction project claims (the shield). This article explains why notice and documentation are so critical, and also provides practical tips and best practices for owners, contractors and subcontractors regarding notice and documentation on construction projects.

1. Timely and compliant notice is critical

Complying with construction contract notice requirements is critical to asserting or defending construction project claims. Therefore, parties need to read and know the contract notice provisions in order to understand and comply with requirements regarding timing, the proper manner



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Documentation of such events via letters, meeting minutes, daily reports, photos and even videos can be powerful sources of proof in defense of claims, which again are almost always more compelling proof than an individual's recollections of conversations or events

of providing notice, to whom notice must be provided and what must be contained in the notice. Failure to do so can lead to traps for the unwary that can significantly weaken the ability to bring or defend claims.

For example, the newest 2017 version of the commonly used American Institute of Architects A201 General Conditions of the Contract for Construction ("AIA General Conditions") contains just such a potential trap. This is because Article 1.6.1 of the AIA General Conditions now provides that notice under the agreement can be provided by electronic transmission if a method is agreed by parties. In other words, the 2017 AIA General Conditions expressly allows proper notice under the contract to be made by email.

However, Article 1.6.2 of the General Conditions provides that, unlike other types of notice, Notices of Claim as provided in Section 15.1.3 (i.e., any notice of a request for additional time or money under the contract) must be in writing and will not be proper unless delivered by certified or registered mail, or by courier providing proof of delivery. In short, while email notice is acceptable for all other types of notice under the AIA General Conditions, an email notice of, for example, a claim for extension of time or for additional costs due to a delay, would not be proper notice under the 2017 AIA General Conditions, and could cause the claim to be untimely and even potentially invalid all together.

Other key aspects to notice provisions besides just the manner of proper notice include the timeframe within which notice must be provided, what must be included in the notice and to whom notice must be sent. Oftentimes, contracts will have a time period after which the events giving rise to the claim occur in which notice must be provided for the notice to be timely. For example, the AIA General Conditions in Article 15.1.3.1 require that a notice of claim must be provided "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." Other contracts may potentially have even shorter timeframes, and may also provide that a failure to timely provide notice

of the claim constitutes a waiver of the claim. Therefore, knowing and complying with the deadlines for providing notice is crucial.

It is also important to understand and comply with what must be included in the notice. Sometimes contracts will only require a minimal initial notice of claim, with a more detailed and substantiated claim to be provided by a later date. However, some contracts require more detailed claim notice and substantiation with the initial notice. Parties must know what is required and be prepared so as to be able to comply if a claim situation arises. It is also critical to know to whom notice must be provided. If the contract designates a specific representative to whom notice must be sent, a notice provided to someone else with that party may not ultimately be determined to be sufficient.

Timely and compliant notice is not only important for parties asserting claims, but can also be critical to defending claims. For example, if a contractor is being delayed due to an event outside of its control but fails to timely notify the owner of the delay and request a time extension, the contractor may not be able to use that particular delay as a defense to a later claim by the owner for liquidated damages due to a delayed completion of the project because of the prior lack of timely notice by the contractor.

2. Failure to provide timely and proper notice can be devastating

While the intricacies of notice provisions may seem overly technical or unimportant, the fact is that failure to provide proper and timely notice can be highly detrimental and even fatal to otherwise meritorious claims. Courts in many states, including Florida, have rejected claims entirely due to the lack of proper notice.

For example, one such case was *Marriott Corp. v. Dasta Construction Co.*, 26 F.3d 1057 (11th Cir. 1994), which involved a dispute arising out of the construction of the Marriott Orlando World Resort, which at the time was the largest hotel in Florida. The contractor, Dasta, was substantially delayed in its work due to defective concrete installation by another contractor hired by Marriott.

There were also hundreds of changes by Marriott to the drawings and project schedule that caused Dasta significant additional labor costs and lost productivity. At the trial, a jury awarded Dasta \$2.2 million in delay and lost productivity damages against Marriott.

However, the \$2.2 million award was taken away by the trial court, and that decision was upheld on appeal. Even though Dasta had been delayed, because Dasta had failed to comply with the notice of claim requirement in its contract with Marriott, the court ruled that Marriott's failure to grant a time extension to Dasta for the delay could not be considered legally wrongful. Moreover, despite testimony at trial that Dasta's owners had conversations with Marriott about the delays, the court ruled that "none of Dasta's verbal communications to Marriott was sufficient" to comply with the contract's written notice requirement.

While this ruling may seem harsh, it underscores the critical importance of timely compliance with contractual notice provisions. Although at times, courts have excused strict compliance with notice requirements under certain circumstances, courts have just as often denied claims simply for failure to meet notice requirements. Clearly, the best way to avoid this potential fate is to make sure you know, understand and comply with contractual notice provisions.

3. Balancing notice and maintaining good project relations

Of course, there is the practical concern that being overly aggressive in sending notice on a construction project can potentially lead to frayed contractual relations between the parties and difficulties on the project.

One way to try to avoid this is to carefully consider the tone and content of the written notice. For example, the tone of a notice does not need to be aggressive or claims-focused. Instead, a notice should convey the necessary information, but the tone and focus of the initial notice can be on a desire to work together to resolve the issue as quickly and as inexpensively as possible. That way the claim is preserved, while the immediate focus is, as it should be, on resolving and mitigating the issue for the success of the project. This approach may help maintain good project relations while also avoiding a potential waiver rights and claims that could occur if no notice was given.

4. Documentation can make or break claims and defenses

Notice is just the first step necessary to preserve the claim or defense. But, notice alone is not sufficient, as documentation of a claim or defense will be necessary to ultimately successfully prove it in court. Documentation can take many forms, but things documented in writing, such as in letters, emails, meeting minutes or daily reports, or in photos or videos, will always be more effective than just individual recollections or oral statements, particularly where the court or arbitration proceedings may be months or even years after the events on the project. Without appropriate documentation, an otherwise valid claim or defense may simply not be provable in court or arbitration.

For parties making claims, this means documenting not only the events giving rise to the claim, but the communications regarding the claim, the delays or other effects of the events giving rise to the claim and the damages incurred due to the events

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Claimants should be sure to document delays through schedule analysis, correspondence, daily reports and meeting minutes, and to document damages by segregating out and separately tracking specific additional costs due to the delay or other condition giving rise to the claim.

giving rise to the claim. It is important to document such items in writing via letters, meeting minutes and daily reports, and where appropriate, to take pictures or video of events. Similarly, claimants should be sure to document delays through schedule analysis, correspondence, daily reports and meeting minutes, and to document damages by segregating out and separately tracking specific additional costs due to the delay or other condition giving rise to the claim. This should be done at the time during the project when events are occurring, rather than at the end of the project, as contemporaneous documentation made and tracked around the time

of the events is always going to be more powerful and effective proof than attempts to remember or recreate what occurred after project has concluded.

For parties defending claims, contemporaneous documentation is also important. For example, if a claimant gives notice of a delay event, documentation regarding the claimant's actions in taking corrective measure to respond to the event or redeploying labor to other areas of the project, or the lack of such actions by the claimant, can be critical to defense of such claims. Documentation of such events via letters, meeting minutes, daily reports, photos and even videos can be powerful sources of proof in defense of claims, which again are almost always more compelling proof than an individual's recollections of conversations or events.

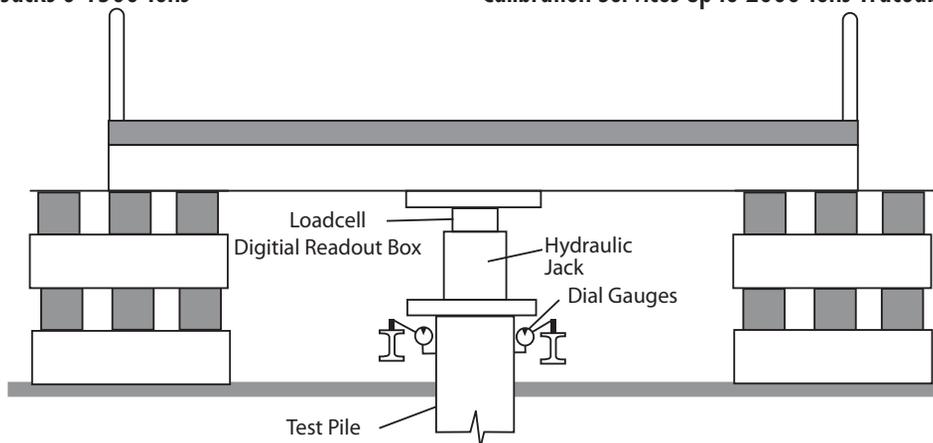
Conclusion

As can be seen, compliance with contract notice requirements, and maintaining contemporaneous documentation of project events and communications during the course of the project, can be essential, both as a sword to preserve and successful pursue claims where necessary, or as a shield to defend against potential claims. Therefore, all construction project participants, including owners, contractors and subcontractors, should be certain that they know and understand the contractual notice provisions on their projects to ensure timely and proper compliance when necessary. They should also take a proactive approach towards documenting important project events and communications as things happen on the project so as to be best positioned to protect their interests in connection with potential project disputes and claims. ▼

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