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Timing Is Key to Claims on Federal Construction Projects

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For construction projects, timing is everything. Each activity must be precisely timed and logically sequenced so the project proceeds in a unified, orderly manner. The greatest mess results when too many workers are trying to do too many tasks without a clear plan.

The federal claims process is no different; a contractor has the greatest success when timing is understood and properly managed. If a contractor has a dispute on a federal project and submits a formal claim, a clock starts for the contracting officer's response (typically 60 days). If the claim is approved, it is good news for the contractor. If the claim is denied, then the timer resets. Now, it ticks for the contractor, which must appeal the decision to the appropriate contracting agency (within 90 days) or the Court of Claims (within one year), or else the claim may be lost.

A potential problem arises when the timing for the claims process does not marry with the timing for the remainder of the project. Even if the project is ongoing, the appeals clock continues to run, which puts a contractor in an awkward position of prosecuting an appeal while simultaneously proceeding with the project. In some situations, additional damages may accrue from the same claim. In others, additional problems may arise on the project, leading to entirely new claims. On a particularly long project, that first claim may be on its way to trial just when the contractor is quantifying a second, third or even fourth impact. Any attempt by the contractor to comprehensively address all the issues may be complicated by the fact that, once in litigation, a separate government official from the project's contracting officer may be in charge of the claim in litigation, and he or she may have very different views about the project.

When presented with this dual-track situation, a contractor may face hard choices. Certain principles of law, such as the "enlarged claim doctrine," may allow a contractor to later add damages to its original claim. In many situations, however, new damages cannot be added because they stem from a separate claim. A good rule of thumb is that if the government could logically grant relief on Item A while denying relief on Item B, these are separate claims. With the separate claim comes the need for an entirely new submission from the contractor and a new decision from the contracting officer, which may take another 60 days or more.



Further, if the contractor proceeds to trial on only some of its claims, it may be barred from presenting these later claims under principles of *res judicata*. This is particularly true if the contractor knew about the additional claims and had within its power the ability to ensure that the additional claims were certified and presented, but did not timely act to do so. Prosecuting one claim too early may leave the contractor at risk to lose later claims.

Managing the claims process is no different from managing the project. Onsite, the excavator has to be coordinated with the mason and the mason with the electrician. So, too, must a contractor's claims be coordinated so one claim does not outpace the others. When encountering difficulties on a federal project and considering a claim, an attorney experienced in construction claims and litigation can assist in managing those activities to achieve a timely, successful result.

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For more than 25 years, Marla has educated contractors, subcontractors, bankers, public and private owners, legislators, educators, insurers, and attorneys on contract surety bonding and construction issues. She's the author of more than 100 articles, including an award-winning series for the Risk Management Association, and has written books, directories, informational brochures, and reports. Her extensive construction and risk management background includes stints as executive director the American Subcontractors Association of Metro Washington and the Surety Information Office. She also worked for Associated General Contractors of America, National Conference of States on Building Codes & Standards, Association of Major City Building Officials, and National Concrete Masonry Association. She served on the boards of the Construction Writers Association, and American Council for Construction Education and was active in the Construction Owners Association of America.

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