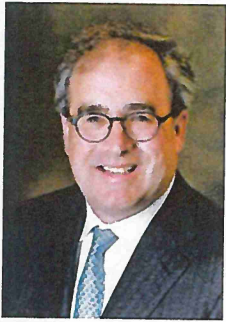


BETTER LATE THAN NEVER DOES NOT APPLY TO NOTICE: A RECENT JUDICIAL DECISION STRESSES THE IMPORTANCE OF COMPLYING WITH CONTRACTUAL NOTICE REQUIREMENTS FOR POTENTIAL CLAIMS

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Compliance with contractual notice provisions is critical to a contractor preserving its right to pursue claims for additional time and money. Yet, too often contractors overlook notice requirements during performance on a project—unwittingly jeopardizing claims worth thousands if not millions of dollars. A recent opinion from the Federal Court of Claims rejecting a differing site condition claim serves

as a harsh reminder to contractors to know and abide by their contractual notice requirements.

In *CKY Inc. v. United States*, No. 16-948 C, 2018 WL 4956963 (Fed. Cl. Oct. 12, 2018), the government awarded CKY a \$6.4M contract to widen and rehabilitate a levee in Texas by excavating and replacing the existing embankment material. The contract required that the new material be tested to ensure it met certain specifications before it was deposited on the levee and used to replace the excavated material. However, the embankment soil exposed by the excavation, and upon which the new material was to be deposited, also had to meet performance specifications, such as moisture content and compaction. After the new material was deposited on the excavated embankment soil, it was retested to make sure that it complied with the contractual performance specifications.

The contractor struggled to meet the performance requirements, however, which resulted in scheduling delays and requests for extended work hours. The contractor argued that the government misrepresented the subgrade conditions in the contract documents, which made it impossible to achieve the performance specifications without substantial additional excavation and material replacement than originally contemplated by the contract. As a result, the contractor asserted claims for differing site conditions, defective specifications, constructive changes, and breach of oral and implied-in-fact contract for more than \$4.5M in additional costs.

“ Instead recovering any of its \$4.5M claim, the contractor was ordered to pay the government \$425k in liquidated damages.”

In rejecting all of the contractor’s claims, the Court held, in part, that the contractor’s failure to provide the government with written notice of the differing site condition within 30 days, as required by the contract, was fatal to its claim. The contractor argued that even though the claim was not formally submitted until a year after it arose the government was informed and aware of the subgrade conditions as they were being encountered and this should have been all the notice the government needed to preserve its differing site condition claim. The court was not persuaded and held that the government was prejudiced by the contractor’s constructive notice of a differing site condition because it “foreclosed less costly alternative solutions or avoidance of contractor claims.” In explaining the prejudice imposed on the government, the court suggested that had proper

notice been provided, the government “likely would have imposed a suspension of construction to evaluate reasonable alternatives.” Thus, irrespective of what the government would have actually done in this scenario, the court found that merely depriving the government of the ability to consider alternatives is enough to cause prejudice and destroy a contractor’s claim that is not properly noticed. Consequently, instead recovering any of its \$4.5M

claim, the contractor was ordered to pay the government \$425k in liquidated damages.

The *CKY Inc.* opinion emphasizes the importance of providing notice in accordance with your contractual requirements and demonstrates the harsh consequences of failing to do so. Luckily, you can avoid the outcome in the *CKY Inc.* opinion by requiring that your entire project team know and follow the notice provision in your contract. ▴

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