Evaluating Contractual Dispute Resolution Provisions: Claims

With this column, I will begin a series of discussions concerning claims and dispute resolution. The discussion will begin with contractual claims procedures and presentment provisions. Developing from there, future columns will address dispute resolution provisions, the various means by which construction contracts often address dispute resolution, mediation, and arbitration.

In this piece, I will discuss claims. Claims, in the sense that the term is being used here, refers specifically to contractual claims for an adjustment in the contract time or contract sum for a project. Claims does not refer to non-contractual claims that might arise such as those claims for personal injury or property damage.

From a best practices perspective, the most important aspect of a claim is to make sure that you have everything written down. For any type of contractual claim, the burden of proving entitlement to the adjustment in contract sum or time lies with the claimant. This is true in a courtroom in front of a judge as well as in a board room in front of the other party. The claimant must be prepared to demonstrate its entitlement to the adjustment. Therefore, make sure that all necessary records of the events giving rise to the claim are well documented. Also, make sure to provide the other party notice of the claim as soon as possible after it arises. The longer a claim languishes, the more difficult recovery can become.

Another practice to bear in mind is that a claim may be presented and denied or ignored by the receiving party. If your claim is not addressed or fully reviewed, presumably in the hope that a failure to act may eventually result in the claim being passed or overlooked, do not continue to sit on it until completion. Modifying a pay application to include the claim, even in not previously approved, will constitute formal presentment and may eliminate a waiver argument.

A common definition of "claim", that you might find in construction contracts is "Claim – a written demand seeking, as a matter of right, adjustment or interpretation of contract terms, payment of money, extension of time or other relief with respect to the terms of the contract." This definition contains all essential terms for a construction claim and applies equally to both parties to the contract.

Some contract agreements will further define a claim and differentiate between claims by the owner or the contractor. For example, the EJCDC C-700 defines claim as follows:

Claim: (a) A demand or assertion by owner directly to contractor, duly submitted in compliance with the procedural requirements set forth herein: seeking an adjustment of contract price or contract times, or both; contesting an initial decision by engineer concerning the requirements of the contract documents or the acceptability of work under the contract documents; contesting engineer's decision regarding a change proposal; seeking resolution of a contractual issue that engineer has declined to address; or seeking other relief with respect to the terms of the contract; or (b) a demand or assertion by contractor directly to owner, duly submitted in compliance with the procedural requirements set forth herein, contesting engineer's decision regarding a change proposal; or seeking resolution of a contractual issue that engineer has declined to address. A demand for money or services by a third party is not a claim.

With respect to filing a claim with the other party to an agreement, the contract language generally controls the process for claim presentment. In many contracts, formal presentment of a claim is required. In some situations, a failure to formally present the claim may act as a waiver of that claim and ultimately prevent recovery. This waiver scenario most frequently appears in contracts as being applicable to the downstream party, but it can be bilateral. An example of a presentment provision with waiver language is below:

Notice of claims should be provided contemporaneously with the events giving rise to the claim or concurrent to the time the claimant recognizes the condition giving rise to the claim. Failure to provide timely notice and preserve conditions and records to substantiate a claim may result in the diminishment or denial of a claim. Failure to provide notice required by the contract documents within 90 days of the occurrence or event giving rise to the claim shall constitute an express waiver and complete bar to recovery for any adjustment to the contract time, contract sum, or other damages and accommodations.

If a contract has language similar to the paragraph above, the parties must be careful to document and provide notice of claims as the events that create the claim arise. It is important to note the 90-day period in this above language. In many contracts language requiring presentment will limit the time period to 30 days or less. In Texas, those shorter timeframes may not be enforceable if the intent of the language is to provide for a complete waiver for failure to timely present the claim.

There is a statute in Texas that prohibits contractual waiver provisions concerning damages from being enforceable if the period provided by the contrast is less than 90 days. This law is directly applicable to presentment provisions and contractual provisions that require notice of a claim for damages. This is important because, while a contract may provide for presentment or notice of a claim within 30 days of the event, if the consequence of a late presentment is waiver, then that provision is unenforceable. However, if the consequence is something short of waiver, then the time-frame provision would not be unenforceable as a matter of law. For example, if the presentment provision precludes and adjustment in contract sum for a claim for delay not presented within 30 days of the event, but allows for an adjustment to time in that event, then the provision would not be directly contrary to the law.

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