

Written Notice

Beware that strict compliance of the contract might be required

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When an owner replaced a contractor for significant safety violations, the owner sought to recover from the contractor the costs for a replacement contractor. A Texas jury found both the owner and the terminated contractor breached the contract and awarded damages and attorneys fees to each. The jury decided that although two of the written notices required to recover the replacement costs were technically absent, there was sufficient communication between the owner and terminated contractor that forcing the terminated contractor to pay the replacement costs was proper and an intermediate appeals court agreed.

The Texas Supreme Court reversed the jury and the intermediate appellate court holding that strict compliance with notice requirements is generally not necessary, unless such notice requirements are part of a written contract. In this instance, the failure to comply with the written notice requirements did not invalidate the termination. However, the owner could not recover its replacement costs, which were only recoverable after having provided the required written notices before termination. *James Construction Group, LLC v. Westlake Chemical Corp.*, 650 S.W.3d 392, Supreme Court of Texas (May 20, 2022).

In this case, the contractor was to perform certain civil and mechanical construction work on the owner's chemical plant located in Geismar, Louisiana. The contractor was contractually "responsible for the safety and health of its employees and Subcontractors" and "for the adequacy, stability and safety of all operations, construction [of] temporary facilities, construction equipment and the construction site and methods necessary for the performance of the Work."

The owner had a contractual right to "intervene" if it reasonably believed that personal injury or property damage may result from contractor's performance. The owner could terminate the contract for convenience "at any time." The owner could terminate the contractor for default, but only after the owner had provided three, separate written notices plus a single 72-hour cure period. After a proper default termination, the terminated contractor was obligated to pay costs for a replacement contractor.

After several safety incidents including multiple "OSHA-recordable" injuries and "near misses" and a fatality, the owner terminated the contractor for default (or so the owner thought). The owner exchanged several internal e-mails about the contractor's safety record, one of which was also sent as a courtesy (or carbon) copy to the contractor characterizing a safety incident as "completely preventable" and requesting a safety review to show the owner how such incidents would be prevented. This e-mail did not reference the default clause, safety clause, or notice requirements of the contract.

The Texas Supreme Court reversed the jury and the intermediate court of appeals determination that this e-mail was sufficient written notice before a default termination. The Supreme Court reasoned that adequate notice should "communicate sufficient information to enable [the recipient] to reasonably conclude that [default] was at play and the [cure period] was ticking." Expressing concerns about safety, even as important as are such concerns, is not necessarily the notice contractually required to recover damages for replacement costs after a default termination. But even if this e-mail was a sufficient first notice, the contract required two more, separate written notices before an effective default termination.

For further reading, the Chief Justice of the Texas Supreme Court authored a dissent disagreeing with the majority opinion. The dissent is at least entertaining, if not interesting. The dissent argues that under the "substantial compliance" doctrine, the language of the owner's e-mail with the contemporaneous context could be sufficient notice, particularly if there was no harm to the receiving party, and full technical compliance was not necessary, even when a contractual provision so required.

With this opinion, Texas has now joined some other states that have seemingly raised form above function when providing notice. Some state-level public contracts even require mandatory or so-called "magic" language for notice to be legally sufficient. Take notice of both the contract and the status of the applicable law when notifying, even for significant safety violations.

