



# In Case You Didn't Notice: Notices and Construction Disputes in Washington

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# Introduction

# Notice and Construction Disputes



# Notice and Construction Disputes

- Construction disputes and claims typically involve lots of **documents** and **asymmetrical access to information**.
- Additional **stakeholders** or **experts** may need to get involved with a claim or disputes.
- Notice requirements are a way to **create a more level playing field** and, ideally, **resolve disputes** before excessive resources are spent in adjudicative proceedings.

# Notice and Construction Disputes

- Many disputes involve **contractual notice requirements** negotiated/agreed to by the parties.
- Other disputes involve **statutory notice requirements** before proceeding to adjudicative resolution.
- In both cases, the goal (at least in theory) is to **reduce information asymmetry, address fixable issues, and facilitate negotiated resolution.**



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# Contractual Notice Requirements

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# Contractual Notice Requirements

- Construction contracts, particularly for larger projects, typically include protest and/or claims procedures.
- Procedures usually require timely protest and/or notice of claims be provided.
- Notice sometimes includes formal requirements.
  - Recipients/addresses/form of notice
  - Specific content
  - Supporting documentation

# WSDOT Standard Specifications

- Prototypical protest and claims procedures.
- Section 1-04.5: Protest
  - “If in disagreement with **anything required in a change order, or the Engineer’s Written Determination or decision** that the **Contractor believes they are entitled to an increase** in the Contract price or time . . . .”
  - Signed, written notice of protest within 14 days
  - Supplement protest with written statement, supporting documents, cost estimate, and schedule impacts within 14 more days

# WSDOT Standard Specifications

- Disputes Review Board (DRB)
  - If created, dispute presented to DRB for evaluation.
- Section 1-09.11: Claim
  - “If ... Contractor has **pursued and exhausted** all the means provided in Sections 1-04.5 and 1-04.5(1) ... the Contractor may file a claim as provided in this section.
  - Detailed and certified claim required
  - Content and form requirements (e.g., notarized)
  - Within 14 days of DRB/WSDOT decision on protest

# AIA A201 General Conditions

- Commonly used on private construction projects.

## § 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.

# AIA A201 General Conditions

## **§ 15.1.5 Claims for Additional Cost**

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

## **§ 15.1.6 Claims for Additional Time**

**§ 15.1.6.1** If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

**§ 15.1.6.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated, and had an adverse effect on the scheduled construction.

# “Short Form” Example

- Example of simplified notice and claim requirements.

**4. Claims.** If Contractor claims entitlement to extra compensation or time for any reason whatsoever, notice of any such claim shall be submitted to Client in writing by Contractor within five (5) days of Contractor’s knowledge of the basis for the claim or the date on which Contractor reasonably should have known of the basis for the claim; otherwise the claim shall be absolutely and unconditionally waived and released. Any Work performed by Contractor, except that described in and reasonably inferable from **Exhibit A**, performed without Client’s advance written approval is at Contractor’s risk and expense.

**(a) Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in Exhibit A or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Agreement, the Contractor shall promptly provide notice to the Client before conditions are disturbed and in no event later than fourteen (14) days after first observance of the conditions and may make a claim for additional compensation and time for such conditions.

## Case Law: Older Cases

- **Sime Construction Co., Inc. v. Washington Pub. Power Supply Sys.**, 28 Wn. App. 10, 621 P.2d 1299 (1980): Failure to submit claim required by the contract barred the claim later.
  - “Had [the subcontractor] given the 15-day notice required under the prime contract which would have outlined the additional cost ... [the contractor and owner] could have balanced the desirability of the design improvement against those costs in determining economic feasibility.” 28 Wn. App. at 16.
- “Washington law requires contractors to follow contractual notice procedures, unless those procedures are waived.” **Absher Construction Co. v. Kent Sch. Dist. No. 415**, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995).

## Case Law: *Hensel Phelps*

- *Hensel Phelps Const. Co. v. King Cnty.*, 57 Wn. App. 170, 787 P.2d 58 (1990).
- Quasi-contractual alternative claims like *quantum meruit* are unavailable if party does not comply with required notice and claim provisions.
- Contract claim provisions contemplated extra work, trade stacking, etc.
- “Phoenix could have submitted its cost overruns to Hensel. It did not.” 57 Wn. App. at 178.

## Case Law: *Mike M. Johnson*

- *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).
- Issue: If the other party has **actual notice** of grounds for a claim, does failure to following notice requirements still bar the claim?
- Contractor did not submit Section 1.04.5 protest.
- Owner had actual notice of changed conditions.
- Court held that **contractor waived** the right to claim additional compensation.

## Case Law: *Mike M. Johnson*

- “This court, as well as the state appellate courts, has historically upheld the principle that **procedural contract requirements must be enforced** absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.” 150 Wn.2d at 386-87.
- “[A] party to a contract **may waive a contract provision** meant for its benefit, but waiver by conduct ‘requires **unequivocal** acts of conduct evidencing an intent to waive.’ ” 150 Wn.2d at 391 (quoting *Absher*, 77 Wn. App. at 143).

## Case Law: *American Safety*

- *American Safety Casualty Insurance Co. v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 54 (2007)
- Issue: Did the owner waived right to enforce notice requirements by **negotiating** to resolve a claim despite contractor's failure to provide notice?
- “Implied waiver of contractual rights **requires unequivocal acts**, and here the City's acts were, **at most, equivocal.**” 162 Wn.2d at 773.
- “If we found that by agreeing to enter into negotiations the City waived its rights under the contract, we would **deter future parties from attempting settlement** before resorting to use of the courts.” 162 Wn.2d at 772.

## Case Law: *Realm*

- *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 277 P.3d 679 (2012) (Division Two)
- Issue: Does non-compliance with claim notice provisions prior to a termination still constitute waiver of claims after the termination?
  - **Yes** (at least under the WSDOT Standard Specs).
  - Waiver occurs **at the time of non-compliance**.
- “If Realm had shown some good faith effort to comply with section 1–04.5, we might reach a different result.”  
168 Wn. App. at 11.

## Case Law: *NOVA*

- *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 426 P.3d 685 (2018).
- Court acknowledges well settled law: “We have repeatedly upheld such notice of protest provisions.” *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d at 865.
- Waiver by notice non-compliance also waives related claims for breach of covenant of good faith/fair dealing.

## Case Law: Waiver

- **Weber Const., Inc. v. Cnty. of Spokane**, 124 Wn. App. 29, 98 P.3d 60 (2004): Owner **waived** the right to strictly enforce notice requirements by **preventing the contractor from complying**.
- **Graham Contracting, Ltd. v. City of Fed. Way**, 2023 WL 3721171, 26 Wn. App. 2d 1049 (2023) (unpublished): Owner **did not waive** the right to strictly enforce notice requirements by implementing a **separate process** for resolving disputes.
  - “Graham offers no evidence that the City **intended the meetings to replace** the contractual disputes and claims requirements.” 2023 WL 3721171 at \*6.



# Statutory Notices and Defect Claims

# Types of Statutory Notice-Defects



- Residential (RCW 64.50)
- Condominium (RCW 64.34)
- Lien
- Public Works (Retainage and Bond)

# RCW 64.50 - Purpose

## 64.50.005. Finding--Intent

### Currentness

The legislature finds, declares, and determines that limited changes in the law are necessary and appropriate concerning actions claiming damages, indemnity, or contribution in connection with alleged construction defects. It is the intent of the legislature that this chapter apply to these types of civil actions while preserving adequate rights and remedies for property owners who bring and maintain such actions.

# RCW 64.50.020

(1) In every construction defect action brought against a construction professional, the claimant shall, no later than 45 days before filing an action, serve written notice of claim on the construction professional.

(a) The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect.

(b) If the claimant is a condominium association created after July 23, 2023, the written notice of claim shall include a written report from a construction defect professional. In addition to describing the claim in reasonable detail sufficient to determine the general nature of the defect the written report shall state the construction defect professional's qualifications, the manner and type of inspection upon which the report was based, and the general location of the defect.

# RCW 64.50.030

(1) In every action brought against a construction professional, the claimant, including a construction professional asserting a claim against another construction professional, shall file with the court and serve on the defendant a list of known construction defects in accordance with this section.

(2) The list of known construction defects shall contain a description of the construction that the claimant alleges to be defective. The list of known construction defects shall be filed with the court and served on the defendant within thirty days after the commencement of the action or within such longer period as the court in its discretion may allow.

(3) The list of known construction defects may be amended by the claimant to identify additional construction defects as they become known to the claimant.

(4) The list of known construction defects must specify, to the extent known to the claimant, the construction professional responsible for each alleged defect identified by the claimant.

(5) If a subcontractor or supplier is added as a party to an action under this section, the party making the claim against such subcontractor or supplier shall serve on the subcontractor or supplier the list of construction defects in accordance with this section within thirty days after service of the complaint against the subcontractor or supplier or within such period as the court in its discretion may allow.

# RCW 64.50.050

(1) The construction professional shall provide notice to each homeowner upon entering into a contract for sale, construction, or substantial remodel of a residence, of the construction professional's right to offer to cure construction defects before a homeowner may commence litigation against the construction professional. Such notice shall be conspicuous and may be included as part of the underlying contract signed by the homeowner. In the sale of a condominium unit, the requirement for delivery of such notice shall be deemed satisfied if contained in a public offering statement delivered in accordance with chapter 64.34 RCW.

(2) The notice required by this subsection shall be in substantially the following form:

CHAPTER 64.50 RCW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE SELLER OR BUILDER OF YOUR HOME. FORTY-FIVE DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE SELLER OR BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR SELLER OR BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER OR SELLER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

(3) This chapter shall not preclude or bar any action if notice is not given to the homeowner as required by this section.

# Who and What are Covered? (RCW 64.50.010)



## Who and What are Covered? (RCW 64.50.010)

- **“Action”** – lawsuit or “action in contract or tort for damages or indemnity brought against a construction professional...”
  - Includes complaint, counterclaim, cross-claim
  - For damage or the loss of use of real or personal property
  - Caused by a defect in the construction
  - Of a residence, or in the substantial remodel of residence.
  - Does not apply to claims for personal injury or wrongful death
- **“Claimant”** – homeowner or association
- **“Construction professional”** – architect, builder, builder vendor, contractor, subcontractor, engineer, or inspector...

# What is a Construction Defect?



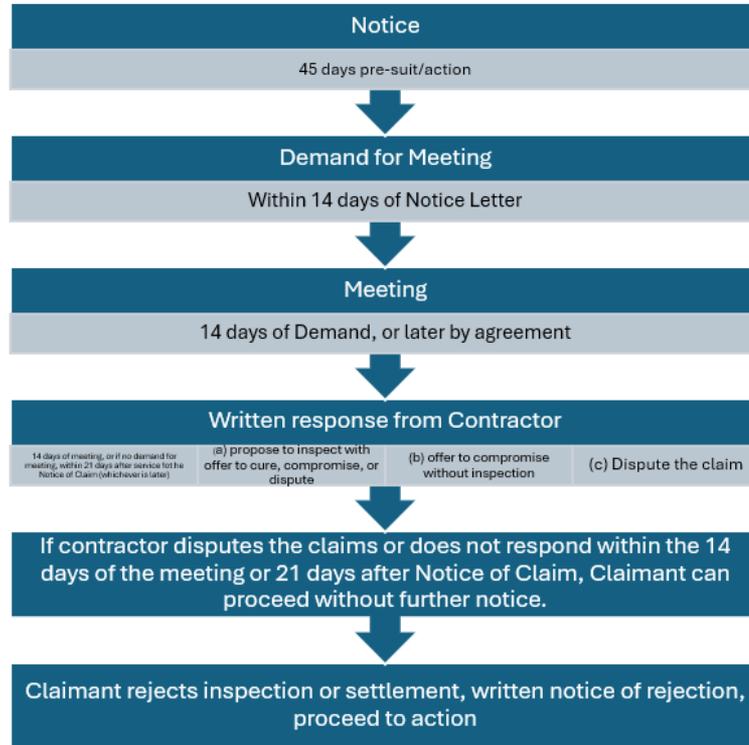
# What is a Construction Defect?

- Construction Defect - Not defined by RCW 64.50.010
  - From cases:
    - Failures in design, workmanship, materials or construction
- Examples
  - “Hammer and nails”
  - Design
  - Landscaping

## 64.50.020

- Who: Claimant v. construction professional
- What: Construction defect action involving residential construction
- Requirements:
  - Written Notice of Claim
  - 45 days before filing an action
  - Describe the claim “in reasonable detail sufficient to determine the general nature of the defect.”
  - Added requirement for condo associations created after July 23, 2023 – must include a **written report from a construction defect professional.**

# 64.50.020: A Visual



## 64.50 in Practice - SOL and SOR

- Statute of Limitations for construction projects:
  - 6 years if written contract
  - 3 years if oral contract
  - Discovery rule. See *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006).
  - Affirmative defense precluding application of discovery rule: RCW 4.16.326(1)(g)
    - Must be plead!
- Statute of Repose (RCW 4.16.310)
  - Purpose to limit discovery rule and avoid placing huge burden on construction professionals, and prevent stale claims where evidence lost or witnesses no longer available.
  - 6 years from date of “substantial completion.”
  - Statutory definition of “substantial completion” ≠ contractual definition

# SOL/SOR

Statute of Limitations	Statute of Repose
6 years (written) or 3 years (oral)	6 years
Discovery Rule	Substantial Completion
Must be discovered w/in 6 years following substantial completion OR limited to 6 years, regardless of discovery, if affirmatively plead (RCW 4.16.326(1)(g))	Total bar if claim does not accrue within 6 years



# 64.50 and SOL/SOR

- **Tolling**

- Non-condo claims
  - RCW 4.16.325
    - +60 days Without prejudice – RCW 64.50.020(6)
  - But beware of dismissal if SOL has expired
    - Example: Claimant files suit 5 years 11 months after “accrual” date. Summary Judgment without prejudice is granted. Can claimant re-file now 6 years have elapsed?
- Under RCW 64.34 (WCA)
  - 64.34.452(4)
    - +60 days

## 64.50 In Practice

- How does it stack up against contractual notice?
  - MMJ vs. RCW 64.50
- What should Notice Letter contain?
- Does it really have teeth?
  - *See Lakemont Ridge Homeowners Assoc. v. Lakemont Ridge Limited P'ship*, 156 Wn.2d 696 (2006).
  - *See Babbitt v. Kingsgate Ridge Manor Assoc. of Apartment Owners*, 5 Wn. App. 2d 1052 (2018) (not reported).



# Other Notice Categories

- Condominium Act – RCW 64.34
  - 64.50.020 notice is required, plus heightened requirement of expert report
  - SOL is **four** years (accrual date depends on residential unit versus common element);
- Public Works
  - Bond
  - Retainage
- Liens
  - Pre-Lien Notice
  - Foreclosure

# Conclusion

- Paying attention to notice requirements and timing is critical to preserve and enforce rights with respect to construction disputes, especially in Washington.
- Be aware of contractual notice requirements and act early to ensure the ability to comply.
- Be mindful of statutory notice requirements for defect claims, particularly when close to SOL/SOR.
- Important to understand statutory rights and obligations as to both Claimant and Construction Professional.

# Conclusion

## Questions?



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Evan represents owners, contractors, and design professionals in a wide range of construction matters and disputes arising from public and private projects in Washington and around the country. From contract drafting and negotiation to project advisory matters to litigation and alternative dispute resolution, Evan helps his clients navigate the legal pitfalls of construction projects, resolve disputes, and preserve and enforce their rights.

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