

# BRICKS IN THE WALL

**Building Toward a More Cost-Effective and Efficient Construction Project**

## Giving Proper Notice

**H**ave you ever been involved in a construction project when you learned some disturbing facts about a contractor's or your own progress on the job? Have you ever learned these disturbing facts three months later than you should have? Let's take a look at some reasons why giving proper notice can make a huge difference to your bottom line.

**Notice – should you give it?** It is an easy answer. Do it. Giving or receiving proper notice can determine how liability is allocated when a construction project goes bad. It is a simple concept that most construction industry personnel know, but one that you may not apply in practice.

**What may happen when you do not correctly give notice?** Damages, and lots of them. It is very easy during the day-to-day activities of a construction project to overlook the fundamentals. Why does this happen? There are a variety of reasons: you are too busy, your job superintendent does not know what your contract says, you know that “today is looking bad, but tomorrow will be better,” you have been told that the materials are arriving next week, or you just do not want to rock the boat because of business relationship reasons. Anyone can fall into this trap; even large, sophisticated companies. See *Sigmon Coal Company, Inc. v. Tennessee Valley Authority*, 359 F. Supp. 2d 686, 693 (E.D. Tenn. 2004) (award-

ing over \$7,000,000 in damages to Sigmon Coal Company because TVA failed to give timely notice under the parties' supply contract).

### **Why should you give notice?**

Giving notice can help you avoid bigger problems later in the project:

Notice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only one of the contracting parties. In the absence of an express notice provision, the court will frequently imply an obligation to give notice as a matter of common equity and fairness.... Requiring notice is a sound rule designed to allow the defaulting party to repair the defective work, to reduce the damages, to avoid additional defective performance, and to promote the informal settlement of disputes.

*McClain v. Kimbrough Construction Company, Inc.*, 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990) (internal citations omitted).

Some notice obligations are built into statutory law. For example, the Tennessee mechanics' and materialmen's lien statute requires a lien claimant to provide very specific types of notice on several different occasions. See, e.g., TENN. CODE ANN. §§ 66-11-111

and 66-11-112 (regarding a general contractor's notice requirements), and TENN. CODE ANN. §§ 66-11-106, 66-11-112, 66-11-115, and 66-11-145 (regarding a subcontractor's or supplier's notice requirements). Failing to provide the notice(s) required under the lien statutes can bar recovery.

Another Tennessee statute, the Prompt Pay Act, TENN. CODE ANN. §§ 66-34-101, et seq., entitles a subcontractor prevailing on its claim to recover attorneys' fees if the required notice has been promptly and correctly given. See TENN. CODE ANN. § 66-34-602.

Do not overlook the simple fact that giving notice, as painful or embarrassing as it might seem at first, can give everyone involved on the project a better opportunity to correct a mistake early or plan for an alternative. The bottom line is that giving notice can save you money.

There is something in this for everyone involved in a construction project. Read your contract. Make sure that all of your key personnel on the project know what your contract says. Owners should understand when and what kind of notice should be given because they may be able to bar a general contractor's recovery of damages. General contractors should understand notice obligations because they may have to defend claims brought by subcontractors or prosecute their own claims against owners. Subcontractors

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should be familiar with notice requirements because their claims may be completely barred if notice is not timely and properly given.

This information is provided for informational purposes only and does not constitute legal advice. It is intended to give you a broad overview of very limited issues; it is not intended to apply to every situation or to address every circumstance that may arise.



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