From: Neal Eckel, Farhang & Medcoff

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Re: Legal Update on Claims against the Government

For those of you who do government work (and the lessons from this case also apply to private work) make sure that if a claim arises you strictly comply with any statutory, governmental, and contractual requirements. Missing a deadline or not properly submitting a claim can be a bar to recovery for changes in work, delay damages, and other claims that may arise.

On October 19, 2021, the Arizona Court of Appeals issued a decision in the case of *Pulice Construction v. City of Tucson* ((No. 2 CA-CV 2020-0165). The decision dealt with a contract awarded to Pulice by the City of Tucson to demolish a bridge and replace it with two bridges over a section of the Union Pacific Railroad. Pulice’s bid was based on their belief that only one train passed through the intersection each week when in fact many more trains passed through each week.

Pulice learned about the discrepancy in train traffic numbers provided by the City in March 2017 and notified the City Engineer shortly after discovering the error. However, Pulice did not submit a written claim to the City for its amended costs based on increased train traffic until late 2018 (after the construction had been completed). It wasn’t until October 2018 that Pulice notified the City it was making a claim for additional compensation for increased rail traffic in the amount of $5,364,383.

The City denied the claim as being untimely made and Pulice filed a lawsuit in Pima County Superior Court. The trial court granted summary judgment to the City and the Court of Appeals upheld the decision in favor of the City.

The determining factor in the decision was that Pulice failed to provide sufficient notice of its claim under the PAG Specifications. One PAG Spec (Section 104-4) only requires a contractor to notify the Engineer if an issue has been discovered (which Pulice did). However, the same section states that if an issue cannot be quickly resolved a second written notice must be given detailing the basis of the claim and including estimates of additional pay items that may be affected by the issue. Pulice failed to timely submit a written notice of the estimated increased costs/claims.

Pulice argued that Section 104-4 didn’t apply and that Section 105-18.01 did apply, which simply required them to bring the issue to the attention of the Engineer (which they did). But the Court noted Section 105-18.01 also requires the contractor to provide a written notice of claim before starting the work on which the claim is based. Here, Pulice did not submit its written claim until 18 months after it learned of the error and after it had completed the work.

The bottom line: informing the governmental entity of a discrepancy in the work or a possible claim is not the same as making a claim under the state laws. The City had a right to know that it faced a claim for additional costs so it could “compile records of the contractor’s costs” or to “consider alternate methods of construction that may cut costs.” The Court concluded that Pulice deprived the City of the opportunity to track or mitigate any claimed delay damages.

In addition to the PAG notice requirements, the Court also noted that under A.R.S. Section 12-821.01, a party is required to assert a claim against the government within 180 days of when it knew or reasonably should have known the cause of the damages.