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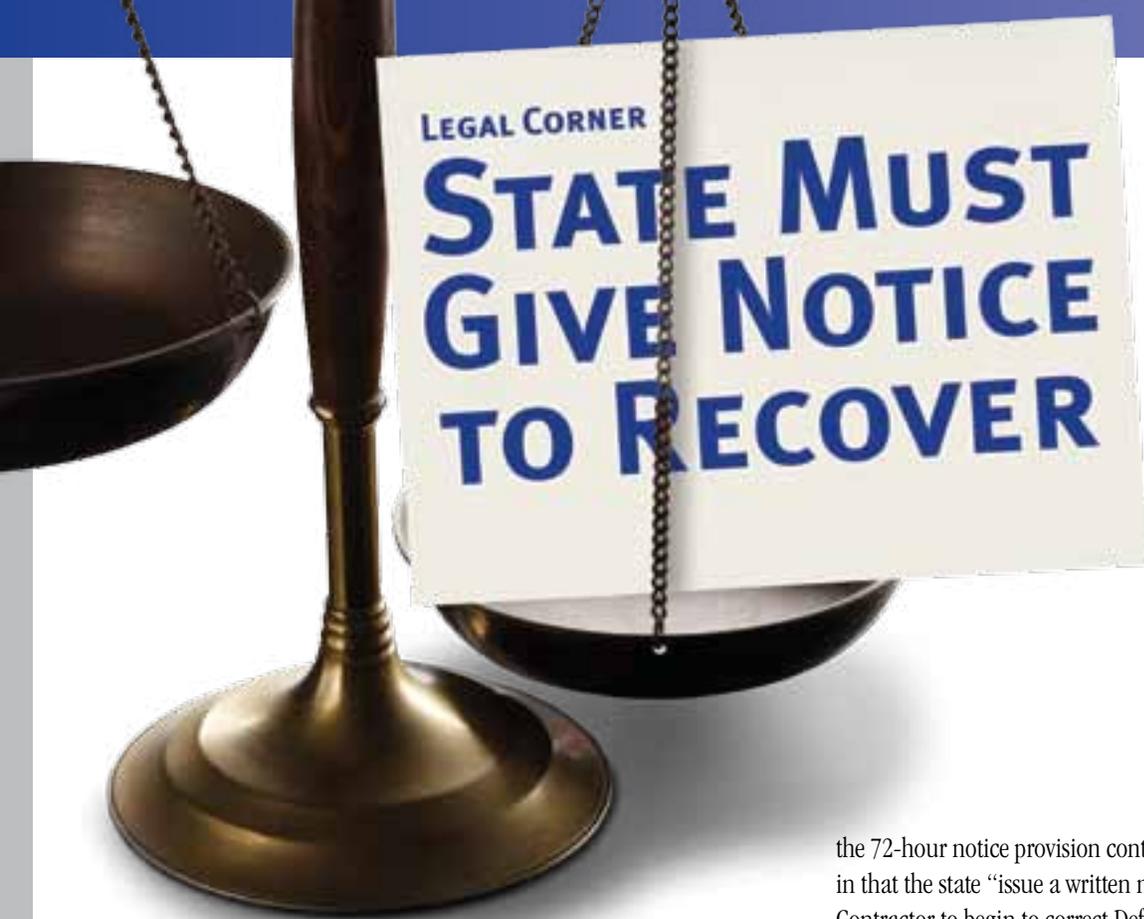
LEGAL CORNER

STATE MUST GIVE NOTICE TO RECOVER

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By Donald W. Gregory, Esq.
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The State of Ohio has often argued that technical notice must be received from a contractor on a public project to recover additional compensation, but frequently the state is less diligent about providing its own notice when it wants to back-charge a contractor.

The Court of Claims recently found that “the issuance of a 72-hour notice is a condition precedent to the termination of the contract.” See *N.L. Constr. Corp. v. Ohio Dep’t of Admin. Servs.*, Ct. Cl. No. 2011-08318, Aug. 30, 2012. In *N.L. Construction*, the plaintiff-contractor brought claims against the Ohio Department of Administrative Services (ODAS) and the Ohio Department of Transportation (ODOT) for damages arising from the termination of its general trades contract. The contractor moved for summary judgment on the basis that the state failed to follow the contractually mandated procedures when it terminated without first providing the contractor with a 72-hour notice and without permitting it to cure any deficiencies in its performance. The state countered with two arguments: 1) that the 72-hour notice provision of the contract was “permissive;” and 2) that any construction of the contract requiring the state to provide 72-hour notice would impermissibly grant the contractor “greater rights than those guaranteed by statute.”

The Court of Claims rejected both of the state’s arguments and entered judgment in favor of the contractor. First, the court recognized that while

the 72-hour notice provision contained in Article 5.3.1 was “permissible” in that the state “issue a written notice providing three days for the Contractor to begin to correct Defective Work,” when read in conjunction with the remainder of the contract, 72-hour notice was nonetheless “required before ODOT may choose to terminate the contract.” Based on its reading of the plain language of the contract, the court outlined what it interpreted as a “three-step process in order for an agency like ODOT to perfect a termination ‘for cause.’”

The first step is to notify the contractor of the deficiencies in its performance and its right to cure (72-hour notice). Next, if the contractor fails or refuses to cure within 72 hours, the owner may either perform the work itself; or back-charge the contractor; or resort to other contractual remedies including a termination for cause pursuant to Article 12.3. If the owner chooses termination for cause, the owner must then issue a five-day notice in accordance with Article 12.3.2. Finally if the contractor fails to satisfy the requirements of the five-day notice within 15 days from receipt thereof, the owner may declare a default and terminate the contract.

The court’s concise logic clearly sets forth the conditional nature of the so-called “permissive” notice provisions – it, and *only* if, the contractor fails to cure the defective work after being given proper notice, *may* the owner intervene and terminate the contract.

The Court of Claims also rejected the state’s argument that this interpretation of the contract granted the contractor “greater rights than those guaranteed” in Ohio’s remedial work statute, R.C. 153.17. Specifically, there was no indication with the contract that the parties did not intend to grant “greater rights,” and furthermore the statute itself did not preclude the state from adding a 72-hour notice provision to the contract. The state chose the contractual language it used in the contract, under which, “read as a whole, ODOT’s right to choose other contractual

remedies, including termination under Article 12.3, arising only after the contractor fails to comply with the 72-hour notice.”

Because it was undisputed that the state failed to comply with the mandatory 72-hour notice, the *N.L. Construction* court found the state’s termination of the contract to be invalid. Furthermore, under the doctrine of first breach, the court found that the state’s counterclaims to recover under the contract were barred as a matter of law. (*Citing Software Clearing House, Inc. v. Intrack, Inc.*, 66 Ohio App.3d 163 (1st Dist. 1990); *Kersh v. Montgomery Dev. Ctr.*, 35 Ohio App.3d 61, 62 (10th Dist. 1987).)

As made clear by the *N.L. Construction* court, contractual and statutory notice and an opportunity to cure is a condition precedent to termination of the contract, and failure to abide by these requirements is a material breach of the contract that operates to bar the state’s recovery against a contractor.

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