

APPENDIX E

CLAIMS AND REQUESTS FOR EQUITABLE ADJUSTMENT

1. Contract Clauses. The Contract Clauses defined below are those that are most commonly referenced in the administration of the disputes filed against the government on construction contracts.

a. Disputes (FAR 52.233-1). This clause allows the contractor to file a claim if there is a dispute with the Government's interpretation of the contract requirements.

b. Certification of Claims and Requests for Equitable Adjustment (REA). (FAR 52.233-1 & DFARS 252.233-7000). These clauses state that any contract claim or a request for equitable adjustment over \$100,000 shall include certification that the claim or REA is made in good faith, that the supporting data is complete and accurate, and that the amount requested reflects the amount for which the contractor believes the government is liable. The certification shall also include a statement verifying that the signer of the certification is authorized to sign on behalf to the contractor.

2. Definitions.

a. Claim. A claim under this clause, is a written demand by the contractor seeking compensation in a sum certain, or an interpretation or adjustment of the contract terms as a matter of right. A written demand or assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim until certified.

b. Request for Equitable Adjustment(REA). This is different than a claim in that it is a request, not a demand and does not request a decision by the Contracting Officer. It is usually filed with the ACO for an interpretation by the construction field office. As specified in DFARS, a request for equitable adjustment does not have to be certified unless it's over \$100,000.

c. Unabsorbed Overhead. Fixed home office expenses (i.e., rent, utilities, labor, etc.) which the contractor continues to incur during a suspension of work where it has been directed to standby. In order to recover these costs, the contractor must establish that the suspension was caused by the Government, that it incurred the expenses claimed that it had been directed to standby, and that during the suspension it was not able to secure "new" work to absorb the continuing overhead expenses. The courts and contract appeal boards support that the only acceptable method for computing unabsorbed overhead is the "Eichleay Method" Information concerning the Eichleay Method can be found in ASBCA 5183, 60-2 BCA 2688.

d. Modification Impact Costs. These are hard to determine and quantify and require a very close examination of the facts of the claim or REA. The Government's position is that the contractor must show that the costs claimed were actually, or will be, incurred as a result of Government action, inaction or pursuant to the circumstances recognized in the contract clauses as entitling the contractor to an equitable adjustment in price or time. There must be some clearly identified and unusual circumstances present before the government can pay costs that are considered to be additional to those already paid in a modification or modifications, in light of the release clause stated therein.

3. Authorities and Responsibilities.

a. Contracting Officer (CO). Has the authority granted by the PARC to decide or settle all claims arising under the contract and to render a final decision when the claim cannot be settled by mutual agreement or alternate dispute resolution (FAR 33.210 and FAR 33.211).

b. Administrative Contracting Officer (ACO). Has the authority granted by the PARC to settle disputes prior to a formal C.O. decision, and REAs arising under the contract if they are within the monetary limits of the warrant. A final decision denying a claim is not under the authority of the ACO. Once a formal C.O. decision has been issued on a claim, the ACO may not attempt to resolve the dispute without prior direction from the C.O.

c. Disputes Analysis Board (DAB). The DAB has no authority in the claims process. However, it does have the responsibility to review and analyze the claim and to recommend a course of action to the Contracting Officer (FAR 33.204).

4. The Claims Process usually starts with a contractor request for equitable adjustment because of a difference in contract interpretation and ends with a contract modification, a denial of a claim, or an appeal to the ASBCA or the U.S. Court of Federal Claims.

a. Policy.

(1) Typically, a dispute is initiated by the contractor with the Area Office as either a request for equitable adjustment or as a claim. If the claim is over \$100,000 it must include the required certification. If, and when, a request for equitable adjustment is filed as a claim, the same certification requirements apply.

(2) An analysis of a contractor's REA or claim is made at the construction field office level by the Area Engineer and Resident Engineer staff. This analysis is fully staffed with key elements in the resident, area and district offices. The claim or REA is initially assigned by input

into construction automated information systems by field office staff. The office responsible for the action will perform additional updating of claim status; i.e., Area Office or District Construction Division. When an initial claim is identified and input into construction automated information systems, this information will be provided to the C.O. Once the Government's position is established, the Government communicates its position to the contractor and, if it is not acceptable, the contractor may submit a claim or appeal the C.O. decision.

(3) FAR 33.204 states that the Contracting Officer should have informal discussion with the contractor in an effort to try to resolve the claim. To satisfy this requirement, a Disputes Analysis Board (DAB) is set up.

b. The Disputes Analysis Board (DAB).

(1) When utilized, the DAB consists of five members: a Contracting Office representative, the Resident Engineer, the Area Engineer, the Claims Coordinator from Construction Division, and legal counsel from Office of Counsel. The DAB should also include field personnel who prepared the government project documentation that is used for the evaluation of the claim where applicable. It is the function of the DAB to evaluate the claim - discussing all perspectives including their strengths and weaknesses, and come up with a position addressing the validity of the claim. If the DAB's position is to recommend denial of the claim, the Finding of Fact will be prepared and sent to the contractor asking if there is any additional information the contractor desires to have considered. The Finding of Fact typically includes an offer for a meeting with Government representatives if the contractor so desires. If there is no meeting requested and the contractor provides no additional information, the Contracting Officer's Decision (COD) is drafted and the draft COD is sent to the Contracting Officer for finalizing the COD and issuance of the final decision.

(2) The claim is processed by the District and a Contracting Officer's decision is sent to the contractor which may be appealed to the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Court of Federal Claims.

(3) If, at any time, the Government changes its position or feels it is in the best interest of the Government to do so, it may open negotiations in an effort to settle the dispute without litigation. Negotiations after the COD is issued and prior to litigation will be at the direction of the Contracting Officer.

c. Certification of Claim. Reference FAR 33.207. If the claim is over \$100,000 it must have a certification signed by an officer of the company, stating that the claim is made in good faith, the supporting data is complete and accurate, and the amount claimed is that for which the

contractor believes the Government is liable.

d. Interest Paid on Claims. Reference FAR 33.208. Interest shall be paid on the amount found due from the date the Government receives the claim (properly certified, if required) or the date payment otherwise would be due, if later, to the date payment is made.

5. Constructive changes. Many claims arise from what is known as a constructive change. Any conduct by the Government which is not a formal change to the contract, but which has the effect of requiring the contractor to perform work different from that prescribed by the contract constitutes a “constructive” change entitling the contractor to relief under the Changes clause of the contract. Such conduct may be in the form of an “affirmative act”, a failure to act, i.e., an “omission”, or a “course of conduct”. The conduct may be expressed in writing, or it may be oral. It may also be casual or informal; for example, words such as “order” or “direct” need not be used. In short, it may be anything, in practical effect, which constitutes a requirement for the contractor to perform work not required by the contract. However, it should be understood that a mere suggestion by the Government does not constitute a constructive change. A contractor cannot recover under the constructive change doctrine for additional work that is essentially volunteered. On the other hand, this should not be used as a rationale to knowingly allow a contractor to perform work not required in the contract, as the Government may be required to provide compensation for added value of work performed by a contractor. It is important that this concept be understood and that Government employees, or its agents, conduct themselves appropriately in day to day dealings with contractors, or in reviewing and acting upon contractor work products, in order to avoid obligating the Government for unauthorized changes. While many members of the Government “project delivery team” (PDT) may interface with the contractor, or review its products or services – only the Contracting Officer (CO) or the Administrative Contracting Officer (ACO) are authorized to change the scope of the contract and obligate the Government for additional contract funds or time.

a. Identification. When a contract modification is executed by the CO or ACO, it clearly indicates that the Government has changed the contract. This is not so, however, with a constructive change, the very nature of which reflects the absence of formal consideration and a contract change by the Government. Often constructive change orders arise from letters, emails, or other documents directing, in substance, that work be performed, but without use of the word “change”. Such “change” actions by administrative, technical or project management personnel are most likely made unknowingly - and they may adamantly deny they ever intended any such thing. Similarly, the Government, by means of a mistaken interpretation of the contract, may require the contractor to perform additional work, believing that a contractual change is not necessary. Both instances represent inappropriate conduct by the Government. A constructive change may result merely from oral instructions. Hence, the contractor is faced with the problem

not found in dealing with formal change orders – the problem of “identification”. Typical of this type of situation is a change initiated on a shop drawing by the technical reviewer without a corresponding formal change to the contract. Any change found necessary by the shop drawing review should be coordinated with the Construction Division ACO for determination of necessity to issue a formal modification to the contract. Changes marked on shop drawings are not legally sufficient and carry no contractual authority.

b. Types of Orders. Constructive change orders can arise in a variety of contexts. The following are some examples

(1) Acceleration. A construction change to accelerate performance results when,

- the contractor has encountered an excusable delay for which he is entitled to a performance time extension; and,
- the Government fails or refuses to grant a request for such a time extension; and,
- the Government acts in such a way as to require complete performance within the original performance period.

(2) Defective Specifications. If the contract contains design specifications (indicating how the item is to be made - not merely how it is to perform) there is ordinarily an implied warranty that, if the specifications are followed, the item produced will meet the contract’s performance requirements. Accordingly, a compensable constructive change results if the specifications prove to be defective, or incomplete, or if they impose unattainable (commercially impractical) requirements (even though the unattainable requirements are ultimately relaxed to permit performance). Specifications may be defective because of mere error, inadequate detail, practical (as distinguished from actual) impossibility of performance, or a combination of these factors.

(3) Government Furnished Property. If the contract requires the Government to furnish certain property and the property proves to be defective, the contractor can obtain relief. The “Government Furnished Property” clause cross-references the “Changes” clause for relief. Thus, the furnishing by the Government of a defective item that is part of the design specifications, may be compensable as a constructive change order. The same rule applies to defective patterns, erroneous data or information, erroneous drawings, or erroneously marked parts.

(4) Contract Interpretations. If the Government directs the contractor to perform work in accordance with an interpretation of the contract specifications which differs from the contractor’s interpretation, and the Government’s interpretation is mistaken, the action may

constitute a constructive change entitling the contractor to appropriate relief. This may also hold if the Government interpretation were reasonable since the contractor is allowed to use its interpretation if it is reasonable. Under the “Changes” clause the contractor must, of course, follow the orders or it may be terminated for default. The contractor must promptly:

- notify the Government that its interpretation is incorrect and thus constitutes a constructive change.
- file a claim for recovery of increased costs and/or an extension of performance time under the Disputes clause.

(5) Method of Work. If the contract (expressly or by implication) permits a choice between various methods of doing the work, and the CO or ACO thereafter insists that the contractor use method X, when contractor chooses to use the less expensive (but nevertheless satisfactory) method Y, a constructive change results. The contractor is entitled to recover the additional expenses incurred in following method X, i.e., the difference between the expenses of method X and what expenses would have been under method Y). A compensable change also exists when the Government takes action which results in the contractor having to alter the planned sequence of performance (with consequent increases in cost).

(6) Inspection Requirements. Actions of quality assurance personnel (and other Government personnel) going beyond original contract requirements may also give rise to constructive changes. These actions include directions to the contractor to perform an unjustifiable number or type of tests; unreasonably changing the time and manner of inspection, tests, or quality control; or requiring a standard of performance higher than that set by the original contract. However, one of the following must exist: either

- the inspectors or other personnel have (or are deemed to have) authority to order contract changes; or
- their actions are, become, or are deemed to be acquiesced in by the CO or ACO.

(7) Rejection and Rework. If the Government rejects, over the objections of the Contractor, work later determined to have been in compliance, and directs rework such a requirement is a constructive change.

(8) Miscellaneous. Other Government actions which may constitute compensable constructive changes include ordering substitution of materials; design changes; ordering compliance with extra-contractual specifications; ordering a specific item when the original

contract terms only required that item or equal; and imposing a condition on performance not contemplated under the original contract terms.

(9) Minimum Requirements. Whenever a contractor makes a request for adjustment citing a constructive change, it must show, at a minimum, the following:

- what the contract initially required,
- that the contractor actually performed the additional work,
- that it had additional cost; and/or time,
- that the Government directed the work.

c. Authority. The Changes clause provides, in part, that only the CO or ACO have authority to order a change. Thus, if a quality assurance representative, or any other Government representative does not have (or is not deemed to have) actual authority to order a change, his/her orders (whether oral or written, formal or informal) do not constitute valid changes (formal or constructive) and do not entitle the contractor to recover under the Changes clause. Therefore, at the preconstruction conference, the contractor should be advised that all changes to the contract will be made by authorized persons only. Any orders considered by the contractor to be constructive changes should be confirmed to the ACO in writing. The contractor should be instructed to:

- (1) immediately protest to the ACO before performing such work; or
- (2) if such a protest is impracticable (due to the time element, or other reasons), immediately write a letter to the ACO with a copy to the person ordering the work, which:
 - describes the particular change that has been ordered;
 - names the person ordering it,
 - states the contractor is proceeding with the work, and
 - states that the contractor will file a formal request for equitable adjustment as soon as data is available.

If the ACO then agrees with the order, or fails to countermand it, the order is treated as having been endorsed by the ACO and the contractor's right to recover is protected. The wording in the Changes clause may not always hold, however, since the forum to which it is appealed may rule that a contractor has a right to rely on quality assurance representative orders.

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6. The 20-Day Rule. The Changes clause provides that, except for claims based on defective specifications, no claim for any change shall be allowed for any costs incurred more than 20 days before the contractor gives written notice such as described above. However, case law has tended to support the notion that the Government must show that it has been “prejudiced” by lack of notice in order for the 20-day rule to have full force and effect. Therefore, specific instances involving the 20-day notice rule, should be referred to the District claims coordinator for consultation with Office of Counsel and the C.O.

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FINDINGS AND RECOMMENDATIONS OF THE DISPUTES ANALYSIS BOARD (DAB)

CONTRACT: DACA45-98-C-0528, Unaccompanied Officers Personnel Housing, Lowry AFB, Colorado

CONTRACTORS: ABC Corporation (Prime), DEF Builders (Sub) and GHI Const Co (2nd tier sub via JKL Steel Co)

SUBJECT: Claim 501 - Structural Steel Impact

DAB convened on 9 Feb 1999 in the Denver Resident Office.

DAB members:

Harvey Robinson, Area Engr, Rocky Mtn Area
Richard Anderson, CSB, RMA
Rich McRae, Resident Engr, DRO
Billy Sellin, Const Div NWO
Tom Faugno, Office of Counsel, NWO

SUMMARY OF DISCUSSION:

Contractor's Claimed Amount:

The claim is in two parts: Part 1 involves GHI Construction Co. claim for \$132,134.45. Part 2 involves DEF claim for \$579,269. ABC's overhead and fee are claimed at \$105,230.32 for a total claimed amount of \$816,633.77. Claim was certified on 6 August 1992 by ABC Corp.

Contractor's Claim Position: (LPR Const Co.)

1. Part 1, DEF supplied and installed structural and miscellaneous iron for the project, including steel columns and X-bracing.
2. The structure is a non-self supporting structure by AISC definition and this "was not conveyed by the plans and specification to the contractor." Because of this, the contractor did not provide temporary supports other than "normal cable cross bracing used during steel erection." As a result of this and "thermal movement and from construction loads such as concrete placing and material stacking", the installed steel would move, requiring realigning and replumbing.
3. Because of the thermal movement and the non-self supporting nature of the structure, damages are claimed as increases in labor hours and crane time over what was "bid".

Government's Position: (LPR Claim)

1. It is true that by AISC definition, the structure is

indeed non-self supporting. However, the sequence of erection is adequately described by the contractor on page 2 of the contractor's "Executive Summary". The contractor developed an accurate erection sequence from the information on the contract documents. He has, therefore, the responsibility to provide the bracing required to adequately support his construction.

2. The word "owner", used in AISC Code of Standard Practice, para 7.9.3 and 7.9.6 is defined as the Prime Contractor not the Government. It is the Prime contractor's responsibility to coordinate the work of all trades under the contract. This definition is consistent with para 1.2 of the Code.

3. The other item that caused structural movement is "thermal expansion". No matter the type of structure, self supporting or non-self supporting, thermal movement takes place. It is up to the contractor to allow, support or compensate for this movement. The designer is not required to take care of any thermal problems that may be encountered during construction.

Contractor's Position (DEF Builders)

1. Part 2 is a claim from DEF Builders Inc, a subcontractor to ABC for the steel stud and drywall work.

2. DEF's claim is that "the lack of temporary guying resulted in substantial movement in the structure until the exterior studs were installed and the diagonal metal strapping installed." This problem is caused by the absence of definition of this as a non-self-supporting structure.

3. DEF was burdened with the costs of reworking construction which could not meet plumb tolerances until the structure was stabilized. This problem was caused by thermal movement of the structure.

4. DEF incurred costs to repair drywall cracking caused by building movement which could have been prevented by rescheduling drywall work after stabilization of temperature.

5. DEF incurred other costs due to numerous unresolved change orders and costs which it had no responsibility.

Government's Position: (DEF Builder's claim)

1. As previously stated, the structure is classified as non-self-supporting. However, the omission of that statement from the contract documents did not prevent or prohibit the contractor from constructing the facility in a manner that would support all imposed loads during construction. To blame this movement on the government is ludicrous. The government has no control over the structural movement of the building during construction.

2. The facility is the contractor's to construct. Any and all loads or forces imposed during construction are his to accommodate. The government is not responsible or in a position to dictate erection sequence. If structural movement became a problem, either by thermal or construction imposed loads, it is the contractor's responsibility to correct.

Figure E-2 (Cont'd.)

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3. The contract drawings are very clear in describing the sequence of erection of the structure. There is no evidence that the absence of the words, "this is a non-self-supporting structure", caused any of the movement problems that were encountered. It is the contractor's responsibility to support the structure during erection.

DAB RECOMMENDATIONS:

Based on the position stated above and the fact that any movement of the building during construction is the responsibility of the contractor, it is the recommendation of the DAB that the Contracting Officer deny this claim in its entirety.

Figure E-2 (Cont'd.)

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Contract Support Office

March 9, 1999 Serial No. 376

SUBJECT: Contract DACA45-98-C-0528, Unaccompanied Officers Personnel
Housing, Lowry AFB, CO.
(Claim 501 - Structural Steel Impact)

The ABC Corporation
805 E. Tully Ave., Suite 70
Denver, CO 80245

Gentlemen:

In response to our certified claim submitted with Serial Letter No. 744-407, dated August 6, 1998, I offer the following:

The Disputes Analysis Board (DAB) met on February 9, 1999 to discuss your claim. The findings and recommendations are enclosed.

Prior to forwarding the DAB recommendations to the Contracting Officer, I invite you to review your claim and advise me if there is any new or additional information that you wish to present.

My target date to forward the DAB recommendations to the Contracting Officer is March 25, 1999. Please submit your new information by that date. If I don't hear from you by March 25, 1999 I will assume that you have no new facts and you wish to have the CO base his decision on the information you have already submitted.

Sincerely,

Matthew Ellis, P.E.
Authorized Representative
of the Contracting Officer

Figure E-3

E-13