

BE SURE TO “NOTICE” THE NOTICE PROVISIONS IN YOUR CONSTRUCTION CONTRACTS

Typical construction contracts contain various provisions with respect to the contractor providing notice relating to time and/or price, for example, events or circumstances surrounding potential losses or claims for realized losses. The purposes of the provisions are to minimize such losses as much as practicably possible. Notice provisions are applicable to sub-contractors as well, depending on the language included in their respective contracts. Such provisions usually require that the provision of notice is the first necessary step in order to make a claim.

In the event of a dispute, contractors should expect the courts to enforce the notice provisions contained within the contract agreed to by the parties. There are several nuances to this statement, however as a matter of procedure, it would be wise to precisely follow the notice provisions contained within the contract, even if it would be tedious to do so. Further, regularly reviewing notice provisions throughout the project lifecycle would be a prudent practice

to implement, in order to have clarity on what substantive information is required in the content of the notice (with sufficient detail), when to provide the notice (specific timeline / number of days), and where / how to deliver the notice (for example, in written format sent via a certain method). By following this approach, contractors can certainly be on a stronger footing in the event claims need to be further pursued.

Although each case depends on a variety of factors unique to the parties and the fact pattern itself, and ultimately the reasoning applied by the judge both in settling the dispute between them while also establishing or supporting current precedential value within the law, generally speaking, contractors should follow the advice outlined above with respect to providing notice, even in the rare occasion when there are not any notice provisions contained within the contract.

Consider the cautionary tale in *Tower Restoration v. Attorney General of Canada*

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(2021 ONSC 3063) where the court dismissed the contractor's action originating from a \$1M claim for additional payment in connection to a \$3.2M lump sum project bid to replace every window at a fully occupied maximum security prison. The owner (in this case, the Government of Canada) rejected the contractor's claim with the exception of a \$13,000 payment to compensate for increased wages. The owner reminded the contractor of the dispute resolution provisions located within the contract which specified a 15-day timeline to submit a notice of dispute. The contractor did not comply with the 15-day requirement and instead waited almost another year before asking the owner to reconsider. After the owner did not respond to this request, the contractor brought the action to court. As mentioned, ultimately the contractor's action was dismissed because it failed to deliver the notice of dispute as prescribed. Of note, the court stated:

"[22] ...Tower was a sophisticated commercial enterprise engaged in a multi-million-dollar contract with the Government. It knew that it would have to comply with the strict terms of the GC to receive additional payment totalling over \$1,000,000. Most tellingly, Tower employed the process outlined in the GC to make the 2013 Claim in the first instance.

[25] The Supreme Court of Canada and

other appellate courts have explained that, in construction contracts, the purpose of binding notice provisions is to provide the other party with sufficiently detailed information to allow it to consider its options and take corrective action before the contractor pursues a claim: *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643 at paras. 31, 60-62; *Doyle Construction Co. v. Carling O'Keefe Breweries of Can. Ltd.*, [1988] B.C.J. 832 (C.A.) at para. 111-112.

[26] These policy rationales are germane to disputes arising from government construction contracts, which involve sophisticated commercial enterprises, a competitive bidding and selection process, use of public funds, contracts of adhesion, and which have precedential value beyond the immediate parties: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] SCC 37 at para. 37-43."

Lastly, the court ordered the contractor to pay the owner's costs in the amount of \$60,000.

In summary, by ignoring notice provisions all together, contractors risk the chance of realizing on any recoveries with respect to their claims.

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