



White and Williams LLP



Construction Practices News Alert, March 2010

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PRESERVING YOUR PAYMENT CLAIM AGAINST THE COMMONWEALTH OF PENNSYLVANIA

THE TIGHT DEADLINES CONTRACTORS NEED TO KNOW

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Imagine you are a trade contractor on a large, multi-prime project and, despite your best efforts, the trades in front of you are holding up your work, making you less efficient and costing you time and money. The project is behind schedule, the owner is non-responsive and you begin to wish you never bid on the job. Does this sound familiar? Of course it does; the key question becomes how do you preserve your claim against the owner for all the extra costs you have incurred?

In anticipation of the federal stimulus package, White and Williams previously provided contractors with a primer on bidding (see 2009 news alert "*Being Ready to Bid on Public Jobs: Are you Stimulus Ready?*") for the hundreds of "shovel ready" public projects in Pennsylvania. With the executive departments of Pennsylvania, including the Department of General Services (DGS) and the Department of Transportation (PennDot), now beginning to spend stimulus dollars, it is unfortunately likely that the above scenario will become a reality for trade contractors who do business with the Commonwealth. Contractors with claims for additional costs must be aware of the tight deadlines involved in the state government claim process.

WHEN DOES A CONTRACTOR HAVE A CLAIM?

Once a contractor has a claim against the Commonwealth, it must act within the timelines provided by the Commonwealth Procurement Code. Section 1712.1 of the Procurement Code provides that a contractor must file its claim with the contracting officer within six months of the accrual of the claim.¹ This six-month limitation period is strictly enforced, and a claimant's failure to comply may result in the waiver of the claim.

Since the Procurement Code six-month deadline is triggered by the "accrual" of a claim, a contractor must know when its claim has accrued, *i.e.*, when the claimant has a "claim." A two-part test is used to determine when a contractor has a claim under the

Procurement Code.² A claim accrues when: (1) the contractor knows the amount due under the claim and when it is able to prepare a "concise and specific written statement detailing the injury;" and (2) the contractor "affirmatively" knows the Commonwealth will not make payment of its claim.³ Furthermore, a claim does not accrue until the contractor "knows the full extent of [its] claim."⁴

LESSONS LEARNED FROM THE KNORR CASE

The Pennsylvania Commonwealth Court's decision in *Wayne Knorr, Inc. v. Commonwealth of Pennsylvania, Dep't of Transp.* illustrates when a contractor has a "claim" against the Commonwealth that has accrued for purposes of the six-month limitations period.⁵ In *Knorr*, PennDot maintained that the claim of Knorr, the contractor, was barred by § 1712.1 of the Procurement Code because it had not been asserted timely.⁶ PennDot argued that Knorr's claim accrued when Knorr informed PennDot that it was just beginning to evaluate its additional costs on the project, but anticipated that its extra costs would be in excess of \$650,000. PennDot argued, in the alternative, that Knorr's claim must have accrued at the time that PennDot informed Knorr of its contrary opinions regarding Knorr's issues on the project. The Board of Claims rejected these arguments.

Instead, the Board found that Knorr's claim accrued when PennDot issued its "Notification of Final Quantities and Contract Settlement Amount." The Commonwealth Court affirmed the Board of Claims' decision, holding that "until PennDot issued its Notification of Final Quantities and Contract Settlement Amount, Knorr did not know what, if any, adjustments PennDot would make to payments due Knorr (*i.e.*, Knorr did not have a definitive refusal of its request for adjustment) and Knorr could not form a concise or accurate statement of claims against PennDot."⁷

The rationale of the court's decision in *Knorr* is quite practical. The decision shows that a contractor and the Commonwealth may have

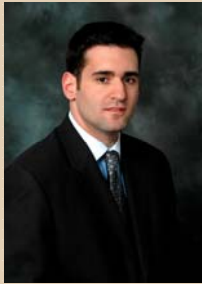
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ongoing discussions regarding issues about a claim and additional costs a contractor claims it suffered on a project, without necessarily triggering § 1712.1's six-month limitation period. If the *Knorr* court found otherwise, contractors would have less incentive to discuss matters with the Commonwealth before fully realizing the cost impact so as to avoid triggering the six-month deadline. In short, *Knorr* allows for some level of flexibility in project dealings and claims negotiations.

The test applied in *Knorr* is contractor-friendly, as it requires a significant level of understanding of a claim prior to having to assert it to the contracting officer. However, the best practice for a contractor is to assemble, quantify and submit the claim as soon as possible and to engage counsel at an early stage for advice and guidance. Common indicators that a contractor may have a "claim" include denials of change orders, requests for adjustments, and denials for additional time. It is not uncommon to have multiple claims on the same contract and for the claims process to run concurrently with the completion of the project.

HOW AND WHEN DO YOU MAKE YOUR CLAIM?

After timely submission of a claim by the contractor, the contracting officer has 120 days to review the claim and issue a "final determination." If the contracting officer fails to issue a "final determination" within 120 days, the claim will be deemed denied. In many instances, the contracting officer will hold a claims conference with the contractor and the owner's representative in an attempt to resolve the claim. A contractor should be aware that the notes or statements made in a claims conference, even though the parties are attempting to settle the claim, have been held admissible at a subsequent trial on the claim. As a result, contractors should consider hiring an attorney at the outset of the claim process so as to insure the contractor's legal rights to payment are protected at all stages.

If the contracting officer denies a claim (either through an affirmative denial or through the lapse of time), the contractor has just 15 days to file a "statement of claim" with the Pennsylvania Board of Claims.⁸ This 15-day deadline is extremely short. Thus, to protect its claim, a contractor should calendar 120 days from the date of submission of its claim to the contracting officer, and not simply await a response from the contracting officer.

A contractor's "statement of claim" begins a lawsuit against the Commonwealth on the basis of the claim. The Board of Claims operates in the same manner as a court of law. Thus, representation in front of the Board of Claims is critical.

The claims process can be difficult and cumbersome. The attorneys of the Construction Practices Group at White and Williams LLP can help document, prepare and prosecute your claims in the Board of Claims against Commonwealth of Pennsylvania public owners, including the Department of General Services, the Department of Transportation and the Pennsylvania Turnpike Commission.

¹ 62 Pa. Cons. Stat. § 1712.1.

² See *Wayne Knorr, Inc. v. Dep't of Transp.*, 973 A.2d 1061, 1088 (Pa. Commw. 2009).

³ *Knorr*, 973 A.2d at 1088.

⁴ *Id.*

⁵ *Knorr* is fact intensive, but does provide guidance to contractors wishing to assert a claim against the Commonwealth.

⁶ As discussed above, § 1712.1 requires that "claims" are submitted within 6 months after they accrue.

⁷ *Knorr*, 973 A.2d at 1089.

⁸ The Commonwealth and the contractor may agree to an extension. 62 Pa. Cons. Stat. Ann. § 1712.1(e).