WHEN TIMELY NOTICE OF AN INTENDED CLAIM IS NOT REQUIRED

A previous blog discussed "Missing Deadlines in Contract Administration and Claims." March 3, 2016. As explained therein, the consequences of missing deadlines may include the total loss of a claim or appeal. The blog discussed three specific deadlines:

1. Meeting dates on a delivery schedule.
2. Filing a claim within 6 years of its accrual.
3. Filing an appeal of a denied claim at the Board of Contract Appeals within 90 days, or filing an appeal of a denied claim at the Court of Federal Claims within one year.

There is another deadline for claims that should also be considered--the notice to the contracting officer of your *intention* to file a claim and the reasons for this. Unlike the above deadlines, exceptions are made by the courts and the boards to this notice requirement, and that is the subject of this blog.

In supplies, services and construction contracts, you must file a notice with the contracting officer when circumstances arise where you believe you will file a claim. This is strictly a notice based on facts, not a detailed, supported claim. The requirements in the FAR for this notice appear in the changes clauses as follows (30 days for supplies and service contracts, and 20 days for construction contracts):

> **Changes Clause for fixed-price supplies and service contracts:** (a) The Contracting Officer may… make changes within the general scope of this contract ….(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract. (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. [] FAR 52.243-1
>
> **Changes Clause for fixed-price construction and demolition contracts:** (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract. However…no adjustment for any change [] shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. [] FAR 52.243-4.

Nova Group/Tutor-Saliba, JV v. the United States, No. 15-885C (Fed. Cl. March 16, 2016) is a good example of the exception to the notice requirement, showing when it will be waived. In *Nova* the contract was for design and construction of a ship repair wharf at the Puget Sound Naval Shipyard. The Navy was required to approve the contractor's designs. More than five months after the last design was approved, the Navy construction manager sent Nova a letter questioning its design compliance with the contract (i.e., its stability), but did not direct Nova to

stop construction. However, based on the letter, Nova stopped operations, hired a third party designer who concluded that its design was appropriate, and ultimately the Government proceeded with the original design which it had approved months earlier. Nova then attempted to mitigate the delays by accelerating the work and adding overtime, and it ultimately filed a claim for the "constructive change" based on the Navy's decision to question the stability of the design. The Navy denied the entire claim stating that Nova had failed to provide written notice "before implementing the stated change to accelerate the work…until 11 months after the costs were incurred," in violation of the 20 day notice requirement in FAR 52.243-4.

Nova appealed the denial of its claim and the government sought to dismiss Nova's complaint because Nova had failed to provide written notice. The court rejected this argument, holding that the case fell squarely within an exception where the government has actual or imputed notice of circumstances giving rise to the claim, cited in *K-Con Bldg. Sys., Inc. v. United States,* 778 F. 3d 1000 (Fed. Cir. 2015). In the Nova case, the government knew about both the work stoppage and acceleration (and knew why it occurred) during the entire period. Nova also alleged that the government observed and approved the acceleration and the added manpower, equipment and overtime. The court noted that the government was likely aware of the constructive change, including the work stoppage, followed by acceleration of the work prompted by the Government warnings about schedule slippage. The court denied the government motion to dismiss, thereby permitting Nova to attempt to prove its claim.

Remember, the two notification provisions in the changes clauses do not require that the complete *claim* must be provided to the contracting officer, only the mere notice of an *intended claim* and the general circumstances causing the claim. This includes claims arising from both directed change orders and constructive changes (when you realize that the latter has occurred). In your notice, you need not provide an exact dollar amount or period of delay, but you must state why you intend to file a claim.