



Construction Law

NOTICE FOR ME, NOT FOR THEE

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Timely and proper notice is key for preserving construction claims. Whether a contractor is seeking an equitable adjustment from the owner or looking to hold a subcontractor responsible for failing to perform, notice is always important. The same is true for subcontractor or owner claims against the general contractor. But the way that the law treats a failure to provide contractually-required notice can differ depending on which direction the claim is going.

Construction contracts typically almost universally require that the contractor provide the owner with prior notice of any potential change order work or work that would entitle the contractor to an equitable adjustment in the contract price. Under the standard AIA General Conditions of the Contract for Construction, if the contractor wishes to make against the owner for additional costs, it must first provide notice to the owner before performing the work subject to the claim. See AIA A201-2017 § 15.1.5. Similarly, for a contractor to make a differing-site-conditions claim against the owner, the contractor must give the owner and the architect notice prior to disturbing the condition encountered, and in no case shall the contractor provide notice later than 14 days after first encountering the differing site condition. See AIA A201-2017 § 3.7.4.

The same is true for subcontractor claims against the general contractor. Under the AIA Standard Form of Agreement Between Contractor and Subcontractor, the notice requirements in the A201-2017 “flow down” and apply equally to subcontractor claims against the general contractor. See AIA A401-2017 Article 2. The subcontractor must also provide notice to the contractor of any claim that the contractor can pass on to the owner not less than two working days preceding the time by which the contractor’s claim must be made to the owner. See AIA A401-2017 § 5.3.

Construction contracts also typically require that contractors be given notice and an opportunity to cure before the owner can impose a backcharge on the contractor. For example, under the A201-2017, before the owner can backcharge the contractor for having to cure the contractor’s default, the owner must first provide the contractor with notice and a ten-day opportunity to cure. See AIA A201-2017 § 2.5. Similarly, the AIA standard subcontract also requires the contractor to give the subcontractor notice and five working days to commence efforts to cure its default before the contractor can hold the subcontractor liable for a backcharge. See AIA A401-2017 § 3.5. The same subcontract form also requires the contractor to give the subcontractor seven days’ notice before supplementing the subcontractor’s work due to the subcontractor’s failure to prosecute the same. See AIA A401-2017 § 3.4.2.1.

How courts treat a failure to provide a contractually-required notice depends on the direction that the claim is going. Specifically, courts are more forgiving when a contractor or subcontractor fails to give contractually-required notice of a claim for a change order or equitable adjustment. The courts are more strict when an owner or contractor fails to provide notice of a backcharge.

In *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380 (Colo. App. 2008), the Court held that a subcontractor’s failure to provide notice of a differing site condition (which would entitle subcontractor to a change order) would not preclude the subcontractor from recovering additional compensation from the general contractor. The contract, as is typical, required advance notice to the general contractor before the subcontractor proceeded with any additional work. But the Court noted that a notice requirement is fulfilled so long as the general contractor was aware of the claim. *Id.* at 387-88.

More importantly, the Court held that the subcontractor's failure to provide any notice at all would not be fatal to the subcontractor's claim unless the general contractor was prejudiced by the failure. In so holding, the Court recognized that the purpose of the notice requirement was to allow the owner an opportunity to mitigate costs that might result from the differing site condition. *Id.* at 388.

While there may be some leniency when a subcontractor fails to timely provide notice to a general contractor of a claim, or when a general contractor fails to provide an owner with notice, the law is not as forgiving when the roles are reversed. Entitlement to payment for additional work is not the same as entitlement to recover damages for an alleged default.

In *Denver Ventures, Inc. v. Arlington Lane Corp.*, 754 P.2d 785 (Colo. App. 1988), a subcontractor committed a breach of contract by unjustifiably stopping its performance after it had completed only twenty-five percent of the required work. The trial court held, and a division of the Court of Appeals agreed, that the contractor was required to give the subcontractor notice and opportunity to cure. And because the contractor failed to do so, it was not entitled to recover any damages from the subcontractor.

The notice and cure provision in *Denver Ventures, Inc.* was fairly typical, and was in fact identical to the language found in the 1987 and 1997 versions of the AIA A401 subcontract. *Id.* at 788. Even though the subcontractor in *Denver Ventures, Inc.* wrongfully stopped working, and even though the trial court found that the subcontractor was in breach for doing so, the contractor was not entitled to recover any damages from the subcontractor because it failed to provide the subcontractor with notice and an opportunity to cure as required by the subcontract. *Id.*

Despite what may appear to be different treatment of parties to a construction contract, there may be justification for treating the scenarios differently. When a general contractor or subcontractor encounters a differing site condition and seeks an equitable adjustment, it is not claiming breach of contract. Also, the work typically must be performed, whether or not notice is provided. In contrast, where an owner seeks to hold a contractor liable for a backcharge or a contractor seeks to hold a subcontractor liable for a backcharge, it is asserting that a default has occurred under the terms of the contract. For that reason, contractual provisions requiring notice and an opportunity to cure typically must be followed unless doing so would be futile.



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