

WAIVER OF CONTRACT NOTICE PROVISIONS

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In construction contracts, the contractor is frequently required to notify the owner other in writing of differing site conditions, changes in the scope of work, unforeseen delays and breaches by the other party. These notice provisions often contain a deadline for the notice to be given to the other party. For example, a contract may require the contractor to notify the owner in writing within ten (10) days from the date of the discovery of a differing site condition. If the contractor fails to provide notice within the deadline, the contract states that contractor's claim against the owner is waived. This article will focus on exceptions to the notice provision and circumstances where the notice provision is waived because of the acts or omissions of the owner or the owner's representative.

Generally, contractors are required to strictly comply with written notice provisions in construction contracts. However, under certain circumstances, a contractor may be entitled to additional time or compensation even if it fails to abide by contract notice provisions. See Rellim Constr. Co. v. Flagler County, 622 So.2d 21 (Fla. 5th DCA 1993)(contractor's failure to provide documentation for rain delay was waived by architect who did not require documentation at time of claim); Viking Builders, Inc. v. Felices, 391 So.2d 302 (Fla. 5th DCA 1980)(written notice provision did not bar contractor's right for additional compensation for modifications requested by owners); Blake Constr Co., Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569 (D.C. App. Ct. 1981)(subcontractor was under no obligation to submit written request for time extension). In addition, the owner may waive the notice provision by having actual or constructive knowledge of the delay. Vanderline Electric v. City of Rochester, 54 A.D.2d 155, 388 N.Y.S.2d 388 (N.Y. 1976)(knowledge of delay by owner waived detailed notice requirements of contract); Hoel-Steffen Constr. Co. v. United States, 456 F.2d 760 (Ct. Cl. 1972)(actual or constructive notice to owner of delay in work may be sufficient to negate contractual terms).

Hoel-Steffen involved a suit by a contractor against the owner for costs incurred as a result of extra work performed on the contract. 456 F.2d at 760. The contract contained a "suspension of work" clause which provided, among other things, that the contractor must give the owner written notice of a delay claim within twenty days of its occurrence. The owner argued that the contractor failed to comply with the terms of the clause. Although the contractor did not provide the owner with written notice that conformed to the terms of the clause, the court held that a letter sent by the contractor provided the owner with actual or constructive notice of the on-site problems. Id. at 767-68. The court held that the contractor provided notice to the owner which waived the need for strict compliance with the suspension clause. Id. at 767.

Similarly, the owner may also waive its defense to lack of timely notice by the subsequent consideration of a contractor's claim. See Chaney Bldg. Co. v. Sunnyside School District No.12, 147 Ariz. 270, 709 P.2d 904 (Ariz. 1985). In Chaney, the owner had withheld contract payments for alleged performance delays because the contractor failed to abide by the terms of the contract notice provision. Although the contractor failed to provide the owner with written notice of delay within seven days as required by that contract, the owner had actual notice of the reasons for the delay which included wind damage and failure to obtain technical data. The contractor asked for a 90-day extension of time but the owner only granted a partial extension of 21 days. Id. at 907.

The owner argued that the contractor's claim was barred in its entirety because it failed to provide written notice within seven days as provided by the contract. The court held that the owner, merely by considering the contractor's claim, waived compliance with the notice provision. Id. at 906-07. The court further articulated that by examining the merits of the delay claim, the owner waived strict compliance with the notice provision. Id. at 907.

Like Hoel-Steffen and Chaney, the Vanderline case examined contract provisions which required that written notice be provided to the owner for any delays or suspensions that the contractor has experienced. However, unlike the preceding cases, Vanderline analyzed the issue of failure to comply with the notice provision when the owner has caused the delay.

In Vanderline, a contractor sued the owner for delay damages suffered as a result of the owner's unreasonable interference. The owner argued that the contractor was not entitled to damages because it failed to comply with a contract notice provision which required that the owner be provided with written notice five days after the claim arose. In addition, the provision required that the notice included the amount of damages sustained.

In analyzing the provision, the court held that the owner could not use the provision as a defense to the contractor's delay claim. The court stated that a claim for delay damages by the contractor would not have arisen but for the owner-caused delays and interference with the project. Therefore, because the contractor was not responsible for the delays, failure to abide by the notice provision would not bar the contractor's claim for delay damages.

Although contractors should always follow the notice requirements in construction contracts, failure to follow these provisions does not necessarily preclude a contractor from seeking additional time or damages from the owner. The owner may have waived strict compliance by the owner or the owner's representative's acts or omissions.

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