

DEPARTMENT OF THE ARMY
Corps of Engineers, Omaha District
215 North 17th Street
Omaha, Nebraska 68102-4978

DM 1180-1-7

CEMRO-OC

Memorandum
No. 1180-1-7

16 October 1995

Contracts
PROCEDURE FOR PROCESSING CLAIMS UNDER CONSTRUCTION CONTRACTS

1. Purpose. The purpose of this memorandum is to prescribe policies and procedures for processing claims under contracts.
2. Applicability. This memorandum applies to all offices administering contracts with "Disputes" clauses.
3. Definitions. For the purpose of this memorandum the following definitions apply:
 - a. Area/Project Engineer. The person in charge of a construction or operations and maintenance (O&M) field office.
 - b. Field Office. Any construction or O&M field office administering construction contracts.
 - c. Claim. A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, adjustment or interpretation of contract terms, or other relief arising under or relating to a \$50,000 or more is not a claim until certified as stated in paragraph 4b below.
4. Basic Procedure for Processing Claims.
 - a. All claims by a contractor against the Government must be submitted to the contracting officer for a written decision.
 - b. For claims which are submitted pursuant to the Contract Disputes Act of 1978 (P.L. 95-563) and which exceed \$50,000, a company official authorized to bind the contractor with respect to the claim must certify at the time the claim is submitted, that it is in good faith, that the supporting data are accurate and complete to the best of his/her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable and that he/she is duly authorized to certify the claim on behalf of the contractor. Failure to so certify its claim will necessitate the

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initial receiving office to notify the contractor, in writing, that certification of its claim is missing or improper. Nevertheless, the claim will continue to be processed.

c. Claims of \$50,000 or less must be decided by the contracting officer within 60 days after receipt of a request that a decision be issued within that period. If such a request is not made, the decision should be issued within a reasonable time. Notification of a formal claim should be forwarded to Construction Division, Contract Administration Branch (CEMRO-CD-C), within 3 days after receipt of the claim. Any claim in this category which has been submitted to the Field Office and has not been resolved by written agreement of the parties within 30 days after receipt shall be fully investigated, submitted to the Disputes Analysis Board and forwarded to CEMRO-CD-C. Such claim shall be accompanied by all necessary backup documentation as described below. If certain portions of the backup material are unavailable at the end of the 30 days time, that material which is available should be forwarded along with a description of the material that is unavailable and a statement as to when it will be forwarded.

d. Within 60 days of receipt of a submitted certified claim over \$50,000, the contracting officer must either issue a decision or notify the contractor of the time within which a decision will be issued. In such cases, the area/project engineer shall estimate how much time it will need to compile the documentation described below and submit notification of a formal claim to CEMRO-CD-C. This notice should be forwarded within 3 days after receipt of the claim.

e. Responsibilities of the Field Office regarding claims investigation shall be as follows:

(1) Acknowledge receipt of the claim and provide, in writing, to the contractor an estimated time within which it will be disposed of by the office. State in general terms what potential dispositions exist for the claim. For example, if the contractor's claim is less than \$25,000, the acknowledgment letter should state that within a certain number of days, the area/project engineer will either be prepared to negotiate a settlement or send the claim forward to the District Office with a recommendation that a contracting officer's decision be prepared. If the estimated time for processing the claim cannot be met, a follow-up letter should be sent to the contractor adjusting the schedule. Copies of these letters should be furnished to CEMRO-CD-C.

(2) Analyze the claim in terms of whether it complies with the various time limits for notice that a claim exists or that

costs are being incurred. These time limits are stated in the Changes, Differing Site Conditions, or Suspension of Work clauses. Such analysis should include evidence of prejudice resulting to the Government because timely notice was not provided.

(3) If not included in the claim, the contractor should be requested to furnish backup data for its claim which is determined to be missing but necessary for a proper review; i.e., additional facts, explanation of its position, breakdown of its costs, the specifications and/or drawings in question, other contract clauses relied on, etc.

(4) Investigate all Government records within the receiving office's control. Such investigation shall include analyzing all correspondence pertinent to the claim, reviewing contractor quality control reports and the Government supplements noting entries which are pertinent, reviewing inspectors' diaries noting pertinent entries, reviewing photographs of the work in question, reviewing memorandums to file on meetings or telephone conversations pertinent to the claim, and reviewing all other records available, noting those which may be pertinent. Any of the above-referenced records which are deemed pertinent to the claim should be copied, if possible, and set aside for forwarding to the District. If impossible to copy, the originals should be set aside.

(5) Identify all Government employees who are familiar with the facts of the claim and state, in general, the subjects with which they are familiar. If the employee has a day-to-day knowledge regarding the facts of the claim, his/her written statement identifying the claim, discussing his/her knowledge of it, identifying facts which tend either to refute or verify the contractor's contentions, and identifying contract documents which support his/her position should be secured.

(6) Area/project engineers should in all cases endeavor to settle disputes by negotiation and agreement with the contractor or forward unresolved matters to the District Office within 30 days. Consultation with the contracting officer or other personnel of the District Office may be requested, if necessary, to assist in settling disputes or to participate in conferences or negotiations with contractors. Such assistance should always be requested if there are impending disputes involving large sums of money, especially if complex legal, engineering or other technical matters are involved. Misunderstandings or differences can often be resolved if claimants are afforded an opportunity to discuss all salient facts and are convinced that all such facts have been considered before a decision is reached. Area/project engineers

are encouraged to convene a Disputes Analysis Board consisting of appropriate Field Office, Office of Counsel and Construction Division personnel to review and discuss the merits of claims before they are forwarded to the District Office. The area/project engineer shall chair such meetings. Disputes Analysis Board meetings should be scheduled regularly on an as needed basis and all claims whose validity is questioned or doubted should be considered.

(7) If agreement cannot be reached or if the area/project engineer does not have the necessary authority to finally settle the matter, the contractor should be promptly informed, in writing, that the claim is being forwarded to the District Office for a contracting officer's final decision.

(8) Any claim which has not been resolved by written agreement of the parties within 30 days after receipt (or some greater time which is approved by the Chief of Contract Administration Branch) shall be forwarded to CEMRO-CD-C with the following documentation.

- (a) Original correspondence.
- (b) Pertinent quality control reports and Government supplements.
- (c) Inspectors' diaries if pertinent.
- (d) Photographs which might bear on the dispute.
- (e) Memorandums to file on meetings with the contractor, on meetings with Government personnel, and telephone conversations which bear on the claim.
- (f) Written statements of knowledgeable Government employees.
- (g) Payment estimates and their backup, progress charts, CPM printouts, shop drawing submittals and approvals which might bear on the claim.
- (h) Any other record, favorable or unfavorable, which is pertinent to the claim.

(9) All claims forwarded to the District shall include an analysis of the claim prepared by the area/project engineer, or a knowledgeable and designated employee. This analysis shall summarize the contractor's position as well as the Field Office's

position. It should highlight the principal facts of the claim which support the position taken by the Field Office. It should also include a discussion of any claim item which is not supported by documentary or other factual evidence, and, as such, may be attributable to a misrepresentation of fact.

(10) On claims that are to be denied, a pre-Contracting Officer Decision Settlement Conference should be offered to the contractor. The area/project engineer should chair this meeting. The contractor should be allowed, and encouraged, to make his/her best case in support of the claim. This conference may be held at the District Office level and be chaired by the contracting officer in cases where the claim is complex, of a sensitive nature, or when to do so would be in the Government's best interest.

f. Responsibilities of Construction Division. Immediately after a formal claim comes to the Construction Division, it will require a thorough fact finding investigation by appropriate staff members. During this investigation, a representative of the Office of Counsel may be called upon to determine the adequacy of the investigation and evaluate the relevancy and materiality of the evidence considered. It is of the utmost importance that complete documentation and information on the dispute be furnished to avoid further reference of those matters back to the Field Office. If the recommendation is to deny the claim, the entire file will be forwarded to Office of Counsel with a request that it review the claim. Construction Division shall keep the contractors advised of claim processing delays or slippages of the schedule to the extent appropriate and necessary.

g. Responsibilities of Office of Counsel.

(1) Upon receipt of the claim by Office of Counsel, it shall review the file to make sure that all necessary information has been included. All deficiencies in the file shall be relayed to Construction Division as soon as possible.

(2) After the file is judged complete by Office of Counsel, the contractor shall be notified, in writing, that its claim is being investigated by that office and that a decision will be issued within a specified number of days. Copies of all such correspondence shall be furnished to CEMRO-CD-C and the area/project engineer.

(3) After the fact finding investigation has been completed and the staff recommendations have been considered, the contracting officer may offer the contractor an opportunity to attend a pre-decision conference to discuss the formal claim.

Field Office personnel who are involved may be requested to attend. Depending on the circumstances, the contracting officer may either attend the conference personally or designate one or more Government personnel as his/her representative.

(4) The Government and contractor representatives should utilize the conference or conferences, as the case may be, to objectively explore the facts involved. The Government should reveal the facts and evidence upon which its position is based and the contractor should be requested to do likewise. If the Government determines that the formal claim has merit, in whole or in part, an attempt should be made to negotiate an equitable price settlement, either at the conference or at a later time agreed to by the parties.

(5) If the parties cannot agree, the contracting officer shall issue a final decision and Findings of Fact as soon as practicable (not later than 30 days after the last claim conference). This decision must be appealed by the contractor in accordance with the Contract Disputes Act of 1978.

5. Alternate Disputes Resolution. In keeping with Corps of Engineers policy to resolve disputes at the lowest appropriate management level, all disputes should be examined to determine whether resolution might best be accomplished by some means other than litigation; i.e., Alternate Disputes Resolution (ADR). Such methods include negotiation, mediation, arbitration, "mini-trials", etc. Except for negotiation, ADR methodologies to solve disputes should not be attempted without consultation with Office of Counsel. Nevertheless, the best dispute resolution is dispute prevention. Acting, to prevent disputes before they occur, is key to building new cooperative relationships.

6. Reporting of Formal Claims.

a. All formal claims; i.e., those over 60 days old, must be reported to USACE within 5 days after receipt of the claim in Office of Counsel. Therefore, it is essential that all area/project engineers advise CEMRO-CD-C, of all claims within the times and with the information required in paragraphs 4c and 4d above.

b. Office of Counsel is responsible to enter claim information into the Case Management Information System (CMIS). Case information is updated as significant events occur but in no case later than 30 days after the last occurrence.

c. It should be emphasized that all pertinent information, relative to any dispute, should be disclosed even if it might favor

the contractor's position. Nondisclosure often results in substantial loss of work effort at one or more levels in the District.

7. Conclusion. It is the policy of the Corps of Engineers and the Omaha District that contractors should receive fair and impartial as well as prompt decisions on disputed contract matters. This requires each person in the chain of command, dealing with contract claims, to give immediate attention to any correspondence setting forth a claim. If the matter cannot be resolved at any given level, the report to the next office should be accurate and complete, divulging those facts not only supporting a denial of the claim but, as mentioned above, those which may appear to be detrimental to Government's position.

FOR THE COMMANDER:


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