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## Make sure you follow the proper procedure if you want to claim for extras and delay costs

In the recent decision, *Ross-Clair v. Canada (Attorney General)*<sup>1</sup> the Ontario Court of Appeal reaffirmed and clarified the necessity to follow the provisions in a construction contract to properly advance a claim for compensation in excess of the contract price. Ross-Clair entered into a contract with Public Works and Government Services Canada (“**PWGSC**”). The contract provided for a detailed procedure governing the circumstances under which Ross-Clair could claim additional compensation arising out of changes in soil conditions or PWGSC’s negligence or delay. The contract was a regular PWGSC contract and not a CCDC – 2 contract. Pursuant to the general conditions of the PWGSC contract, a claim was expressly required to be supported by information sufficient to allow the engineer to determine whether was justified. Ross-Clair advanced the claim for extras and PWGSC took the position that Ross-Clair did not provide a description of the facts and circumstances giving rise to the claim sufficient to enable the engineer to determine whether or not it was justified. Before an application judge, part of the claim for extras was found to be sufficient to enable the engineer to determine whether was justified. PWGSC appealed to the Ontario Court of Appeal.

The PWGSC contract required that the contractor give notice within 10 days of the occurrence and of their intention to claim for the resulting expense or damage. The contract required three components to make a claim. Firstly, notice of the claim must be in

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<sup>1</sup> 2016, ONCA 205 (CanLII).

writing. Secondly, the claim must be supported by *sufficient* information to allow the engineer to determine whether the claim was justified. The technical requirements of a claim were set out in the general conditions of the claim. Finally, the claim must be submitted to the engineer within 30 days of the date that a Final Certificate of Completion is issued. The contract provided that if the contractor failed to give proper notice and provide a claim within the stipulated time no payments would be made to the contractor.

Ross-Clair provided a notice but thereafter sent letters describing their claim. In an exchange of correspondence PWGSC maintained a position that there was insufficient documentation or information to determine if the claim was justified. Later, the project was certified as complete and Ross-Clair was not granted any further extension to the contract with regards to the additional claims that were made. Approximately 15 months later, Ross-Clair provided PWGSC with an expert's report.

In argument, counsel acknowledged that the contract was a standard form used in all contracts with the federal government. It should be noted that these precise timelines are not contained within the CCDC – 2 contracts. The Court found that these federal contracts create a code to determine if there is a proper claim and whether it is justified. This code gives substantial authority to the engineer and therefore the federal government must follow his or her decision subject, of course, to arbitration. The Court stated that the letters putting forth the claim lacked specificity, were confusing and provided virtually no information in support of the extra work done and the cost associated with such a claim. The Court found that the expert's report delivered 15 months after the Final Certificate of Completion was submitted too late. As a result the Ontario Court of Appeal overturned the lower court's ruling concluding that although Ross-Clair provided the appropriate notice they faulted to provide sufficient detail to substantiate a claim as required by the code.

The Court of Appeal found that in the context of federal contract cases, they followed *Technicore Underground Inc. v. Toronto (City)*<sup>2</sup>, which dealt with the requirement that notice be provided in a timely manner, and added that the code as set out in the federal contract be strictly followed for claims for extras and delay costs. As such, in contracts with the federal government it is recommended that contractors retain experts to ensure that sufficient detail is provided in a claim within the prescribed time. This may make these type of claims extremely difficult because the delay is often ongoing and the full extent of the damages may not be able to be calculated until the contract is finished. Consequently, a contractor to PWGSC will need to be working on these claims early on and retain experts who will be ready to provide a report within 30 days.

It is important to note that in CCDC – 2 contracts the time for providing the proof is within “a reasonable period of time after the notice is given”. One would expect that owners will want to add additional general conditions setting out timelines and the type of detail required so as to imitate PWGSC contracts. Contractors and subcontractors will need to be aware of these clauses and organize themselves accordingly if they believe that there will be a claim for a significant extra especially those pertaining to delays.

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#### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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<sup>2</sup> 2012 ONCA 597 (CanLII).