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The Importance of Contractual Notices

At the beginning of 2020, the words COVID-19 and coronavirus were not part of our everyday vocabulary; now we hear of little else.

Whilst in the future, we will have the luxury of looking back on the pandemic and reflecting at leisure on how we dealt with the hardships it caused us, for the majority of businesses, many new measures have had to be implemented rapidly. It is likely that your business has put measures in place at short notice so that its delivery teams can navigate these challenging times and succeed in the future.

The pandemic has placed a heavy burden on project teams to quickly serve contractual notices and ensure that contractual risk is managed and minimised across the contractual supply chain; from customers to manufacturers, right through to suppliers and their subcontractors.

In view of having to act promptly, it is worth noting some key points about serving effective contractual notices in response to potential delaying and disruptive events such as COVID-19.

First and foremost, whilst notices may be perceived as adversarial in nature, do not be afraid to issue them. They are a contractual requirement and merely facilitate positive communication between the parties. If you make the other party aware of a potential issue, they may be able to devise a mitigation measure(s) which removes or limits the impact of an issue; after all, forewarned is forearmed.

What is a notice and why are they so important?

Notices are a requirement in many contracts and specific clauses are drafted where the parties to a contract are obligated to notify one another in certain circumstances. These clauses are very important, although they are often not appreciated properly.

Notices also serve a softer purpose to encourage effective communication between parties. They give the parties a chance to raise issues formally and elicit a response that would otherwise have been avoided or overlooked by the other party.

Can I go ahead and issue a notice?

Before a notice can be issued, it is important to review the contract and determine which clause(s) relate to the matter at hand and whether there is a prerequisite to an entitlement to time, money, or both.

What is a good notice?

Notice clauses should be clear, precise and prescribe what a notice should contain. A typical notice clause will state: (1) what a notice should look like; (2) how the notice should be issued, be it by email, post, or fax. Accordingly, the email address, postal address or fax number should be provided; (3) who is to be the recipient; (4) who has the authority to issue a notice; (5) the information the notice should contain; and (6) stipulations regarding the time limit for sending a notice and the associated sanction(s) of failure to do so.

The party drafting the notice should also consider including the following details:

- i. Which clause the notice is pursuant to;
- ii. A clear description of the event;

- iii. Details of whether the event is likely to cause delay;
 - iv. What mitigation measures have or will be taken;
 - v. Details of whether the contract price is likely to be affected;
- and
- vi. Whether a meeting between the parties is necessary.

Whilst you may not be able to identify specific impacts at the time of drafting a notice, by issuing one you protect your position. This may entitle you to relief, should a delay flow from the notified event. It is highly unlikely that you will be entitled automatically to any relief if an event likely to cause delay is not notified. Therefore, regardless of the contract type, it is strongly recommended that you issue a notice to your contractual counterpart, advising them of a potential delaying event.

In the absence of notice requirements set out in the contract, English courts have generally considered that the claimant is only required to give the best information it is reasonably able to provide, and only information which is available to them at that time.

Even a trivial mistake when submitting a notice can cause problems later for the claiming party. Therefore, it is vitally important that when serving a notice, the relevant contractual requirements are met.

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Be aware of condition precedent

In contract law a condition precedent is a legal term to describe when a condition(s) must be satisfied before another part of the contract can take effect. In many contracts, the submission of a valid notice is a condition precedent for making a claim.

If a contract does not contain a condition precedent but requires the claimant to give a notice of delay, this will be treated as condition precedent. A failure to give such a notice will result in loss of entitlement to make a claim in respect of such delay.

What is a time bar?

There is a growing trend in ‘manufacture, supply and construction’ contracts to stipulate a time period by which some obligations must comply; for example: serving a valid notice. If these time periods prescribed are written in conjunction with a sanction, such as a waiver of right to claim time or money, they are referred to as a ‘time bar’ clause.

The result, in practice, means that if a notice is not sent within the timescale prescribed in the contract, the claiming party will not have fulfilled a condition precedent to claim. Therefore, the claimant may lose their rights to claim time, money or both for that event.

Why are time bar clauses used?

The intention of a time bar clause(s) is to improve the administration and management of contracts. Setting a notice deadline for the claimant ensures that the other party is notified at an early stage. This gives the party time to evaluate the issue and take steps to mitigate any potential impacts on the project.

Time bar clauses are also designed to prevent a build-up of claims during a project, the snowball effect of which can result in a costly legal battle towards the end of a project. These clauses encourage the contracting parties to co-operate and act in a timely and transparent manner, addressing issues as soon as one party becomes aware of them.

Failure to serve a required notice within the specified period will, in theory, time bar the claimant from claiming any extension of time or additional payment.

A checklist to summarise:

- i. Review the contract and identify the clauses which you want to rely on for an extension of time and/or costs;
- ii. Draft the notice in accordance with what is prescribed by the contract and ensure it contains the relevant detail that you wish to rely on later when submitting a claim;
- iii. Submit the notice within the timescales prescribed in the contract; and
- iv. Update the notice(s) when more information becomes available.

If an event impacts the project, following these key steps above will ensure you have implemented the right measures to pre-empt challenges with your contractual counterparts. This will both protect your rights and if instituted in a transparent manner, will facilitate a collaborative resolution.

If you require any further information, please contact Carl Simms at carlsimms@hka.com.