



## **Ohio Court of Claims Decision Puts Public Works Bond Sureties Directly Behind the Eight Ball: Strict Application of Claims Waiver Provisions Bars Surety Payment Claims**

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In *Berkley Ins. Co. v. Kent State Univ.*, Ohio Ct. of Cl. No. 2018-00579JD (Jan. 14, 2019), the Ohio Court of Claims expanded its prior rulings strictly enforcing contract dispute resolution provisions in the public construction contract arena. The Court ruled, despite the circumstances that actually existed between the contracting parties, that a contractor's surety who takes over and completes a project after the contractor's default and termination is likewise bound by the contract's dispute provisions. The ruling reinforces the significant risk of waiver of claims by contractors and their sureties when claims are not promptly submitted in accordance with contract provisions governing disputes, even though all parties are aware of the dispute and claim.

### **Case Summary:**

In 2014, Kent State hired R & M Electric Co. dba Summit Electric ("Summit") to perform electrical work in connection with renovations and additions to Kent State's School of Art. Berkley Insurance issued payment and performance bonds for Summit's work on the project. In November 2015, Summit abandoned the project and was subsequently terminated for cause. Berkley stepped into the project, completed the work, and honored its payment bonds obligations. The surety then pursued payment of the contract balance.

The contract between Kent State and Summit contained standard Article 8 dispute resolution provisions, which provided that "the Contractor shall initiate every Claim by giving written notice of the Claim to the A/E and the Contracting Authority within 10 days after the occurrence of the event giving rise to the claim. . . . [t]he Contractor's failure to initiate a Claim as and when required under this Section 8.1 shall constitute the Contractor's irrevocable waiver of the Claim."

After project completion, in a June 2017 letter, Kent State issued several back-charges and also stated that it was going to withhold a portion of the contract fund. Berkley "objected to [Kent State's] withholdings and/or its imposition of back charges, through written and other communications to [Kent State.]" Berkley did not institute a formal claim under Article 8 of the contract. Kent State asserted that Berkley waived its claims, and its right to contest the back charges, because it did not strictly comply with Article 8. Berkley responded that filing a formal claim was unnecessary and unfair in light of the already ongoing negotiations between the parties regarding the back-charges and the withholding.

The Court sided with Kent State. In doing so, the Court held that Berkley's objection to the back-charges and withholding, and subsequent negotiations with Kent State, did not constitute a proper claim under Article 8. *Id.* Accordingly, Berkley waived its claims:

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The Court cannot rewrite the parties' contract by relieving [Berkley] of its contractual obligations based on assertions of unfairness or inequity. Thus, [Berkley's] reasons for failing to comply with Article 8 are irrelevant and, having failed to initiate the Article 8 process at any point, Berkley waived its claims.

#### Bottom line:

Although incredibly adverse for the surety industry, the Court's decision is hardly surprising. For years, Ohio Courts have strictly enforced dispute and change provisions in contracts, especially in the public construction arena. This puts contractors and their sureties at great risk for waiving their claims. The decision underscores the importance of knowing the contract documents, especially their dispute and change provisions, and the need for strict project compliance with notice and administrative claim processes. Each project stakeholder needs to confirm that their team members are following the contract and issuing required notices. Likewise, a surety bonding a contractor is well served to require contract notice compliance audits to ensure that the bond principal is adequately protecting contract collateral, especially in instances where a contractor is at risk of default.

Further, when sureties must perform on their payment and performance bonds, the need for timely, responsive, and surgically precise project management cannot be understated. Public construction contracts often have very limited windows for claims to be made (often only a few days) or they are waived. Sureties must be able to assess the situation swiftly, including whether any viable claims exist, and act accordingly to preserve their rights.

It is imperative that both the contractor and surety have a clear understanding of how Article 8 works and ensure they are in compliance at all costs. Sureties should consider auditing their contractor's claims process on all state projects as a safeguard. Anything less is a waiver of rights under Ohio law. Hahn Loeser's [Construction Team](#), which has extensive experience representing contractors and surety companies, proactively helps project stakeholders identify, assess, and mitigate project risks and aids project management personnel in real time with required contract terms and procedures.



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