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Ohio Court of Claims upholds necessity of contractors and sureties to follow contractual dispute resolution process

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In *Berkley Ins. Co. v. Kent State University*, Case No. 2018-00579, 2018-Ohio-5453 (Dec. 6, 2018), the Ohio Court of Claims held that when a construction contract contains a mandatory dispute resolution process, that process must be followed. Otherwise, the surety or contractor’s claim is irrevocably waived.

In summary, Kent State University (KSU) hired R & M Electric Co., Inc., doing business as “Summit Electric” (Summit), to provide electrical construction work to renovate KSU’s School of Art. Several months after work commenced on the project, KSU found Summit in default and terminated the company shortly after it had abandoned the project. As Summit’s surety, Berkley Insurance Company (Berkley) engaged a takeover contractor in accordance with its performance bond and paid valid claims under its payment bond, which subrogated Berkley to Summit’s interest in the contract funds. On June 8, 2017, KSU sent a letter to Berkley notifying it of the university’s intent to issue back charges and assert withholding claims against contract amounts. After receiving the letter from KSU, Berkley expressed its objections through a number of communications with the university. Berkley argued that the back charges and withholdings were improper, because KSU lacked supporting documentation and KSU did not complete its initial accounting process

until June 2017.

The court disagreed with Berkley and held that the contract between the parties included a mandatory dispute resolution clause: “[T]he 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.” According to this provision, failure to initiate a claim in that ten-day timeframe constitutes an irrevocable waiver of the claim. Berkley’s objections to KSU, even though written, did not amount to claims under the mandatory dispute resolution provision contained in the contract.

The court reasoned that even though it may not deem the language in the contract just or equitable, the language is nevertheless clear and unambiguous as to the parties’ intent. Therefore, the “court must simply apply the language as written.” The court found it undisputed that Berkley failed to properly assert its claim within ten days and, thus, irrevocably waived its claim.