



UNDER CONSTRUCTION

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California Court Confirms that Contractors Need to Strictly Follow Notice and Claim Procedures

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Construction contracts usually include detailed notice and claim provisions which are often ignored by the parties. Many contractors operate under the assumption that regardless of the “fine print” in their contracts requiring timely notice of a claim, ultimately a change order or favorable court judgment can be secured so long as the contractor can prove that the owner (or non-contractor caused factors) caused a delay or additional costs. A recent California Court of Appeal decision, *Greg Opinski Construction, Inc. v. City of Oakdale* (2011) 199 Cal. App. 4th 1107, makes clear that contractors should strictly comply with these “fine print” provisions or risk losing the right to additional time or compensation.

In 1963, the California Supreme Court in *Peter Kiewit Sons’ Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal. 2d 241, held that even if a public works prime contract required the contractor to notify the owner of delays – whether to make a claim, or to avoid liquidated damages – the failure to do so was not necessarily fatal. The failure to request a time extension, make a delay claim, or give notice of a delay event as required in the prime contract was excused where the delays involved were caused by the owner. However, the California legislature, just two years later in 1965, responded to the *Peter Kiewit Sons’ Co.* decision by amending California Civil Code section 1511 to allow parties to contractually agree to specific claims and time extension procedures.

Most recently, in *Opinski*, the California Court of Appeal severely limited the

application of *Peter Kiewit Sons' Co.* and confirmed the impact of the 1965 amendment to Civil Code Section 1511. In *Opinski*, a contractor entered into a contract with the City of Oakdale to construct a building. The contract required completion within a specified time frame and provided for liquidated damages for each day of delay. The contract also set forth a specific notice and change order procedure in order for the contractor to seek relief for delays. The project ultimately was completed seven months late due to circumstances beyond the contractor's control (including owner-caused delays). The contractor, however, did not follow the notice and change order procedure set forth in the contract.

The contractor sued the City for unpaid amounts under the contract. The City filed a cross-complaint against the contractor seeking, among other things, liquidated damages for delayed performance. At trial, the contractor sought to argue that any delays were the owner's fault and therefore, under *Peter Kiewit Sons' Co.*, liquidated damages were inappropriate. The trial court rejected the argument and determined not to even accept evidence of owner-caused delays based on the contractor's failure to comply with the notice and change order requirements of the contract. The trial court also awarded the City liquidated damages. The Court of Appeal affirmed the judgment, reasoning that under the amended and current version of Civil Code Section 1511, parties to a construction contract may agree, as the contractor did in *Opinski*, that a contractor "intending to avoid the effect of its failure to perform by asserting that [the owner's acts] caused the failure must be given written notice of this intention within a reasonable time."

The decision in *Opinski* underscores the importance to contractors to read and strictly comply with the construction contract and its notice, change order and claims provisions.

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