

GOOD FAITH AND FAIR DEALING

How Do You Prove a Party Has Failed to Act Based Upon an Ulterior Motive?

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As I considered the subject matter for this column, I found yet another example of courts strictly enforcing notice requirements. If you regularly read this column, you have seen similar scenarios and may wonder, "Why am I reading yet another story about notice?"

The answer is simply because the issue is yet again in a recent example. Additionally, it seems to me (an unscientific observer) that the frequency of notice as a defensive argument is increasing in usage by owners and higher-tier contractors.

In this story from Washington, a contractor agreed to perform certain infrastructure improvements for the city of Snoqualmie. These projects included a new water main, storm drainage system, roadway paving, and relocation of above-ground power, cable, and phone lines to underground locations.

The contract was formed in May 2014 and included the 2012 Washington State Department of Transportation Standard Specifications, which included mandatory notice and claim procedures. *C.A. Carey Corp. v. City of Snoqualmie*, Court of Appeals of Washington, Division 1, Case No. 84602-7-I (April 19, 2024).

Notice requirements are sometimes criticized as mere procedural requirements by elevating form over substance. Fundamentally, notice requirements allow the recipient/decision-maker (usually the owner or higher-tier contractor) to accept or reject potential future costs and/or time associated with a change.

Notice allows all parties to better understand the scope and impacts of changes before they occur and to mitigate, as much as possible, the impacts. The substantive effect of notification helps all parties.

When the owner agrees to the change, the contractor should have no (or less) trouble getting paid because of the agreement. When the decision-maker disagrees, and if the change is still necessary, then the contractor should reasonably control its costs knowing later payment may not be made.

Notice is more than a mere procedural requirement. Notice helps the project and the parties to progress pro-actively.

Returning to the Washington story, shortly after the contractor sued the city for breach of contract, the city argued the contractor failed to strictly comply with the notice and claims procedures.

The contractor, and interested industry groups, argued that the contractor need not have strictly complied when it substantially complied.

In other words, they argued that if the city actually knew about the changes and impacts, then the contractor need not have duplicated the same communication effort by documenting notifications in writing and at the strict timing of "within seven days of the occurrence of [the change]" and "before commencing performance of the [changed work]."

However, the trial and appellate courts held that strict compliance was what the parties intended and; therefore, was the requirement.

Each court relied upon a Washington State Supreme Court decision from 2003 explaining that "contractors are required to comply with the mandatory protest and claim procedures even when the owner has actual notice of the protest or claim."

Washington is not unique in this requirement. Virginia is another state requiring strict compliance and, on Virginia Department of Transportation contracts, a particular phrase (sometimes called "magic language") is required. Texas joined the same group in 2022. (See Roads and Bridges Law Column, April 2023.) This is not a complete list; there are more.

Do not worry! You can comply during the project.

- Dedicate resources to change and notification management. Do not just watch events unfold; manage and use them to your advantage.
- Track timelines. While acquiring, preparing, providing, and negotiating change pricing, track events during the project so you know when to notify.
- Understand how to notify. Proper notice is usually written. Meeting minutes or daily reports may not be enough.
- Transmission mode may matter. Hand delivery may be best or certified mail may be required. E-mail may not be acceptable.
- Unnecessary notice may be safer. When you learn the actual scope of impacts, it may be too late to notify because you should have known sooner and/or you agreed (by contract) to an earlier notice deadline. It may be better to notify and not need it later than never to have notified.

