

# Notification Requirements in Construction Contracts: An Expert's Viewpoint

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All contracts in relation to the construction industry, whether standard form or bespoke, contain provisions with respect to notification requirements. The clause specifies that a contractor must give notices to the employer in the case of any event which deviates from the provisions and the agreed terms specified in the contract. This deviation may be in relation to (1) the completion date, (2) change in scope of works or variations, (3) additional cost that needs to be incurred that is not allowed in the contract. Such terms serve an important purpose, as such, this allows matters affecting project execution to be investigated while they are still current and can be resolved immediately.

In each of the cases, notification must be provided while the claim or the impact of the event is current. An assessment of the claim and its impact, current and future must be made as soon as the contractor has reasonable information regarding the same. A contractor's entitlement to relief with respect to time as well as cost is heavily dependent on the submission of these notices.

Notification requirements are strictly interpreted in common law as well as civil law countries. In accordance with common law principle, parties may argue that the prevention principle would allow them to circumvent this requirement. In accordance with civil law principles, parties may argue that even when a contract sets out notification requirements and time bar provisions, a party cannot waive its right to seek entitlement; if it has suffered an unfavourable impact due to events which are, in actuality, beyond its reasonable control.

The tribunal taking into account the factual circumstances and the laws of the jurisdiction determine the matter. Nevertheless, notification requirements cannot be circumvented, and parties must adhere to these in accordance with the contract. In this article, I aim to shed light on the events that warrant a notice to be served (excluding termination and repudiation of a contract), the reasons why it is served and the manner in which the expert considers these notifications or lack thereof, notwithstanding the fact that notifications are a matter for the tribunal to determine and not for any expert to assess.

## Instances where parties must provide Notification

There are four main possible scenarios (amongst others) when a contractor may serve a notice to the other party. These are: (1) Extension of Time, (2) Additional costs, (3) Force Majeure Events and/or (4) Variations.

The treatment of the notice under each of the heads is different.

1. In the case of extension of time, the contractor needs to provide a notice as soon as a delay event has come to light and has caused an impact on the execution of the contractor's obligations.
2. In the case of additional costs, the contractor needs to notify the employer of an event (including but not limited to additional work, change in law, defects in the works of third parties, and finance charges) and the cost impact that it has incurred as a result of the event.
3. In the case of a force majeure event, the contractor would usually be entitled to time related relief, unless the contract also specifies cost related relief as well.
4. The notices in relation to a variation do not entitle it to a variation order or the corresponding relief. The employer needs to acknowledge such variation and send a formal variation order. Parties, however, execute works in good faith to continue project execution.

## Reasons for provision of Notifications

Notices are a means of informing the other party to a contract of any events which have changed the circumstances in relation to execution of a contract. These notices are beneficial to both the contractor as well as the employer for the following reasons:

1. It would allow the employer to investigate the situation at the time of its occurrence, take steps to either resolve the issue (if any), find alternatives, and/or provide either time related or cost related relief to the contractor.
2. Any employer's primary concern cannot be whether the contractor is entitled to relief, but rather what issues are causing the time and cost impact and how they can be mitigated. The employer, after being informed of these events, may seek to undertake its own mitigation measures for timely completion of works.
3. Such notices demonstrate a healthy contractual relationship between the parties and create an environment for smooth execution of works under the contract.
4. Providing timely notices, regardless of the contractual requirements can be construed as an act of good faith and would only benefit the contractor in the event of dispute.
5. If the contractor fails to provide timely notices, it risks losing the credibility of its claim. As such, since

notices were not provided during the occurrence of the event, the employer will perceive the event to be an afterthought rather than a legitimate issue, which was beyond the contractor's reasonable control, and has prevented the progress of the contractor's obligations under the contract. It would also discredit the contractor's case in the event of a dispute.

6. In the case of a variation, it may withdraw an instruction, and in the case of a force majeure event, it may halt activities to save costs. The contractor can possibly lose the benefit of relief if it does not provide these notices.

In the case of extension of time claims, Clause 20.1 in FIDIC contract places heavy emphasis on providing a notice before submitting a claim. In most construction contracts, the provision of a notice is a condition precedent to making any claim for entitlement. This means that serving the notice is a mandatory requirement (unless agreed otherwise between the parties), and the contractor will lose entitlement to a claim if it does not meet the requirements for providing notices as specified in the contract.

The JCT Standard Form Contracts Clause 2.27, requires that the contractor must provide a notice when it became reasonably apparent that the progress of works is likely to be delayed. Unless otherwise amended, this clause, allows a lesser flexibility of notice provision, since it must be provided whenever it becomes 'reasonably apparent'. This ambiguity reduces time for the contractor to provide the notice, since provision of the notice is an immediate action to the contractor recognising an event as a delay event and the fact that it might have an impact to the completion date.

The issue with notice requirements is not when it is given, but rather the fact that it must be given. For instance, the wording in a FIDIC contract clearly states that the notice must be given as soon as practicable or within 28 days of the contractor becoming aware of the risk event. The wording of the clause provides flexibility on the contractor giving a notice, since it would need to provide a notice only within 28 days of it being aware of such a situation. While a contractor must be prudent and not delay such notification unduly, there is a period of flexibility that could be afforded by the contractor. However, if the contractor fails to give such notices, it might lose entitlement to any relief unless the contract states otherwise.

Core Principle 3 of the SCL protocol clearly states that "*The parties and the CA should comply with the contractual procedural requirements relating to notices, particulars, substantiation and assessment in relation to delay events.*"

The SCL protocol significantly emphasizes the requirement in relation to the submission of notices for any employer risk event as close as possible to the date of the adverse event, irrespective of whether it would impact the completion date. If the contractor fails to provide notices, it will bear the risk of not getting any entitlement. The SCL Protocol in such cases suggests that a contractor must provide sufficient

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notices for all delay events, irrespective of whether or not it co-relates as an employer risk event. Some contracts specifically require the contractor to provide notices for all delay events irrespective of which party bears the consequence of the delay event.

### **An Expert's Assessment of these Notifications**

As an expert, my aim when assessing a case in a dispute primarily focuses on (1) whether an event has impacted a contractor's progress while executing the work specified in its contract (2) lay down the factual matters pertaining to the claim and (3) in the cases of variations, assess the whether the works were executed, and cost incurred thereto.

The notices, regardless of the form, whether direct or indirect, help an expert assess any factual circumstances that may have led to the contractor incurring any additional costs or facing events which have delayed its progress or faced other issues which are beyond its control/ beyond the control of either party. Neither the expert nor the tribunal are present during the execution of a project, hence, an expert shall rely on contemporaneous documents such as correspondences, progress reports, minutes of meetings, emails, work inspection reports, material approval requests etc to understand the facts of the event or matters beyond the contractor's control. Further it helps the expert assess and lay down the manner in which the parties conducted themselves throughout the project to assist the tribunal in its determination.

The notices help an expert understand if the employer acknowledged an event and its corresponding impact on the contractor's obligations. In

some instances, the employer may acknowledge an event and its impact, but dispute on the relief. The employer may acknowledge the event, its impact and may award extension of time of the contract but may not award any costs for the same. Such matters could be captured in the notices and may allow the expert to highlight the same for assisting the tribunal.

In addition to assisting the tribunal in collating the factual matters that the parties were dealt with during the currency of the contract, it is the expert's primary duty to provide an assessment of delay (in the case of a time related claim) and the cost (in case of a cost related claim), for the events that were pleaded by the parties. With this, the tribunal will have sufficient means to determine the matter, if the tribunal finds that the event/ changes does have merit and is tenable, regardless of the existence of the notification issues. In summary, as an expert, I would build the factual circumstances of the matter taking into account the direct/indirect notices for assisting the tribunal. Regardless of the notice provided or otherwise, I will assess the matter based on its factual merits and leave the tribunal to determine the pleaded positions of the parties with respect to the notification requirements.

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