



Time Waits For No One... Including Contractors

By: Thomas O. Williams, Esquire

A recent case involving a Pennsylvania general contractor highlights the importance of timeliness in asserting claims for additional compensation on Commonwealth owned projects.

Many experienced Pennsylvania construction contractors who do work on Commonwealth construction projects are aware that their rights, as they relate to claims for additional compensation, are governed by the Commonwealth Procurement Code (62 Pa. C.S. §1, *et seq.*, in particular, Chapter 17). What many contractors are not aware of, is exactly when they must submit claims. The recent case of *Lobar Associates, Inc. v. Pennsylvania Turnpike Commission*, decided on August 1, 2019 by the Commonwealth Court of Pennsylvania, illustrates the extremely harsh consequences of failing to timely submit claims, even if the claim is submitted just a few days late.

The story begins when Lobar Associates, as general contractor, agreed to construct a material testing laboratory for the Pennsylvania Turnpike Commission in Somerset County. Lobar completed its work on the project in June 2016. A month later, Lobar submitted a supplemental work order to the Turnpike Commission requesting additional compensation for changes to the project made during construction. On September 21, 2016, a Commission representative responded to Lobar Associates by email indicating that it would pay only \$35,233.05 of Lobar Associates' \$150,925.19 claim. Lobar Associates responded with a request for further review which was denied by the Commission on October 17, 2016. On March 27, 2017, Lobar Associates submitted an administrative claim to the Commission's contracting officer seeking \$418,767.42 for the additional work and delay damages. The Turnpike Commission denied Lobar Associates' claim asserting that it was untimely because it was not submitted within six months of the Commission's September 21, 2016 determination that it would pay only \$35,233.05.

The Commonwealth Procurement Code sets forth the time in which a contractor must submit a claim. Specifically, section 1712.1(b) states that a claim shall be filed with the contracting officer within six months of the date it accrues. This section goes on to state that, if the contractor fails to file a claim, or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Following the denial by the Turnpike Commission, Lobar Associates filed a claim with the Board of Claims on September 14, 2017. The Commission, relying on Section 1712.1(b), filed objections with the Board asserting that the Board lacked jurisdiction over Lobar Associates' claim in that it was barred by the six-month statute of limitations of the Commonwealth Procurement Code. The Board agreed, and dismissed Lobar Associates' claim in its entirety.

Lobar Associates filed a timely appeal to the Commonwealth Court, where the issue upon which the fate of Lobar Associates' claim rested was when exactly Lobar Associates' claim

"accrued" so as to trigger the statute of limitations for the submission of its claim. The Commonwealth Court heard argument and affirmed the ruling of the Board of Claims that Lobar Associates' claim was barred by the Commonwealth Procurement Code's six month statute of limitations. In doing so, the Commonwealth Court made a determination that the September 21, 2016 email from the Commission, stating that it would pay only a portion of Lobar Associates' initial claim, was a final decision and thus the point at which Lobar Associates' window of opportunity to file a timely claim commenced.

The record, including testimony of representatives of the Commission and Lobar Associates, indicated that Lobar Associates did not consider the Commission's September 21, 2016 email to be a final decision on its claim, and thus it believed there was no urgency to formally move the claim forward to the next step. In its affirming opinion, the Commonwealth Court cited to a line of Supreme Court cases in which the Supreme Court, in addressing the issue of when a contractor's claim has accrued, stated "a claim accrues when (1) a claimant is first able to litigate his or her claim, e.g. when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth. This two part test, on which the fate of a contractor's claim may depend, is not likely front and center on a project manager's mind. But still the clock and calendar keep moving.

Based on the record, it appears that Lobar Associates may have been looking for a response from the Commission which contained specific words such as "your claim is denied," or that the Turnpike Commission's determination was a "final decision." The Commonwealth Court, in a pronouncement that should give great caution to contractors doing business with the Commonwealth, stated simply that a claim accrues when the refusal communicates that payment will not be made and there is no requirement that the Commonwealth's determination must place the contractor on notice that it is a "final decision." Of course, the facts in this case show that there was not a complete refusal to pay, but really what could be characterized as a "partial" refusal or "partial" approval. Ultimately the claim filed by Lobar Associates on March 27, 2017 was deemed by the Commonwealth Court to have been untimely filed (by a mere six days).

Though Lobar Associates has a right to file an appeal to the Pennsylvania Supreme Court, this decision places contractors on notice that, if they are uncertain or confused whether a negative claim response received from the Commonwealth has started the six month clock, they should not delay in submitting claims and should not wait for any further communication or clarification from the Commonwealth advising them that its response was a final decision. As this case illustrates, the six month statute of limitations in the Commonwealth Procurement Code for the assertion of claims is an unforgiving deadline.

Thomas O Williams, Esquire
TWilliams@ReagerAdlerPC.com
Direct Dial: (717) 909-6948

