

IMPORTANT NOTICE



Contractors, Preserve Your Rights

GIVE NOTICE – A PM’S GUIDE TO CONSTRUCTION “NOTICE”

WHAT'S AT STAKE:

“NOTICE” is arguably one of the most critical and foundational components of modern construction contracts, yet numerous contractors don't know what “NOTICE” is and many more never use “NOTICE” as a formal means of communication. Often, a contract will stipulate that a failure to provide “NOTICE” constitutes a loss of entitlement.

DISCLAIMER:

I/WE ARE NOT ATTORNEYS AND THIS PAPER SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. ALWAYS SEEK COMPETENT LEGAL ADVICE FROM YOU ATTORNEY FOR QUESTIONS ABOUT CONTRACTS, CONTRACT LAW, AND YOUR RIGHTS.

About this Paper

As Project Managers we are charged with and responsible for every aspect of our projects contract. Typically, every feature described in the contract documents falls under the purview and responsibility of the Project Manager, but once the project begins, all too often, certain contract provisions are forgotten and not considered. One provision that we frequently see overlooked is “NOTICE”. This paper was written in hopes that you will learn something new about “NOTICE” and the importance of “NOTICE” during the execution of your contracts.

About the Author

Mike Martin, MBA, PMP is a Project Manager who has worked on projects from Prudhoe Bay Alaska to New York, Washington DC and places in between. Mike has managed projects large and small, simple and complex; Projects that include clients like Exxon Mobile, USACE, The Department of Homeland Security, Walmart, Kroeger, and even down to Ma and Pa homeowner. Having read, created, or worked with thousands of contracts that sometimes contain tens of thousands of pages, Mike's experience is considerable and from that experience his desire is to share some of his insights gained along the way.

Notice, what is It and Why Does It Matter?

If you think about it, the concept of “NOTICE” is everywhere in our lives. If you are a tenant or a Landlord then “NOTICE” is likely described in one of the provisions of your rental contract. For example, the Landlord typically has a duty to provide “NOTICE” if he wishes to raise your rent or evict you from the premises. Likewise, the tenant typically has a duty to give “NOTICE” to the landlord if they want to move out. Bad things happen when either the tenant or the landlord fails to provide “NOTICE” before altering their contractual relationship. We have all likely heard a story or two about landlords and tenants.

Consider also, if you have entered into any service contracts such as for a utility, a cell phone, a car lease, or even something at low or no cost like Facebook there is likely a contract and that contract likely contains a “NOTICE” provision. You are given “NOTICE” all the time and may not even realize that it was “NOTICE”. If someone wants to sue you then you are served (subpoenaed), and given the complaint, which is “NOTICE”. If your utility company wants to raise their rates, you may receive “NOTICE” of a hearing in the mail or even see a television commercial broadcasting the pending change, which may also constitute “NOTICE”. If your mortgage company sells your mortgage, you are given “NOTICE”, if your credit card company wants to change your interest rate you are given “NOTICE”, and if Facebook changes their privacy policy you are given “NOTICE”. You see, the concept of “NOTICE” in U.S. contract law is everywhere you look.

What’s a bit counterintuitive is that although the principle of “NOTICE” is seemingly everywhere in our society those people whose entire livelihood depends on specific and often very detailed contract language (I’m talking about Contractors here) are frequently the worst at understanding and utilizing the extremely important contract provision known as “NOTICE”.



DON'T WAIT, GIVE “NOTICE”

Are you a contractor, or a Construction Project Manager? It is essential for you to understand that giving timely “NOTICE” may be the most important thing you do.

Consult with your attorney as laws may differ between states regarding certain aspects of “NOTICE”.

Construction Contract notice clauses often stipulate that notices must be:

1. Timely
2. Unambiguous
3. Written

What is “NOTICE”

The concept of “NOTICE” is critical to the integrity of legal proceedings. In other words, Due process requires that legal action cannot be taken against anyone unless the requirements of “NOTICE” are observed. The same holds true in many construction contracts in that claims cannot be made to another without first satisfying the contractual and legal requirements of “NOTICE”.

Consider this common occurrence, contractor and owner agree to A, B, & C, however during the project “B” changed in some way but no one formally said anything, no “NOTICE” was provided. Now at the end of the project the contractor says to the owner, by the way, item “B” is going to cost a lot more money and here is the bill. The owner, on the other hand, had no idea that item “B” would cost more and tells the contractor so. Now we have a problem and the contractor may have lost his entitlement to make a claim. Furthermore, is it fair for the owner to be given a large and unexpected invoice at the end of the job? The owner may have decided to take an entirely different and less costly course had he been provided proper and timely “NOTICE”.

Notices, in a broad sense, are used to communicate rights and responsibilities to an interested party. In a legal sense there are many forms of notice, which may differ between states, so again it may be necessary to consult your attorney to review your contract. Typically, in construction, “NOTICE” is a condition precedent to entitlement for extra time, money, or other contract changes, which means that in order to claim an entitlement, any entitlement, “NOTICE” must precede the claim. In other words, one must give “NOTICE” before any action related to the “NOTICE” can take place. Think about it this way, party “A” cannot advance a claim against party “B” in secret and expect to prevail. Party “B” must receive “NOTICE” prior to Party “A” moving forward with a claim.

Wrapping up the “What is NOTICE” section, **Black’s** Law Dictionary defines “NOTICE” as “a legal notification or warning that is delivered in a written format or through a formal announcement.”

Why Give Notice

There are many reasons why one party to a contract would give “NOTICE” to another party to a contract, and by taking a simplistic approach to the question it can be explained like this. In a typical construction contract, Party “A” agrees to provide some service or goods to Party “B”, and in return party “B” agrees to pay Party “A” some amount of money. Sounds simple enough, that is until either party perceives that the contract terms differ from the requirements experienced during the execution of the contract.

Another way to state this is after Party “A” detects some condition that is incompatible with the signed contract, Party “A” should promptly notify Party “B” of such contents and complain about these matters. And then, past a contractually defined time limit, if no party lodges a complaint, the parties shall comply with signed agreements.

Not all contracts contain a “NOTICE” clause, but when they do it is important to follow the terms of the clause.

“NOTICE” is so important in contract law that even when a contract does not contain a specific “NOTICE” clause it is still critical to provide “NOTICE” anytime there is potential for a claim.

There Are Countless Reasons to Give “NOTICE”, Here Are a Few

- Differing site conditions..... Any substantive feature that differs from the plan
- Received or issued change directive..... Issuing or responding to directed changes
- Access Delay..... Your access is delayed for any reason
- Claim for extras in advance of work..... Anytime extra work is expected
- Claim for extras after work performed... Anytime extra work is provided
- Constructive changes to the scope..... Issued for changes in planned scope
- Directed Acceleration..... To either direct or respond to directed acceleration
- Delay Claim..... Delays always have an impact
- Added Costs due to RFI..... Costs anticipated as a result of an RFI response
- Late Deliveries of Owner Items..... Anytime owner provided items impact the plan
- Non-Payment..... Anytime payments are late
- Multiple Problems Some projects are fraught with problems
- Failure to provide notice..... In response to untimely claims for extras

Either a failure to provide “NOTICE” or a failure to exactly follow the contracts provisions regarding “NOTICE” can cause the offending party to lose all entitlement to their claim.

U.S. v. Cunningham, 125 F.2d 28, 31 (D.C. Cir 1941) (holding that a provision requiring written notice in a contract is a condition precedent to which parties must comply, and the court is not at liberty to disregard the words used by the parties or insert words for which they did not use)

Why Does “NOTICE” Matter

It stands to reason that Owners, general contractors and other upstream contractors are entitled to know if extra charges are involved *before* the work is performed. This is why many contracts require “NOTICE” in order to preserve that right. There is considerable case law dating back over 100 years supporting contract “NOTICE” clauses that are often found in construction contracts. Taking this a step further, even in the absence of a “NOTICE” clause, a contractor is unlikely to succeed in making a claim in the absence of timely “NOTICE”.

Not only does providing “NOTICE” matter but it is very important to understand the contracts “NOTICE” procedures, however, and make sure that you comply. Claims procedures may require “written notice of any claim within 48 hours of the event giving rise to the claim.” Courts will enforce this type of clause. If a subcontractor does not give sufficient “NOTICE” to the general contractor (within the time and in the manner required by the general contract), then the general contractor will not be able to compel payment by the owner. This is the nature of the conduit relationship. If you fail to provide proper “NOTICE”, you may not have a claim, no matter who caused the problem or how much it cost.

Notice Has its Risks

Certainly the risk of no “NOTICE” or improper “NOTICE” is a loss of entitlement, however, issuing a formal notice at an early stage of the contract could serve to entrench the position of the parties at a time when informal discussions may have been sufficient to completely solve the issue. Also, a contractor who properly complies with the contracts notification requirements may be unfairly branded as being claims-oriented or confrontational. This could in turn affect the relationship between the employer and the contractor during the life of the contract.

Key “NOTICE” Success Factors



Issuing “NOTICE” may be one of the most important things a Project Manager can do on a project. Your contract, and the courts, both provide for many of your rights during a project, one of which is to be compensated for extra work. Don’t make mistakes with regard to “NOTICE” as you may lose your right to entitlement, regardless of who is responsible and how much money is involved. Often, the standard form contracts have resolved the competing benefits associated with notification obligations in favor of recognizing the need for issuing timely notice.

Firms without standard “NOTICE” forms and who do not use “NOTICE” in the ordinary course of business may find themselves in helpless situations at the end of a project. By the projects end, it is too late to submit change requests for past work when there is no record or history of “NOTICE”.

Key Points to Consider:

- Good project communication is essential to a projects success, and “NOTICE” is one communication tool kept in any good Project Managers “tool box”.
- When in doubt, give “NOTICE”
- “NOTICE”, must be timely and contracts will often define when, in relation to some material event, “NOTICE” must be given.
- “NOTICE”, often must adhere to some format. Your contract may stipulate certain key format or content features required in your “NOTICE” letters. Follow the contracts format requirements exactly.
- “NOTICE”, must be in writing.
- Buy or create your own standard form “NOTICE” letters, they will be there when you need them. For dozens of “NOTICE” letter templates and even more examples, try www.denalitemplates.com
- See the next page for a letter example used by the author, which is written to a subcontractor who failed to provide notice.

Sometimes Contractors and Project Managers are afraid that giving “NOTICE” is too adversarial and may otherwise jeopardize good working relationships and/or their ability to bid more work with the upstream contractor. The alternative is worse, even disastrous, and should not preclude one from giving “NOTICE”. “NOTICE” letters don’t have to be adversarial and can be written in a conciliatory manner.

For a mere \$49.95, you can purchase a complete pack of customizable “NOTICE” letter templates including dozens of actual “NOTICE” example letters at:

www.denalitemplates.com

(EXAMPLE LETTER)



FAILURE TO PROVIDE “NOTICE”

5/17/2014

Joe Smith
Smith Electric
140 E. 45th Ave
Seattle, WA 98148

Re: **Failure to Provide Adequate “NOTICE” and Appropriate Documentation Regarding Your Change Request(s)**

Change Request Status for *HRU Circuit, Generator Controls, SP-1 Panel Relocation* and *Generator Polaris Lugs*: **Rejected**

Dear Joe,

I am writing in regards to several of your Change Requests including your change requests titled “*HRU Circuit*”, “*Generator Controls*”, “*SP-1 Panel Relocation*” and “*Generator Polaris Lugs*”. Modular Housing Phase 1 is substantially complete and submitting change request(s) for work that was performed months ago is unacceptable. Additionally, pursuant to the terms of our contract with you, failure to provide timely “NOTICE” waives any rights you might have to compensation. What this means is when a contractor fails to provide timely “NOTICE” they waive rights to recovery later for something they missed. This concept is foundational to US Contract law, and failure by a contractor to notify the Prime or owner in writing or to maintain and furnish accurate and timely cost records constitutes a waiver of entitlement.

Please see “*Article 4 (Changes) paragraph two (2)*” and “*Article 9 (Disputes) paragraph two (2)*” of your contract which states the following:

- “Change Requests require five (5) calendar days’ “NOTICE” from the beginning of the event for which a claim is made. All claims not made in a timely manner shall be deemed waived”.
- “If subcontractor believes it has been directed to perform changed work in any manner other than receiving a subcontract change order, Subcontractor must notify Contractor in writing prior to performing the work that it believes such direction to be a change. Failure to provide “NOTICE” under this section shall constitute a waiver of any right to an adjustment of the contract price or contract time”.

Additionally, found within the contract documents provided by the State of Florida under “*Section 00700 Article 8.1.4*” states, “If the CONTRACTOR believes that such performance will require an increase in Contract Price or Contract Time, the CONTRACTOR shall notify the

Contracting Officer of such required increase within fifteen (15) calendar days following receipt of the Contracting Officer's "NOTICE".

9

ABC Builders is rejecting Change Requests "HRU Circuit" and "Generator Controls" due to failure to provide adequate "NOTICE" and failure to provide appropriate documentation.

In regards to your Change Requests "SP-1 Panel Relocation" and "Generator Polaris Lugs", we will need documentation to justify to the project owner your amounts proposed. All change requests must clearly articulate all direct and indirect cost drivers. Simply providing a lump sum cost with no detail is insufficient and is cause for rejection for failure to conform to the contract documents. ABC Builders is rejecting your Change Requests for "SP-1 Panel Relocation" and "Generator Polaris Lugs" until proper documentation is submitted by you to us and a change request can be submitted by us to the project owner that ultimately results in a contract modification from the project owner.

Below is a list of required items to include in your change request:

- Indirect Costs Breakdown
- Direct Costs Breakdown
- Time Cards Signed by ABC Builders Superintendent
- Material Invoices
- Photo's Related to The Work
- Detailed Description of Work to Perform

Sincerely,

Bob

Bob Jones,
Vice President, Construction
ABC Builders

