The Importance and Value of "Notice" Provisions in Construction Contracts

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1. INTRODUCTION

Most construction contracts, whether they are standard or customized forms, usually contain specific provisions related expressly to the process of giving "notice." The notice generally refers to an obligation on the part of the Contractor to notify the relevant party administering the contract, normally the architect, resident engineer, or owner's representative, of a claim or change event that gives rise to possible additional entitlement for time and/or cost. The duty imposed upon the issuing party when giving notice in terms of information to be supplied and the time for performance of any specific and designated obligations varies with the form of contract employed.

The process of giving "notice" is crucial to the change and claims process in both triggering the contract mechanisms that allow the contractor, for example, to pursue additional contractual entitlements (time and cost) based upon the known circumstances at the time the formal notice was issued as well as preserving the contractor's rights to recover for any unforeseen but related impacts that may arise at a later date. It appears to be a simple process and yet experienced contractors continue to fail to issue contract compliant notice or provide any notice at all, putting their potentially meritorious entitlement for additional time and/or cost in jeopardy or even proving to be fatal.

This article does not provide any legal, contractual, or case law citations, references, or examples, as there are numerous existing publications that better serve such requirements in considerable detail. Instead, this article provides a general discussion about notice provisions with the intent of promoting an understanding of some of the key issues and factors involved that are often missed or misunderstood by the contracting parties, and facilitating improved management and early resolution of claims and change requests in construction contracts.

2. CONTRACT NOTICE PROVISIONS

The contracting parties in a construction contract are each bound to numerous terms and conditions, both in express and implied form, which require designated obligations and actions to ensure compliance and avoid a potential breach of contract. The question arises, however, as to how the owner, for example, can be bound to a specific contract term or condition if it has not received notice from the contractor of the event that triggers the relevant contract provision, and thus the owner would have a subsequent requirement to respond with a specific act, acknowledgement, or rebuttal.

Construction contracts attempt amongst many other things to provide a framework within which to effectively manage the ever-increasing pace and complexity of modern construction projects where claims for delay and cost have become commonplace and almost anticipated from the onset. Accordingly, when an impact or claim event occurs, the party against whom the claim is being

made must have the opportunity to review and investigate the related circumstances and facts in a timely manner, certainly while the issues remain fresh and contemporaneous, and to provide the basis of a suitable response, which could involve mitigating actions to avoid the impact or claim. The concept of being able to mitigate potentially adverse and costly problems through receipt of timely notice and prompt action is of key importance as to the reasons for the inclusion of notice provisions and is often a forgotten factor when both parties become embroiled in a contentious claim situation.

Notice provisions are all too often misconstrued by contractors as administratively obstructive and objectionable, and by owners as a simple and direct means and method to deny the contractor's claims. In reality, notice provisions protect the relevant interests of all parties to the contract and provide core mechanisms towards facilitating a resolution of a claim or requested change as long as they are not ignored and are properly complied with and managed. Notice provisions, when triggered, enable the parties to consider their individual position and financial consequences. The owner, for example, may cancel or authorize a variation, or may be able to reduce its exposure if the basis of claim is justified. Alternatively, a timely notice coupled with contemporaneous documentation and records may enable a claim to be refuted or regulated with precision and relative confidence pursuant to the circumstances and facts involved. Similarly, if a contractor correctly follows the provisions and provides the required supporting data in a timely manner, the contractor's rights have been preserved and the owner has no valid position with which to deny the claim on its face because of failure of notice compliance.

Standard forms of construction contract use different language to describe notice provisions, each adapted to suit the circumstances in which they are to be used. However, the underlying principle in each contract form is effectively identical. A contracting party is required to notify the designated contracting party when a change or impact event occurs, when its effect becomes apparent and by how much, and when to provide supporting time and cost information as the impact of the event develops.

With due consideration of the above factors, three basic and practical key questions regarding notice provisions can be identified as a common thread in construction contracts:[1]

1. When will the formal notice be required in practice?
2. What will the notice need to say to be compliant?
3. What happens if the notice is not compliant with the contract provisions?

These questions frequently raise additional factors that complicate the overall administration of the notice process and affect the merit of the contracting parties' rights.

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[1] Carnell, Nicholas J., *Causation and Delay in Construction Disputes*, Blackwell Publishing, Ltd., 2nd Ed., 2005.

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3. WHEN WILL FORMAL NOTICE BE REQUIRED?

Contract notice provisions normally provide a specific and defined time frame within which a party must strictly adhere to provide notice of a claim or change event. The defined time frame can vary considerably between contract forms; however, it is not uncommon to see a notice period expressed anywhere between 7 to 15 days and in some cases up to 30 days. The contracting parties can of course agree to any time period in this regard when negotiating the contract terms and conditions; however, anything less than 7 days, for example 3 days, would place an unreasonable burden upon the party required to issue the notice and identify the impact or delaying event, evaluate the factors involved, and process the documentation to be fully compliant. This is particularly relevant on larger and complex construction projects where numerous simultaneous areas of differing work involving hundreds of craftsmen and laborers are operating on a daily basis. It may not be physically possible for the contractor to understand and evaluate every potential impact event that may occur under such short timeline circumstances. Often what appears to be a problem on a "first look" basis may resolve itself or may never have been a factor for consideration of notice in the first place. Conversely, an impact event of merit may not manifest itself immediately in terms of being recognized as a potential claim event requiring notice.

Very short notice periods favor the owner in being able to deny a claim every time the contractor fails to meet the notice timeline; however, they would allow the owner to respond on an almost immediate basis with regard to any mitigating actions that may avoid a claim or change altogether.

Short notice periods are unfavorable to the contractor in terms of being able to recognize and process compliant notice, effectively almost being forced into issuing regular, if not daily notices for almost any event, whether it had recognizable merit or not to protect its rights to claim for the impacts of each event. Such an approach would make the administration of the contract over burdensome and promote an adversarial atmosphere between the contracting parties.

Longer specified notice periods, for example 30 days or more, favor the contractor in giving time to finally recognize an impact factor, process the relevant documentation, and prepare a supportable basis for a change or claim. Longer specified notice periods also give the contractor further time to correct any errors regarding issues that were previously missed or relevancies that were misunderstood. Longer specified notice periods are potentially unfavorable to the owner to the extent that the opportunity of adopting any possible mitigating action to avoid the onset of a claim or change will be lost. If an impact event occurs on day 55, and the contractor issues compliant notice on day 80 (25 days later), any mitigating action that could have been adopted, relevant at the time of the actual event, is more than likely to have evaporated and the opportunity to avoid or reduce costs would have been lost.

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Longer notice periods are not uncommon in the context of supplying additional information pursuant to the first notice. For example, if compliant notice is required within 10 days, fully detailed supporting cost and time information is often required to be supplied within 30 days of serving the original notice of impact.

A fair and reasonable time period for a notice provision is for the parties to negotiate and agree upon prior to the formal contract execution. What is clear, however, is that whatever the parties eventually agree, the notice time period should be correctly understood and followed to avoid any possibility of failure of compliance.

Contract notice provisions that do not stipulate any time period at all, or where the words "*within a reasonable time"* are used, create additional interpretation issues of both a practical and legal nature. If the notice provision does not stipulate any time period at all, the question then becomes one of the underlying rationale of how the parties intended such a provision to be utilized and their understanding at the time the contract was signed. In an extreme example, is it acceptable if, on day one, an impact event occurs that ultimately results in a major time and cost claim being issued, but the contractor does not give formal notice until the last day of the project, 350 days later? How would such a provision be contractually applied with due consideration of the rights of each of the contracting parties involved? Therefore, a provision without a stipulated time period is more likely to promote conflict and ongoing disputes.

What do the words "*reasonable time period"* mean? What is a reasonable time period for a notice provision? As discussed above, is it 3 days, 7 days, 15 days, or more? Do the words reasonable also relate to the size of the project and type of impact event itself? For example, an impact event whereby the contractor is denied access to the entire site pursuant to a written instruction from the owner that creates a critical path delay is different from an event where access is denied to a small part of the site that may have a cost impact for disruption but does not manifest itself until much later or may not have an impact at all. What in each case would be a reasonable period to give notice?

The simple answer is not clear and each case should be approached on its merits from a practical and legal perspective. The answer may be different in Boston than it may be in Bahrain, and very much dependent upon the contracting parties, the express provision language used, and crucially, the application of the local law. Clearly, without a specific defined period of notice, the application of the provision is open to individual interpretation, challenge, and potential exploitation, which are all recipes for fostering contractual conflict.

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4. WHAT WILL THE NOTICE NEED TO SAY TO BE COMPLIANT?

The following is a list, albeit not exhaustive, of some of the key factors utilized in the development of standard contract form notice provisions. Notices must:

1. Be in writing;
2. Be served to a specific designated party;
3. Be given as soon as the notifying party becomes aware of the circumstances of an impact, event or condition;
4. Be given within a defined time period;
5. Be given for time and additional cost impacts if both are deemed involved;
6. Provide details of the actual, apparent or anticipated effects of any impacts, if practicable;
7. Provide estimates of the extent of any time and cost impact;
8. Submit supporting documentation within a specified time frame (possible second notice period);
9. Identify specific schedule and work activities affected; and
10. Identify the cause, effect, and duration of the impact.

The above factors appear to be reasonably self-explanatory as to what is required to be contract compliant; however, depending on the actual language used, and the circumstances involved, such clauses can in themselves raise additional issues of compliance or failure. For example:

- What does "*notice must be in writing*" mean? Does this refer to a formal contractual letter or do minutes of meetings, written daily logs, or RFIs also meet the compliance test?
- What if the notice estimates of possible time and cost impact are completely miscalculated and bear no relationship to the actual impact, which is determined at a much later date?
- What is the correct definition and application of wording such as "*aware*", "*apparent*", "*anticipated*"?

What appears to be reasonable language on its face can and probably will be interpreted advantageously in contrasting ways by both contractors and owners, particularly in an adversarial claim situation.

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There are no uniform or codified answers to the questions that each provision might raise. Solutions are subject to the relevant legal jurisdiction in each case. The factor of legal interpretation can vary not only internationally from country to country, but also in the United States, for example, from state to state.

Often, notice is not given in a formal written context or in written form at all. For example, the contracting parties who interact daily on a project may perceive and argue that notice has been given of an impact event because the issue is common knowledge by all involved. An example would be where the owner has a designated site agent based full time on site to monitor the progress of the works. The agent would have direct and daily knowledge of project events as and when they occur. The owner's agent would usually attend daily site meetings, keep a daily diary or log of core issues as observed, and often receive daily or weekly site documents from the contractor. The contractor would argue that the agent, as the owner's representative, has first-hand knowledge of all claim and change events as and when they occur, or constructive notice, notwithstanding that a formal contract letter has not been issued by the contractor, and that under such circumstances, the contract notice requirements have been met. One possible defense to the site agent example would be if the contract called for the notice to be issued to a designated individual who is not the site agent.

The force and effect of verbal or constructive notice without written notice is at best questionable and should never be relied upon in the absence of other recordable forms, particularly where the contract expressly calls for notification of possible claims in writing.

The many combinations of questions and answers, application, compliance, and failure of compliance for notice provisions are all subject to geographical location and the local applicable law. Any party to a construction contract is, therefore, well advised to become familiar with the particular aspects of how notice provisions are interpreted and applied in their state, region, or country, and if necessary seek confirmation through legal advice before attempting to commence operations in unfamiliar surroundings.

In essence, and notwithstanding the many different notice scenarios that can exist, including many more than described herein, any notifying party seeking to provide the best possible framework of compliance should issue a formal contract letter strictly in accordance with each and every clause cited in the contract provisions. Even where formal written notice of a time period is not stipulated or required, the notifying party is still best served by adhering to the best practice of issuing a formal letter as soon as the impact event becomes apparent, and to include as much supporting documentation with regard to delay and cost as is possible at the time. Such an approach provides a platform for continued updating of any claim or change request, as and when further information becomes available, and protects the notifying party's rights under the contract. If such an approach is strictly adopted, any form of defense based on failure of compliance will be hard pressed to succeed, no matter what the express terms and conditions require.

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5. WHAT HAPPENS IF THE NOTICE IS NOT COMPLIANT WITH THE CONTRACT CONDITIONS?

Many contracts contain a forfeiture or exclusion clause which states that if a contractor fails to strictly comply with the notice requirements, the contractor waives or forfeits the right to recover for time and costs associated with the impact issue. The strict application of this particular clause has become commonly known in the United States as the "no-prejudice rule" because the owner does not have to prove prejudice (loss or financial harm) as a result of the contractor's failure to comply with the notice provisions to deny the contractor's claim, irrespective of any actual proof of loss that the contractor has incurred, and even where the claim is completely meritorious. Exclusionary terminology may refer to "waiver of notice" or "constructive notice," and in many international venues "notice as a condition precedent to entitlement to reimbursement of loss or expense."

The strict enforcement of notice provisions can be devastating to a contractor's otherwise meritorious claims during the execution of the works. Where the contractor has failed either partially or fully to comply with the notice provisions and the owner has denied the claim or change on a strict interpretation basis, the contractor can attempt to argue in his defense that: (1) the owner had direct knowledge of the impact event creating the claim or change and, therefore, had received actual notice but not formal (written) notice; and (2) the owner had "waived" the notice requirements due to some previous action on one or more occasions whereby the owner had approved or accepted a claim that was not compliant, thereby establishing a contract precedence or constructive change to the requirements of the contract for future and similar circumstances.

In the United States, the strict enforcement of notice provisions varies from state to state. Some strictly apply the provisions irrespective of merit, while others adopt a more liberal approach on a "fairness demands" basis. The same variable is true for international based contracts, where the law in each country, usually based upon the latest relevant case law which may be adopted from another international venue, is applied by the courts.

If a contractor fails to comply with the notice provisions, the worst-case scenario under a strict application is that the claim will be thrown out irrespective of proof of any merit. Even under a less strict interpretation, however, the contractor is still not guaranteed success with his claim.

Why would any contractor put a meritorious claim at risk by failing to fully comply with the contract notice provisions, either through negligence in administering the management of the contract, or through inadvertently waving its rights due to a failure to understand how such clauses legally operate in the local jurisdiction? Yet all too frequently, experienced major domestic and international contractors lose millions of dollars for these very reasons.

How, for example, can a contractor logically argue, which they frequently attempt to do, that a delaying event caused loss of time and money and had a severe impact on the progress of the project resulting in alleged egregious harm, when in reality the contractor could not find the time to write a simple notice letter about the matter to the owner or correspond in a timely manner? If the impact was so bad, why did the contractor not write many letters tracking and monitoring the impact as it developed? Absent arguments of constructive notice or a prior constructive change to the notice provisions, the simple logic may not add up in the contractor's favor in this regard, and such arguments are frequently and successfully used as a defense against contractor claims in courts and arbitrations. A jury that is not experienced with construction issues and may struggle with the legalities and niceties of detailed contract provisions may be able to clearly understand such simple reasoning against the contractor.

6. RELUCTANCE TO GIVE NOTICE

In some instances where a contractor is fully aware of the notice provisions and the applicable law, a claim event has clearly occurred, and potential time and cost issues are at stake, the contractor decides not to issue a compliant notice or, in fact, any form of notice at all. There are a number of reasons why this may occur, all of which are flawed and ultimately can and should be avoided. Contractors often argue that: (1) "*We decided not to issue a notice of delay because we were anxious to avoid the situation where things got contractual,*" (2) "*We did not wish to make an already adversarial situation worse,*" and/or (3) "*the Owner is one of our best clients and we do not want to upset them. We hope to get many more projects from them in the future. We can make up the losses on the next project.*"

The above answers in effect presuppose that there is a collective wish amongst all of the contracting parties to avoid a situation where the state of affairs may deteriorate. A project where the owner ultimately has to find out for himself that the project is well behind schedule and the contractor is operating with the hope that, without any time extensions or agreement for additional remuneration, everything will be righted in the end, is clearly a situation that is based more on reverie than hard facts.

By serving notice of an impact event, a contractor is unlikely to exacerbate an existing awkward or conflicted situation, as the owner is far more likely to be less upset about being notified of a potential claim and having the opportunity to discuss and perhaps mitigate the situation, as opposed to having a unexpected claim and/or negative project impact appear out of nowhere. When notice is given, the contracting parties involved each have the opportunity to discuss their problems and issues in an open and constructive environment, to better manage and possibly mitigate the events, and to jointly work towards a solution based on a common understanding and need to move the project forward, notwithstanding the onset of a claim or disputed change. If a solution fails to materialize to the satisfaction of the parties, and despite their best efforts to

resolve the matter, they are each aware of the situation, what has occurred and why. Thus, even if the issue ends up as a dispute in a formal litigation of arbitration proceeding, the parties are familiar with the circumstances leading up to the dispute, a joint paper trail has been created, and the issue is far more likely to be settled than if notice was not issued at all.

If a contractor completely fails to issue any form of notice for an impact event of merit, it can be argued that this constitutes a breach of contract by the contractor. This failure would clearly provide the opposing party with a defense against the contractor's claim and create difficulties for any form of interim resolution such as adjudication.

There is no reason why the content of the notice should be confrontational or argumentative, nor should this ever be the case. The notice should simply serve to articulate the event in question to provide a starting point whereby each party can consider and evaluate their respective positions. Accordingly, the possibility of resolving the matter and achieving a settlement is supported by such an approach and not defeated by it.

7. CONCLUSION

Notice provisions in construction contracts can be simple, complex, poorly written, confusing, and sometimes draconian. What they cannot and should not be is ignored. It is crucial for each of the contracting parties to understand the language and framework of the provisions in their specific construction contract with regard to familiarity with the time, manner, and necessary substance of each provision.

In a global market where information is readily accessible to all willing to take the time and trouble to find it, there is no excuse for contracting parties not to be better informed about notice provisions and not to be generally aware of the traps and pitfalls that can occur and how to avoid them. The essential element of compliance with construction notice is geographical. The applicable law in each state, region, or country will determine the consequences of the failure to strictly comply with the contract notice provisions.

Notwithstanding acquiring the knowledge and understanding of how notice provisions may be applied on a particular project, it clearly makes sense that any contracting party, to place themselves in the best position regarding protecting their rights to any claim or change request, should at all times apply the following:

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1. Comply well within the timeline required for giving notice.
2. If no specific timeline is given, serve the notice immediately at the time the claim or impact issue is apparent.
3. If the notifying party is unsure that a particular event is a claim or change issue, notice should be served anyway.
4. Notice should, wherever possible, be a formal letter addressed and served to the designated contracting party.
5. Provide as much timely documentation as possible to support the claim or change request, and if a second notice or further and better particulars are required within a specific time frame, comply within the stipulated schedule.
6. Keep the notice language on an informative, for the record, basis only and avoid any inflammatory or adversarial language.
7. Avoid reliance of notice on meeting minutes, RFIs, daily logs, conversations, etc. Always issue formal notice in each and every case.
8. Wherever possible, maintain an open dialogue with the receiving contracting party to facilitate an informed situation for all involved. This practice will help facilitate settlement wherever possible as a claim/change issue develops.
9. Maintain an accurate and contemporaneous paper trail.
10. Never refrain from issuing notice for any reason. If the basis of any claim or requested change is wrong, it can always be withdrawn. Conversely, if notice is not issued, in most cases it will not be considered compliant if issued retrospectively.
11. Keep a separate claim/change log so that such issues can be tracked, monitored, and managed for contract compliance.
12. Make sure that everyone involved in your project team is familiar with and aware of notice requirements, at least in general timeline terms. It serves no good if site personnel observe a potential delay or claim event and do not report the issue to the contract management team or provide the information too late to be complaint with the notice provisions. Key personnel such as Project Managers are not always aware of the notice provisions cited in their own contract, a situation that should never be encountered but frequently is.

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Many contracting parties completely fail to understand that compliance with notice provisions increases the opportunity to facilitate the avoidance of adversarial situations and promotes the early resolution of claim/change requests. Notice provisions, if properly understood and used, correctly provide positive contract mechanisms that are helpful to each of the contracting parties.

About the Author

Michael Harris *is a Senior Principal with Long International and has over 35 years of construction project and claims management experience. His comprehensive consulting and management background includes risk evaluation and managing and resolving complex claims and contract disputes on major construction projects throughout the U.S. and globally for a wide range of industries, including the power, water, petrochemical, industrial, commercial, healthcare, and general building sectors.*

Mr. Harris has extensive expertise in key construction disciplines including project design, project management, construction management, contract management, risk and claims analysis, on-site risk management, claims resolution, claims avoidance management, cost management, and expert witness report preparation and testimony. As well as his extensive project execution background, he also has considerable experience in various types of dispute resolution forums such as arbitration, litigation, and mediation proceedings in North America, Europe, the Middle East, and the Far East. Mr. Harris has also been appointed as a mediator and arbitrator on various international projects. He has been responsible for the management of numerous major projects, both from a construction and dispute perspective, ranging in size from US$100,000 to over US$500 million.

A strong and rounded project execution background in many countries, together with expansive experience in dispute resolution processes, has allowed Mr. Harris to be thoroughly versed in the management of construction risks and claims for any type of project or problem in any location/country. He is skilled at contract analysis, claims strategy and preparation, claims defense, and the negotiation of settlements. For the 10 years prior to joining Long International in 2009, Mr. Harris has held positions as Executive Vice President and Corporate Director of Claims with two Fortune 500 construction companies. In these roles, he has had responsibility for the management, strategy development, implementation, and resolution of numerous construction disputes and contract claims for major projects on four continents.

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