CON 244

Construction Contracting

Lesson 6

Student Guide Package

May 2016

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Lesson 6– Changed Conditions

Overview

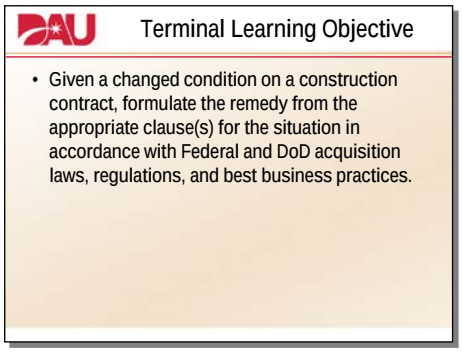
Questions to ponder:

What causes changes on a construction contract?

What is the responsibility of the designer in a Design-Bid-Build contract?

What is the responsibility of the designer in a Design-Build contract?

Lesson Details



Lesson Title	Construction Contract Administration – Changed Conditions
Terminal Learning Objective	Given a changed condition on a construction contract, formulate the remedy from the appropriate clause(s) for the situation in accordance with Federal and DoD acquisition laws, regulations, and best business practices.
Enabling Learning Objectives	• Identify unique construction clauses used in changed conditions. • Predict the impacts of differing site conditions. • Identify the necessary elements of constructive changes. • Given a construction project scenario and schedule analysis techniques, determine construction time, delay, and other equitable adjustments. • Evaluate contract acceleration and expediting. • Identify the overhead method that best protects the government while equitably compensating the construction contractor. • Recognize the rights and responsibilities of the government and the contractor in construction terminations. • Outline the unique construction claim issues. • Analyze specific court cases that support various construction changed condition clauses.
Time Required	3 hours
Method of Instruction	Lecture, plus two Exercises
References, Supplemental Readings	Case Studies from Clause Analysis portion of this lesson FAR clauses listed on page XX of this lesson
Evaluation Method	Student performance will be assessed on course exam and Capstone Case Study.

Lesson 6– Changed Conditions

Introduction

In your capacity as a contracting officer for the government, you have just finished soliciting and awarding 30 contracts of various sizes, including 4 MILCON projects. You are looking forward to some leave after that Herculean effort.

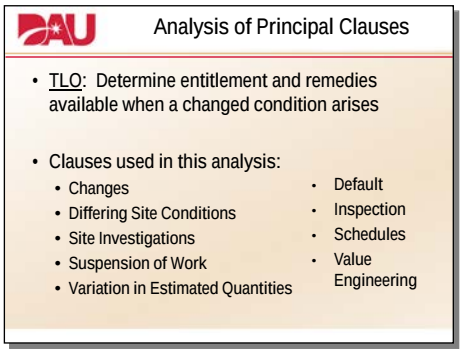
But, in this business there is always an exception.

There are two customers that need their projects finished early; another project has exposed unexploded ordnance and another project has found contaminated soil; another project's workers are not wearing safety gear; another customer wants you to suspend work while they prepare for an inspection; all power on the facility just went off unexpectedly; one contractor has not shown up to the jobsite now for three days; military personnel are calling you to complain of their cars being painted; you have received one letter from a contractor informing you they have followed an inspector's direction and want $250,000 in compensation; another letter informs you a subcontractor has not been paid for materials supplied for one project and this is just the first two hours of your morning.

How are you going to keep all these projects on- line?

About that annual leave you were planning?

Analysis of Principal Clauses



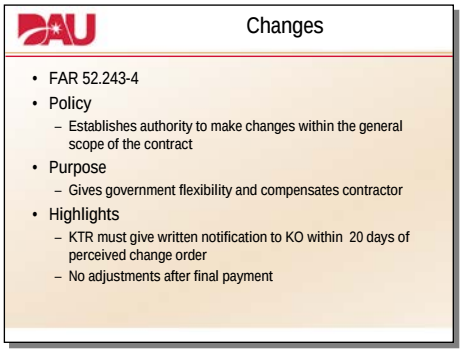
Analysis of Principal Clauses

The objective of clause analysis, regarding changed conditions, is to determine the entitlement and remedies available when a changed condition arises on a construction contract.

We do this through the analysis of the rights and responsibilities expressed in the change- related construction clauses prescribed by the FAR.

Clause Reference	
Changes	FAR 52.243-4
Differing Site Conditions	FAR 52.236-2
Site Investigations & Conditions	FAR 52.236-3
Suspension of Work	FAR 52.242-14
Variation in Estimated Quantities	FAR 52.211-18
Value Engineering	FAR 52.248-3
Default (Fixed Price Construction)	FAR 52.249-10
Schedules for Construction Contracts	FAR 52.236-15
Inspection of Construction	FAR 52.246-12

Changes Clause



Changes Clause (FAR 52.243-4)

The most important and most-used clause for changed conditions in government contracts is the Changes clause. This clause allows the contracting officer to direct changes in the work with the preferred method being bilaterally the clause allows the issuance unilaterally if necessary, within the general scope of the contract.

There are three different Changes clauses used in construction which are prescribed by the FAR, based on the type of contract awarded:

52.243-2 (Alt 3) for cost-reimbursement construction contracts
52.243-4 for fixed-price construction contracts above the SAT
52.243-5 for fixed-price construction contracts below the SAT

This text will focus on fixed-price contracts above the SAT, which comprise the majority of DoD construction contracts.

Policy

Paragraph (a) of the clause establishes the authority of the Contracting Officer to make changes within the general scope of the contract. The clause specifically states this authority includes changes to:

- In the specifications (including drawings and designs);
- In the method or manner of performance of the work;
- In the Government-furnished property or services; or
- Directing acceleration in the performance of the work.

Purpose

There are two main reasons for the inclusion of the Changes clause:

- To ensure the government has flexibility during administration of the contract.
- To ensure that the contractor is compensated when the government exercises that flexibility.

Clause Highlights

One important aspect of this clause is that paragraph (d) states the government will not pay for costs incurred more than 20 days before the contractor gives the government written notification that a changed condition exists. However, historically, case law indicates that this provision is not always enforced, since contractors can typically recover these costs under the Disputes Clause (52.233-1).

Paragraph (f) provides that no adjustments are to be made after final payment. This provision states that no adjustments to that same, particular change may be made as the change has been previously completed, negotiated, and finalized.

What type of compensation may be due the contractor under the Changes Clause?

Reading Assignment – Court Case Review

Santa Fe Engineers

The following case illustrates the use of the Changes Clause by both the Government and the Contractor. When reading the case, note how the parties utilize the clause. Be prepared to discuss both approaches. Also while reading, consider how higher organizations evaluate disputes using the Changes clause.

Appeal of Santa Fe Engineers, Inc.
May 23, 1989
ASBCA No. 32448, 89-3 BCA ¶22024

OPINION BY ADMINISTRATIVE JUDGE TING

Santa Fe Engineers, Inc. (Santa Fe) appeals from a contracting officer's final decision denying its claim for having to provide a base course of select material underneath a new wharf constructed as part of the space shuttle Solid Rocket Booster Retrieval and Disassembly Facility at Port Hueneme, California.

Issues of entitlement are before us.

FINDINGS OF FACT

1. On 28 March 1983, the government awarded Contract No. N62474-78-C-0085 to Santa Fe for the construction of a Solid Rocket Booster (SRB) Retrieval and Disassembly Facility at the Naval Construction Battalion Center, Port Hueneme, California.

2. The project included construction of the Disassembly Building, Initial Wash Building, LST Ramp, concrete wharf with steel pilings, railroad work, dredging, underground utilities, roads, and all mechanical and electrical work associated with the facility.

3. Spent rocket boosters from space shuttle launches out of Vandenberg Air Force Base would be towed back to Port Hueneme. The wharf to be constructed would serve as a staging area from which rocket boosters would be lifted out of the water and transported to the Disassembly and Initial Wash Buildings.

4. The contract included the General Provisions (Construction Contract) prescribed by the DFARS. Among the standard clauses included were the "Changes" clause and the "Disputes" clause.

5. Section 02685 of the specifications was entitled SELECT-MATERIAL BASE COURSE FOR WHARF AND RAMP SLABS. (The ramp was deleted from the contract. There was no base course dispute in connection with the ramp.)

6. Select material is crushed rock of a certain gradation mixed with sand held together by a binder. A "course" is "usually several inches thick [for] the width of a road, a paved section or… in this case a wharf."

7. The purpose of a base course was to serve as a "cushion" between the wharf concrete slab and the soil to "spread or distribute loads." The existence and thickness of the base course would affect the "ultimate strength" of the wharf. Base course is sometimes put under concrete to provide drainage.

8. Paragraph 7 of Section 02685 provided in part as follows:

7. GENERAL REQUIREMENTS: The base shall be composed of granular and binding materials constructed on a prepared subgrade or underlying course. The base course shall be provided where indicated and shall be shaped and compacted thoroughly within tolerances specified. (Emphasis added)

9. The "W" drawings related to the construction of the new wharf. Drawing W-1 (Wharf Plan)
showed a plan view of the wharf. A note pointing to the wharf surface stated:

10" CONC. SLAB W/#5 @ 24" O.C.E.W. [On Center Each Way].

10. Paragraph 1 of the "Wharf Notes" on Drawing W-1 stated:

1. Wharf concrete slab is designed for AASHTO H-20 and
34 KIP strato carried wheel load.

11. Drawing W-1 shows an east-west cut of the wharf along Section A. A cross section of that cut is shown on Drawing W-2. Part of this cross-section is shown below:

[Graphic Deleted]

12. Section A, Drawing W-2, was the only cross section of the wharf. It showed the 10-inch concrete slab. The thickened edges of the slab were shown to be on top of materials designated by a note to be:

24" Gravel or select material base course typ. Compact to 95% optimum density.

A layer of "course to fine sand" backfill was shown from the base course down to an elevation of
+ 9.5. Neither the base course material nor the backfill was shown for the entire width of the concrete slab. Santa Fe had no problem understanding that backfill was required for the entire width of the wharf and so installed the backfill.

13. Drawing W-3 was entitled "WHARF SECTIONS & DETAIL SHT. 2." Section A showed the following:

[Graphic Deleted]

14. In Section A, Drawing W-3, the note pointing to some materials underneath the concrete slab said:

12" GRAVEL OR CRUSHED ROCK BASE COURSE SEE CIVIL GRADING PLAN.

15. Although Section A, Drawing W-3, referred to civil grading plans, none of them shed any light on where a base course of select material was to be installed.

16. A summary of Santa Fe's bid showed that it included 2,222 tons of SELECT MAT BASE COURSE. According to Santa Fe, this base course material was for SAND FILL @ NEW RAMP. We find that this base course material had nothing to do with the base course for the wharf.

17. Based on our review of the bid papers and testimony, we find that Santa Fe did not include any cost for providing and installing any base course in the wharf in its bid.

18. By letter dated 25 June 1984 to the resident officer in charge of construction (ROICC), Santa Fe's project superintendent forwarded a sketch showing what he considered to be "the limits of the base in the wharf area." According to his interpretation of the drawings, 24 inches of base course material was called for under the "thickened edge" of the concrete slab and 12 inches of base course material was called for to a point three feet past the deadman tie back beam. The areas in which Santa Fe felt it needed to provide base course material were highlighted in yellow on exhibit A-2.

19. At the hearing, Santa Fe's vice president took the position that no base course material was required at all. Santa Fe's project superintendent testified that he offered to install some base course material at certain areas of the wharf simply "to move ahead… to get over this project."

20. Recognizing that the note in Section A, Drawing W-2, called for "24 inches of gravel or select material base course," whereas Section A, Drawing W-3, called for "12 inches of gravel or crushed rock base course," the AROICC by letter dated 25 July 1984 authorized Santa Fe to install the lesser amount, i.e., 12 inches. He made clear, however, that:

This 12" of base course material will be placed throughout the entire wharf and ramp area – not just over the deadman as depicted in your referenced [25 June 1984] letter.

21. Before taking this position, the AROICC went back to the architect/engineer (A/E) who designed the project and the AROICC ascertained that 12 inches of base course were contractually required.

22. By letter dated 6 August 1984, Santa Fe said that it disagreed with the government's position that "select material is meant to be for the entire wharf." It took the position that

"[a] 12" base course is intended only at wharf areas defined by this cut section [referring to Section A, Drawing W-3]." Santa Fe requested an equitable adjustment in the amount of $53,203 and a time extension of nine calendar days. (At the hearing, Santa Fe offered no proof that it was in any way delayed as a result of the base course dispute.) The request was presented as a certified claim.

23. The AROICC subsequently directed Santa Fe to proceed to install the wharf base course in accordance with the government's interpretation of the contract drawings.

24. In a final decision dated 22 November 1985, the contracting officer denied Santa Fe's claim. Santa Fe timely appealed the decision by notice dated 10 February 1986.

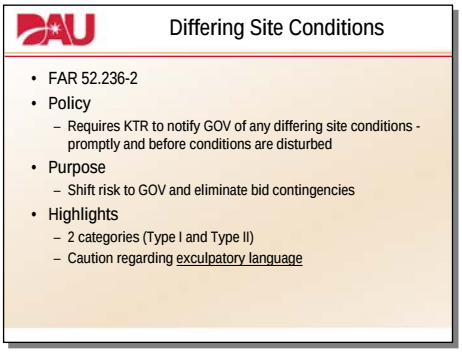
Discussion Questions:

1. What are the facts of the case and the arguments of the parties?

2. Was there a patent ambiguity in the specifications?

3. How would you decide the case?

Differing Site Conditions Clause



Differing Site Conditions Clause (FAR 52.236-2)

The government attempts to represent physical conditions of the construction site through the use of technical specifications and drawings. Unfortunately, some physical conditions may not be known. When conditions at the construction site differ from those indicated in the specs and drawings a differing site condition may exist. A differing site is a changed condition.

Policy

Paragraph (a) of this clause requires the contractor to notify the government promptly of any differing site conditions, before such conditions are disturbed. If site conditions differ materially from those indicated in the contract, the government is required by paragraph (b) to modify the contract and provide equitable adjustment.

Purpose

The objective of this clause is to shift the risk of unforeseen conditions to the government, thereby eliminating the need for contractors to include contingency factors in their bids.

Clause Highlights

Paragraph (a) classifies differing site conditions into two general types, commonly referred to as type I and type II.

A Type I differing site condition exists when the conditions differ from what is shown in the contract. For example, when a contractor encounters lead paint on a demolition contract that states the paint contains no lead.

A Type II differing site condition exists when the conditions differ from what would normally be encountered in work of the same nature. For example, when a contractor discovers an underground fuel storage tank, not shown on the drawings, while performing excavation for a new building.

What compensation does the contractor receive under the Differing Site Conditions Clause?

Shifting the Risk

One way the government has tried to avoid differing site condition claims is by warning bidders to beware of the government-provided information as to existing conditions. This is called exculpatory language. Contracting personnel will find exculpatory language, if it is present, in the technical specifications.

The following example aids in determining why contracting personnel should note this kind of language in a contract package. An attempt by the government to use exculpatory language in denying a contractor's claim for differing site conditions was turned back by the Corps of Engineers Board of Contract appeals. The case went as follows:

The Corps of Engineers needed to repair eroded areas inside a flood control tunnel in Seward, Alaska, On the drawings it distributed to bidders, the language stated "Tunnel condition is as of 10 April 1987. Current tunnel condition is unknown. Water intrusion is unknown." The contract was awarded in November 1987. The work encountered required manual labor instead of machines, which drove up the cost. The contractor filed a claim for a differing site condition to compensate for the additional cost of the manual labor.

The Corps claimed that the disclaimer on the drawings as to the date of the data overrode the Differing Site Conditions clause. The board disagreed. It said that the disclaimer clause, the "exculpatory clause," did not override the Differing Site Conditions clause and that the government could not absolve itself of liability simply by noting that the tunnel information was "old." It concluded that the contractor was entitled to damages. Be aware of any attempts using exculpatory language.

Reading Assignment – Court Case Review

Stuyvesant Dredging Company

This case illustrates use of the Differing Site Conditions clause. Note both the Government's and the Contractor's use of the clause. Be prepared to discuss both approaches. Consider how the clause is fully explored to resolve the dispute.

Appeal of STUYVESANT DREDGING COMPANY
September 11, 1989
ENG BCA No. 5558, 89-3 BCA ¶22222

OPINION BY ADMINISTRATIVE JUDGE JOCKISCH

This is a timely appeal from a contracting officer's final decision denying appellant's request for an equitable adjustment based upon encountering an alleged changed condition while dredging in the Rappahannock Shoal Channel under Contract No. DACW65-87-C-0038. A hearing of approximately one week was held, and briefing of the appeal was completed in August, 1989. This appeal is processed pursuant to the Contract Disputes Act of 1978, 41 U.S.C. Section 601, et seq.

FINDINGS OF FACT

1. On March 3, 1987, Contract No. DACW65-87-C-0038, New Work Dredging, Rappahannock Shoal Channel, Baltimore Harbor and Channels, Chesapeake Bay, Virginia, was awarded to Stuyvesant Dredging Co., in the estimated amount of $4,963,924. Notice to proceed was acknowledged by the contractor on March 23, 1987, which established June 25, 1988, as the original completion date.

2. The following contract clauses are pertinent to this appeal:
   a. General Provisions:
      (1) G.P. 44, Disputes
      (2) G.P. 46, Differing Site Conditions;
      (3) G.P. 50, Permits and Responsibilities;
      (4) G.P. 59, Changes;

   b. Special Provisions:

   (1) Special Clause, 5C4, Physical Data,

      d. Conditions of dredging areas: The drawings show the condition of the channel at the time of the most recent survey, however, the depths will be verified by surveys made immediately before dredging. The contractor may encounter obstructions on the channel bottom during dredging operations, see

paragraph 3.2 and 3.3 of the technical specifications. There are no structures or utility lines known to cross the contract area.

(2) Special Clause, SC-23, Insurance.

c. Technical Specifications:

(1) 3.2 Obstruction Identification: The contractor during dredging operation, may encounter obstructions on the channel bottom which may include but be limited to channel buoys, concrete block anchors with chain, and similar materials. A side scan sonar survey of the dredging area was performed by the Norfolk District, Corps of Engineers during October and November 1985. The results of this survey are shown on the contract drawings. The contractor shall view the location and description of these results as being interpretations of this survey and may not accurately represent actual conditions.

(2) 3.3 Obstruction Removal: If the contractor, during dredging operations, encounters an obstruction he shall physically mark the site and notify the dredge inspector. The contractor shall make a reasonable attempt, as determined by the contracting officer, to remove it from the water and transport it to the Craney Island Landfill, Portsmouth, Virginia, or a contractor furnished disposal area approved by the contracting officer, whichever is more economical. If Craney Island is used, the contractor shall comply with the regulations governing its use. These regulations are available from the Operations and Maintenance Branch, Norfolk District, Corps of Engineers. The extra handling cost shall be negotiated with the contracting officer. If removal cannot be completed as above, the obstruction will be considered within the purview of Contract Clause – DIFFERING SITE CONDITIONS.

(3) 3.4 Additional Information: Additional geophysical information is available for review by interested bidders in the Dredging Management Branch, Norfolk District, Corps of Engineers. This Information consists of a report entitled: Baltimore Harbor and Channels 50 Ft. Project Geophysical Foundation Exploration Report, dated February 17, 1978.

d. Contract Drawings:

(1) Contract Drawing No. H-50-10-12 (1-4) – Rappahannock Shoal Channel – Plans for new work dredging – Survey of June and July 1986.

(2) Contract Drawing No. H-50-10-12 (5) – Rappahannock Shoal Channel – Plans for new work dredging – Subsurface Exploration.

(3) Rappahannock Shoal Channel – Plans for new work dredging – Rappahannock Shoal deep disposal area (alternate) – Survey of October 1984.

None of these drawings portrays any information dealing with debris, shells, armament, or obstructions to be encountered in the dredging area. Basically, they contain boring data for the new work dredging.

Bid Preparation

3. Upon receiving the invitation for bid documents in January, 1987, Mr. Ian Andersen, president of Stuyvesant Dredging, coordinated the preparation of its bid. The bid was based upon using the dredge Stuyvesant, which was a state-of-the-art, high-technology vessel. It was the largest hopper-dredge in the United States. Mr. Andersen considered the work under this invitation to be straight forward, uncomplicated, and easy dredging for a ship of the Stuyvesant's capabilities. He anticipated encountering debris and rubbish. His estimate was based on completing the contract work in 12 weeks, rather than the 440 days for completion provided in the bidding documents.

4. When preparing the bid, Mr. Andersen knew that the project was for new work dredging, as the bid documents indicated the work to consist of widening and deepening a smaller existing channel. From navigation charts he consulted prior to bid, he was informed that the dredging was to take place in an area that had been in the past and was presently utilized as a firing range by the Navy. Prior to bid, the appellant knew of the likelihood of dredging armament.

Contract Dredging

5. After award of the contract, the contractor began dredging with the hopper-dredge, Stuyvesant, on March 12, 1987. This hopper-dredge utilized a drag arm, which acted as a huge vacuum cleaner to suck up the material to be removed. The material went to the pump-room where an impeller, enclosed in a pump case housing, moved the material into various lines which emptied into the hoppers. Then, the material was removed from the hoppers and placed in the disposal area. The vacuum opening of the drag arm was approximately 17 inches square. The shape of the pump-case housing was that of an oblong, hollow metal container of approximately 12 feet in height and 36 inches in width. It was made of a four-inch thick, heavy, brittle metal. The pump-case housing would be periodically replaced as being worn. The enclosed impeller was made of a ductile metal, which was not as brittle as the casing. The impeller was worn but not damaged.

6. Before dredging, the captain of the Stuyvesant reviewed the navigation charts and determined that the dredging would be in a military firing range area. Though he had never dredged in the Rappahannock shoals area before, he had dredged in military waters previously without incident, even though having dredged up small armaments.

He was not concerned about dredging in the area of the firing range. As he stated in a published article after the incident, "Whenever you're around a military port, there's a danger of picking up ordnance. We've pulled it up before, but it never went off."

7. The dredging went as expected by the contractor when it bid the job. As stated by Mr. Andersen, “Everything went as foreseen otherwise.” The otherwise applies to the incident of May 28, 1987, which will be detailed later. During the period prior to May 28, 1987, the Stuyvesant dredged or encountered various items, such as tires, airplane parts, a steel roller, sinkers, anchors, crab traps (even in the middle of designated danger areas), an old steel buoy, anchor chains, and other assorted debris and trash. All who testified at the hearing indicated that there was no limit to the type of trash and debris likely to be found in new work dredging. The appellant never gave a notice of a differing site condition to the government because of any of these encounters.

8. Before May 28, 1987, the contractor dredged projectiles and ordnance during this job. On March 13, 1987, a piece of ordnance was dredged and disposed of. On March 16, 1987, the crew removed a five-inch projectile. Though the captain and crew knew of the dredging of ordnance, no notice of a differing site condition was given the contracting officer. On April 8, 1987, an explosion in the delivery line resulted in moving the dredge to the dumpsite to perform repairs. The shutdown for repairs lasted approximately 19 hours. On April 10, 1987, another severe bang was heard which caused two cracks in the pipe which required repair. On May 8, 1987, another 5” shell was dredged. Appellant gave no notice of a differing site condition to respondent after these incidents. The incidents were considered by the dredge master as “nothing unusual.” Mr. Andersen was aware that ordnance was being picked up by the dredge, but he did not inform the contracting officer.

9. The contractor never considered putting a screen on the drag head after these incidents, as dredging efficiency would be impaired significantly.

Damage to Pump Casing

10. On May 28, 1987, at 4:00 a.m., a sharp explosion occurred on board the dredge Stuyvesant. The dredge-master, in charge of the bridge at that time, checked the gauges, which appeared normal and turned the pumps, which had been running at 140 RPM, to idle. He ordered the drag arm to be raised from the bottom and went to the pump room. The pump room is unmanned and operated from the bridge.

11. Though getting to the pump room within a minute, he found significant flooding of the pump room. Approximately eight feet of water, which was still rising, was encountered. He had the dredged material jettisoned, the pumps shut down, and the flushing line valves closed. He had pumps brought in to pump out the pump-room and had the vessel moved to shallow ground as a precaution. The pump room was not pumped successfully until a private marine contractor provided additional pumping capacity.

12. He did not sound a general alarm, as he did not consider the ship in real danger of sinking. Some other members of the crew were awakened by the explosion. He noted that there had been previous bangs and jolts, though none were of this magnitude.

Investigation of Incident

13. After the situation was under control and after the water was removed from the pump room, the contractor and Coast Guard, which had responded to the incident report, found four or five cracks in the pump shell casing. The cracks were approximately ¾" wide and were found at various places on the shell casing. The large bolts holding the shell casing together were stretched not sheared.

14. Within two to three hours of the accident, the Coast Guard had an investigator on the Stuyvesant. His testimony confirmed his findings stated in the official report. He noted that from statements given by the crew, the contractor had been periodically encountering small ordnance and shudders and bangs while dredging. He found no evidence of exploded ordnance in the damaged area, through he found pieces of ordnance in the spoil area. All who investigated asserted that the definitive cause of the accident may not be determined with 100% finality, as the dredging master had dumped the dredged material for safety reasons at the time of the incident. No one indicates this was other than a prudent action taken at that time, under the then-existing circumstances.

15. The Coast Guard investigator did find in the cracked pump casing a compressed gas cylinder bottle, ripped in pieces, which he officially concluded had ruptured and exploded inside the pump shell casing. He classified the cylinder bottle in his report as debris. He noted the area being dredged was marked on the navigation charts as being a danger area. His testimony concluded that there was an explosion, that the cylinder was the cause of the explosion, and that the conclusions in his initial report were still his position.

16. Appellant's expert, though concurring that no one could be 100% certain, essentially supported the Coast Guard's conclusion. He noted the peeling back or unwrapping of the 51 inch long, nine inch diameter, and ¼" thick gas cylinder, and he concluded that this only could be caused by a great amount of internal force. He asserted that the pattern of the rupture was violent. As pieces broken from the cylinder were found in the pump casing, he concluded that the rupture must have taken place inside the casing, as it would be unlikely to dredge the pieces of an already ruptured gas cylinder, at the same time and place.

17. Appellant's expert concluded that a violent explosion occurred and that the cylinder was the cause. He based much of his determination on the appearance of the unwrapping of the cylinder bottle, on the random cracking, not localized, of the pump shell casing, on the stretching rather than the shearing of the bolts, and on the calculated potential explosive capacity of the gas cylinder. He noted that the energy released by the gas cylinder was "somewhere less than one pound TNT equivalence" and that "military explosives" are extremely effective against brittle material.

18. In explaining why the impeller was not damaged if such a violent explosion had occurred inside the pump, the consultant stated that the impeller was not made of the same material as the brittle casing material, that the casing was not a closed vessel which could relieve pressure on the impeller, and that the dynamics of explosion in water can bring about a pass through effect.

19. During the hearing, the government asserted that the damage was caused by the jamming of the cylinder between the impeller and the casing, rather than an explosion. However, the government's evidence was, at best, lacking on this point, and this position has been abandoned in the brief.

20. By the testimony of all parties, the dredging of a gas cylinder from the ocean floor is not as common an occurrence as implied by the contracting officer's decision; but, the finding of almost anything in new work dredging is not unusual. (See previous findings.)

21. In an article entitled Live Explosives Put Vessels at Risk, published on February 28, 1988, in the Virginia Pilot newspaper, the captain of the Stuyvesant and the president of Stuyvesant Dredging Company were quoted as indicating that they had dredged up live ordnance and that fragments of the exploded ordnance had been recovered.

Positions Of Parties

The positions of both parties shifted from the time of filing pleadings and the Rule 4 papers and the beginning of the hearing of this appeal. At hearing, appellant (contractor) no longer asserted an ordnance explosion and denied a gas cylinder explosion. Its position became that the gas cylinder exploded causing the damage to the pump-shell casing and that the encountering of the gas cylinder was either a type I or II differing site condition.

At hearing, respondent (government) no longer asserted that an explosion occurred caused by a gas cylinder, but rather that no explosion occurred and the damage was caused by the impeller jamming the cylinder against the housing of the pump. In its brief, respondent abandons this position and concurs that the gas cylinder explosion ruptured the pump housing. Respondent contends the dredging of the gas cylinder and its explosion in the pump was not a differing site condition under the contract clause.

Discussion Questions:

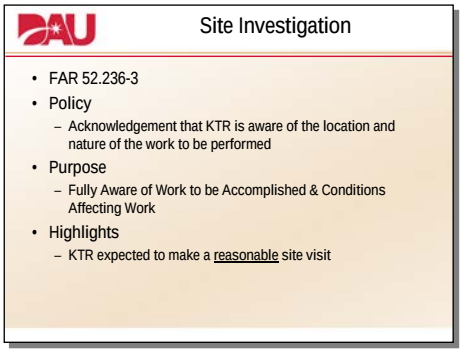
1. What are the facts of this case and the allegations of the parties?

2. What category of differing site conditions is being alleged in this situation?

3. What is the difference between a Category I and a Category II differing site condition?

4. How would you decide this appeal? Why?

Site Investigations Clause



Site Investigation and Conditions Affecting the Work Clause (FAR 52.236-3)

Under this clause, contractors must investigate the work site and examine data made available by the government. The extent to which a contractor will be charged with information contained in the data furnished depends on the language used with the data and the manner in which the data is provided. The clause places a specific obligation upon the contractor to reasonably ascertain surface and subsurface information.

Policy

Paragraph (a) of this clause is an acknowledgement by the contractor that it has ascertained the nature, location, condition, character, quality, and quantity of the work to be performed and the site where the work will be performed.

Purpose

This clause is designed to ensure the contractor is fully aware of the work to be accomplished and the conditions under which they will be performing.

Clause Highlights

In determining whether a site investigation is adequate, the standard generally applied is one of reasonableness under the factual circumstances. The adequacy of a site investigation is measured by what a reasonably intelligent contractor, experienced in the particular field of work, could be expected to discover, and not what an expert geologist might have found. The contractor is not required to make extensive engineering efforts or go to unreasonable lengths, prior to bidding, to verify the site conditions indicated in the contract.

For example, if a geological report is referred to in the contract documents, then a reasonable site investigation would require that the contractor obtain a copy of the report. Contractors are not required to inspect documents specifically stated not to be a part of the contract documents. For example, the contractor does not have a duty to obtain and inspect as-built drawings if they are not part of the contract documents. However, since a contractor has no duty to evaluate data specifically excluded from the contract, it also has no right to rely upon such information.

What compensation does the contractor receive under the Site Investigation and Conditions Affecting the Work Clause?

Reading Assignment – Court Case Review

Federal Contracting Case

This case illustrates the Site Investigations and Conditions Affecting the Work Clause. Note how the Government and Contractor use the clause. Be able to discuss both parties' approaches. Consider how the clause is analyze by another organization in resolving the dispute.

Appeal of Federal Contracting, Inc.
July 6, 1995
ASBCA No. 48280, 95-2 BCA ¶27792

OPINION BY AD MINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant filed an appeal from a deemed denial of its claim. During the period 31 January to 20 July 1994 a dispute arose between the parties concerning the scope of work required by the contract. Following an impasse between the parties, appellant submitted a claim in the amount of $43,928.00 for the alleged extra work. Despite several attempts to schedule a meeting to negotiate an adjustment, no meetings were held between the parties, and no final decision issued. Appellant elected to proceed under the Rule 12.3 accelerated procedure. Only entitlement is before the Board for decision.

FINDINGS OF FACT

1. The government issued a construction contract in the amount of $4,963,355.00 to appellant for the alteration, and indeed, total renovation of the aircraft maintenance hanger at Buckley ANG Base, Aurora, Colorado. The work required appellant to perform certain specified demolition and asbestos removal in accordance with the contract plans and specifications. The structure consisted of a main hanger building with two 2-story lean-to structures attached to the main hanger. The contract was required the complete demolition of everything in the two lean-to structure except the stair towers.

2. The demolition drawings for the first floor, south lean-to (drawing D-3) depicted dry loft and wet loft rooms with drawing indications for demolition of walls to be removed and with a drawing note S2 stating: INSTALL NEW STEEL BEAM FRAMING AT 2ND

FLOOR AND ROOF LEVELS. REMOVE PARACHUTE TOWER NORTH, SOUTH, WEST, AND CENTER WALLS TO 8" BELOW EXISTING SLAB ON GRADE. The demolition drawing for the second floor south lean- to (drawing D-4) depicted the area above the dry loft and wet loft rooms with drawing indications for the demolition of walls to be removed and a reference to a note with the same language regarding the parachute tower as contained in drawing D-3. The site demolition roof plan (drawing D-4) identified the parachute tower extending above the roof and above the area identified in drawings D-3 and D-4 for demolition of the parachute tower. In addition to the previously quoted language of note S2, note S2 on drawing D4 also stated REMOVE EAST WALL ABOVE ROOF.

3. The contract structural plans and details (drawing D-5) indicated the area for the parachute tower in the plan for the south lean-to, first floor, with a note specifying the removal of the walls for the parachute tower and the removal of the existing concrete slab to be replaced with a five- inch concrete slab on grade. The plan for the second floor on this drawing contained instructions for installation of new steel framing prior to removal of the existing concrete wall and installation of a new concrete slab on two-inch composite steel deck welded to framing. The plan for the roof level of this drawing specified the installation of new steel framing prior to removal of the existing concrete wall, installation of a new six-inch concrete slab on two inch composite steel deck welded to framing, and the removal of the existing east wall above the roof.

4. The solicitation and contract contained the clauses and provisions generally found in construction contracts, including provisions regarding pre-bid site visit and investigation of the conditions affecting the work. The solicitation also contained a specific recommendation that the bidders attend a scheduled site visit and that they familiarize themselves with the project specifications and drawings prior to such a site visit.

5. Appellant submitted the lowest bid, which was $284,511 below the government estimate. In response to a government request for bid verification, appellant by letter dated 9 August 1993 verified the bid as correct and stated that appellant had visited the site. Appellant had performed work previously at Buckley ANG Base and was generally familiar with the site. However, appellant did not visit the site for a pre-bid site investigation in connection with the instant contract.

6. In preparing its bid, appellant's estimator did not do any takeoffs for the demolition of the parachute tower. He saw the reference to tower, but did not note it specifically and did not know that there was a tower on the building. After doing the takeoffs, he gave them to appellant's president, who prepared the bid. Appellant's estimator saw nothing on drawing D-3 that indicated the height of the first floor, and he did not refer to any other drawing for elevations for determining the quantity of the demolition work. He referred to elevation drawings only for structural new work, but not for demolition. He did notice note S2, on drawing sheets D-3 and D4, saying that the walls of parachute tower were to be demolished to 8 inches below the existing ground floor slab. However, he interpreted the note as indicating demolition below the first floor slab only

and as not requiring removal of the parachute tower walls except below the first floor slab.
7. Appellant's president reviewed the contract plans, reviewed the takeoffs, and prepared the bid pricing. In preparing appellant's bid, he included an amount for the demolition of the three walls of the tower below the roofline. He assumed, however, that the parachute tower did not extend above the parapet wall line or roof membrane an additional 35 feet. He did not include any amount in the bid for scaffolding, jackhammers and compressors, etc. for the demolition of the tower above the roofline.

8. The tower extended approximately 35 feet above the roofline. The parachute tower was incorporated within the south lean-to. The tower was clearly visible and appellant's president admitted that had he made a site visit, he would have seen the tower and realized that his assumption that the tower only extended to the parapet level was in error.

9. The walls of the tower were load bearing, consisting of four eight-inch concrete walls and a center wall. Moreover, because the tower walls were load bearing, according to note S2 on drawings D-3 and D-4, the new work required placing steel structures in place to provide the load bearing for the second floor and roof prior to the demolition of the tower walls on the upper levels.

10. During appellant's performance, a dispute arose regarding the requirement for the removal of the parachute tower. By letter dated 31 January 1994, appellant informed the government that according to appellant's interpretation of the plans, the contract plans required removal of the tower only as it extended through the first and second floors, and did not require removal above the roof level. Appellant further stated that it did not include the cost of removal of the tower above the roof level in its bid. Appellant, therefore, informed the government that it considered the demolition of tower above the roof to be a change.

11. According to appellant's interpretation of the contract drawings, the drawings did not require appellant to demolish the portion of the parachute tower above the roofline because there were no indications in the drawings concerning the elevation of the tower. Although appellant recognized that the demolition drawings indicated demolition of the tower, appellant concluded that it could not perform the take-offs from the base drawings to prepare its bid because the demolition drawings failed to indicate the vertical dimension of the tower walls. Therefore, according to appellant, it would be necessary to look elsewhere in the plans for elevations. The conclusion that the contract did not require the demolition of the tower above the roofline was based was in part on appellant's expert witnesses' reading of drawing A-12 as significant. Drawing A-12 was an architectural drawing showing the required finished construction. According to these witnesses, this drawing should have depicted the parachute tower ghosted in with its elevations to reflect the demolished structure of the tower.

12. In designing the project, the main concern of the architect/engineering firm was that the walls of the parachute tower were load bearing, so the new work required putting steel structures in place to provide load bearing for the second floor and roof prior to demolition of the tower walls. The standard practice with regard to depicting demolition in the drawings in the case of total removal of a structure was merely to indicate the extent of that demolition in the drawings without reference to elevations since the entire structure would be removed. If there was some specific detail, such as the depth of the tower walls below ground slab, this would be reflected in the drawing as was the case in the instant contract.

13. Following further correspondence between the parties, on 20 July 1994, appellant submitted a claim in the amount of $43,928.00 to the contracting officer and requested a decision within sixty days. Although there were several attempts to schedule meetings between the parties to discuss the claim, these were cancelled by the government. The contracting officer did not issue a final decision. Appellant filed an appeal from a deemed denial on 4 January 1995.

Discussion Questions:

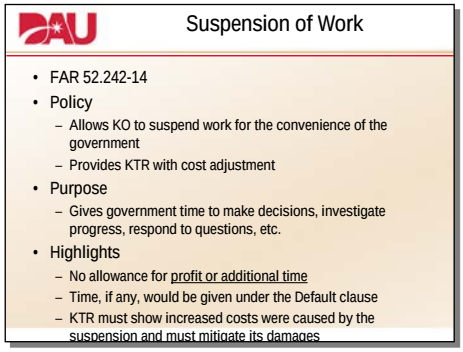
1. What particular aspect of the contract drawings is in dispute?

2. Does the appellant's failure to attend the pre-bid site visit have any bearing on this dispute?

3. Do you feel, after analyzing the facts and the arguments of the parties, that the government's contract drawings were clear and unambiguous as to the issue of demolishing the parachute tower?

4. How would you rule in this case? Why?

Suspension of Work Clause



Suspension of Work Clause (FAR 52.242-14)

Reasonable suspensions of DoD work are normal occurrences in any productive activity. Delays for short periods of time where dollars-per- day costs are small are likely to be deemed reasonable, and are not compensable. The contractor may even include allowances for such delays in its initial offer.

Policy

Paragraph (a) of this clause allows the government to suspend work under the contract for a period of time that the contracting officer deems appropriate for the government's convenience. In return, paragraph (b) provides the contractor with an adjustment for any increase in cost (not time) of performance.

Purpose

This clause allows the government reasonable time to make decisions, investigate progress, inspect quality, respond to questions, process submittals, revise designs, and perform other contract administration activities.

Clause Highlights

If an equitable adjustment is under consideration, the delay must be for an unreasonable period of time. How long does a delay have to last to become unreasonable? Each specific case must be evaluated independently, before the delay may be determined unreasonable. In order for a contractor to prevail, it must show that the delay was unreasonable. In order for the government to prevail, it must show that the delay was reasonable. Contracting personnel must examine all the facts of the suspension to determine unreasonableness.

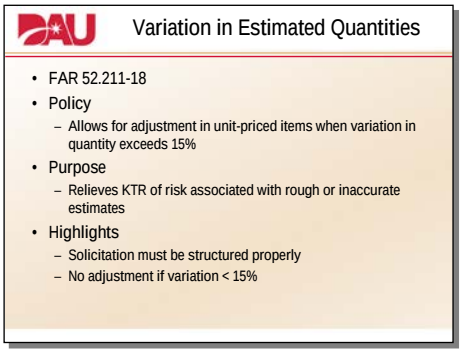
This clause does not allow for profit to be paid for any suspension of work. Why is that? No profit is paid during the suspension period because no work is performed, thus no risk is assumed. Profit is the reward we provide the contractor for assuming performance risk under the contract.

No allowance is made for time, meaning the contractor cannot be granted a time extension under this clause. Only under the authority of the Default Clause could time be given.

A fundamental requirement for contractor recovery is that the suspension of work actually caused the particular increase in cost. The contractor must establish this causal relationship.

What compensation may a contractor receive under the Suspension of Work Clause?

Variations in Quantities Clause



Variation in Estimated Quantities Clause (FAR 52.211-18)

Government construction estimates are indeed simply an estimate of the amount of construction work to be accomplished. Many types of work include elements that are difficult to estimate, such as the amount of dredging required, or the quantity of sand or gravel needed. When quantities cannot be estimated with certainty, the contract solicitation may include provisions for the contractor to propose unit prices for certain items in lieu of a fixed price for the total amount of estimated work.

Policy

This clause allows for adjustments in unit-priced items when the quantity ordered differs from the original estimate by more than 15% (either above or below the estimated quantity).

Purpose

This clause relieves the contractor of risk when dealing with inaccurate or rough estimates and prevents contingency amounts from being added to the contractor's price when estimating the job.

Clause Highlights

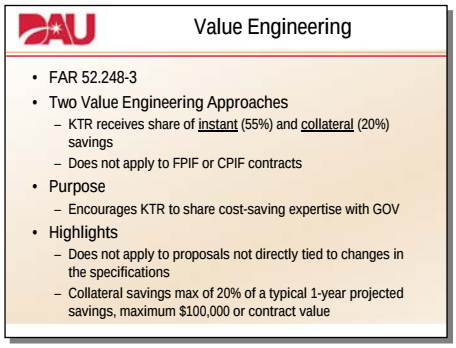
Under this clause, neither party may demand repricing of work falling within 15% of the original estimate. Repricing applies only to those quantities falling outside that range (*N. Fiorito Company v. U.S., 416 F.2d 1284, Ct. Cl. 1969*).

Application

If the construction situation involves quantities falling outside the 15% range, contracting personnel must negotiate an equitable adjustment, upon demand by either party.

What compensation does the contractor receive under the Variation in Estimated Quantities Clause?

Value Engineering Clause



Value Engineering Clause (FAR 52.248-3)

Historically, the Government has discovered many times contractors often find less expensive ways to perform work than the methods called for in the contract documents. However, since most contract changes that reduce the cost of performance may lead to a reduction in the contractor's total profit, the contractor might determine there is little incentive to propose such changes. The Value Engineering clause provides this incentive by allowing the contractor to share in the savings.

Two Value Engineering Approaches

FAR 48.104-1(b) provides for two types of savings for which the contractor can be compensated. The first, and most important, is "instant savings," which represents the contract cost reduction realized by adopting the contractor's proposal, less the cost of development and implementation of the new method. This clause gives the Government 45% of the instant savings on fixed price contracts and 75% on cost reimbursement contracts (i.e. 55% and 25% to the contractor, respectively). Value engineering sharing does not apply to incentive-type construction contracts.

The second type of savings allowed by this clause is "collateral savings," which represents the Government's reduced cost of future operations as a result of adopting the proposed change. The contractor's share of collateral savings is 20% of the estimated annual savings, not to exceed the contract price or $100,000 (whichever is greater).

Purpose

This clause encourages submissions of cost reducing change proposals by promising the contractor a share of the savings. It allows the government to take advantage of the expertise of the contractor.

Clause Highlights

This clause applies to suggested changes to the specifications that the contractor makes to save the government money, and does not apply to proposals not directly tied to changes in the specifications, or to work not originally specified as part of the contract.

The amount of collateral savings generated by a VECP (Value Engineering Change Proposal) is determined by the Contracting Officer, and cannot be appealed under the Contract Disputes Act.

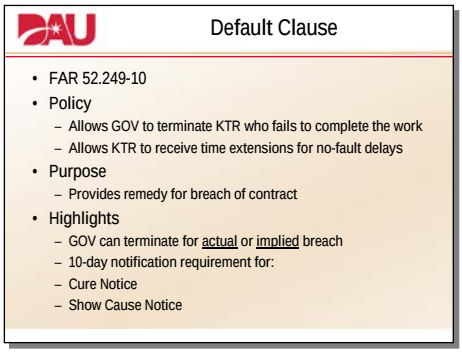
Court Case examples

The collateral savings determination can be appealed – if the contracting officer has incorrectly calculated the contractor's share of those savings (*Banner Fabricators Inc., ASBCA 25088, 81-2 BCA 15215).*

The contractor can also appeal if the government uses the proposal without providing for any savings to be shared with the contractor, ruling that a constructive adoption of the proposal has occurred (Norair Engineering Corp., ENGBCA 3730, 78-1 BCA ¶13190).

This clause also applies even if the proposed change is minor or constitutes a correction of errors in the specifications. In Cardan Co. (ASBCA 25765, 82-1 BCA ¶15628), the contractor was compensated for his suggestion to correct an error in the specified quantity of grass seed required for the grounds.

Defaults Clause



Default Clause (FAR 52.249-10)

The following paragraphs highlight some of the policy and procedures associated with the Default clause, as it relates to changed conditions and delays. Specific details regarding the application of this clause in a contract termination situation will be covered later in this lesson.

This clause provides the government the right to terminate when a contractor is in breach of contract. This breach may be actual or anticipatory. Recognizing that even a diligent contractor may encounter unanticipated delays beyond its control, this clause allocates the risk involved with certain delays and provides extensions of contract time to compensate the contractor when appropriate.

Policy

Paragraph (b) allows for time extensions in the event of an excusable delay beyond the fault of the contractor.

Paragraph (b) also provides examples of delays which may arise from causes beyond the control or without the fault of the contractor:

- Acts of God or of the public enemy
- Acts of the government in its sovereign or contractual capacity
- Acts of another government contractor Fire, flood, epidemic, or quarantine Labor strikes and freight embargoes Unusually severe weather
- Delays of subcontractors and suppliers, if delay beyond their control

Clause Highlights

To be excused from default under this clause, the contractor must give written notice to the government of an excusable delay within 10 days of the beginning of such delay, and establish that the delay was, in fact, unforeseeable, beyond its control, and without fault or negligence on its part.

What compensation will the contractor receive under the Defaults Clause?

Delinquency notices FAR 49.607

The formats of the delinquency notices in this section may be used to satisfy the requirements of 49.402-3. All notices will be sent with proof of delivery requested. (See Subpart 42.13 for stop-work orders.)

(a) Cure notice. If a contract is to be terminated for default before the delivery date, a "Cure Notice" is required by the Default clause. Before using this notice, it must be ascertained that an amount of time equal to or greater than the period of "cure" remains in the contract delivery schedule or any extension to it. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic "cure" period of 10 days or more, the "Cure Notice" should not be issued. The "Cure Notice" may be in the following format:

Cure Notice

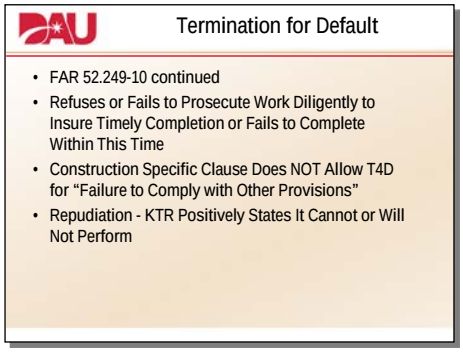
> *You are notified that the Government considers your _____ [specify the contractor's failure or failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [or insert any longer time that the Contracting Officer may consider reasonably necessary], the Government may terminate for default under the terms and conditions of the _____ [insert clause title] clause of this contract.*

(b) Show cause notice. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic "cure" period of 10 days or more, the following "Show Cause Notice" may be used. It should be sent immediately upon expiration of the delivery period.

Show Cause Notice

> *Since you have failed to ____ [insert "perform Contract No.____ within the time required by its terms", or "cure the conditions endangering performance under Contract No _____ as described to you in the Government's letter of _____ date)"], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to _____[insert the name and complete address of the contracting officer], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.*

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract

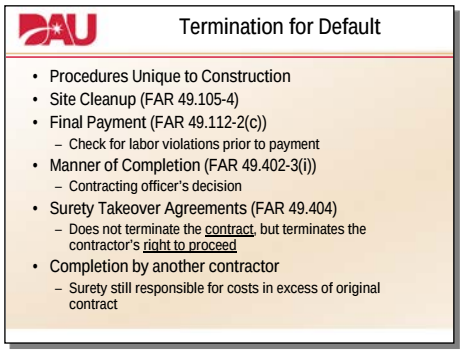


Progress Failure

In accordance with FAR Clause 52.249-10, Default (Fixed-Price Construction), if the contractor refuses or fails to prosecute the work with the diligence that will insure its completion within the time specified in the contract the Government may, with written notice, terminate the contractor's right to proceed with the work.

Failure to Comply

The Default clause for construction is different than other Default Clauses because the clause limits default actions to matters of significant performance delays. In order to terminate a construction contract for failure to comply with other parts of the contract, the government must have a direct link with a progress delay.



Repudiation

This basis for termination arises when the contractor positively states that it cannot or will not perform. In one case, the contractor stopped by the project office and told the government inspector he was going to "call it quits" (*Timberland Management, IBCA 1877, 85-3 BCA ¶18276).* In another case, the contractor stated they wished the government would terminate them so they could "resume a normal life." In both these cases, the statements were, in and of themselves, sufficient evidence of the contractor's repudiation of the contract, and the default terminations were valid.

Procedures for Default

Discussion The procedures for terminating a construction contract for default are in large measure identical to those for terminating any other contract. However, construction contracts do present certain unique situations that should be considered by the contracting officer:

- Cleanup of the site
- Final payment
- Manner of completion
- Surety takeover
- Completion by another contractor

Cleanup of Construction Site

In the case of terminated construction contracts, the contracting officer shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site (FAR 49.105-4).

Final Payment

In the case of construction contracts, before forwarding the final payment voucher, the contracting officer shall ascertain whether there are any outstanding labor violations. If so, the contracting officer shall determine the amount to be withheld from the final payment. (FAR 49.112-2(c)).

Manner of Completion

In the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed (FAR49.402-3(i)).

Surety Takeover Agreements

FAR 49.404(c) states, if the surety offers to complete the contract work, this should normally be permitted unless the contracting officer has reason to believe that the persons or firms proposed by the surety to complete the work are not competent and qualified and the interests of the Government would be substantially prejudiced.

Because of the possibility of conflicting demands for unpaid prior earnings (retained percentages and unpaid progress estimates) of the defaulting contractor, the surety may condition its offer of completion upon the execution by the Government of a "takeover" agreement fixing the surety's rights to payment from those funds.

In that event, the contracting officer may enter into a written agreement with the surety. The contracting officer should consider including in the agreement both the surety and the defaulting contractor in order to eliminate any disagreement concerning the contractor's residual rights, including assertions to unpaid prior earnings. (FAR 49.404(d))

FAR 49.404(e) says, the surety agreement shall provide for the surety to complete the work, according to all the terms and conditions of the contract, and for the Government to pay the surety the balance of the contract price unpaid at the time of default, but not in excess of the surety's costs and expenses, in the manner provided by the contract.

Payments to the surety are subject to the following conditions:

The agreement shall not waive or release the government's right to assess and collect liquidated damages for delays in completion of the work, except to the extent that they are excusable under the contract. (FAR 49.404(e)(2))

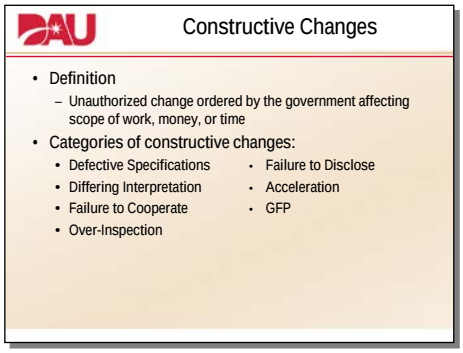
If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings, unless the assignee consents to the payment in writing. (FAR 49.404(e)(3))

The surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor. (FAR 49.404(e)(4))

Completion by another Contractor

If the surety does not arrange for completion of the contract, the contracting officer may arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of sealed bidding or any other appropriate contracting method or procedure. The contracting officer shall exercise reasonable diligence to obtain the lowest price available for completion. (FAR 49.405)

Constructive Changes

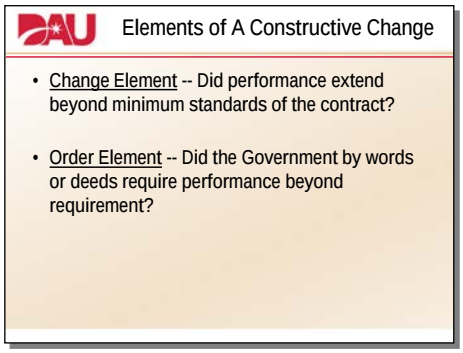


Introduction

Discussion thus far has been concerned with the specific contract clauses used during performance of the construction contract. Now the lesson will explore constructive changes in the construction environment.

Definition

A constructive change is an unauthorized change ordered by the Government to a Government contract that is performed by the contractor. Constructive changes can be very costly occurrences during a construction contract, especially if the government does not recognize or acknowledge the contractor's contention that a constructive change has occurred.



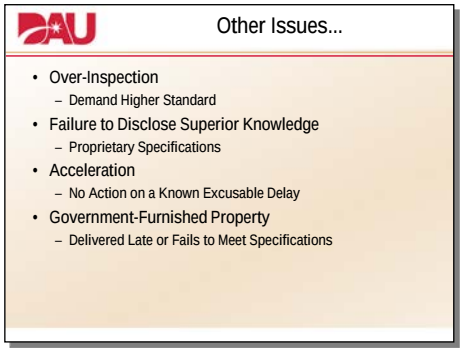
Characteristics

A constructive change is made up of two elements - the change element and the order element.

Change element – Did performance exceed minimum contract requirements?

Order element – Did the Government, by word or deed, require the contractor to perform beyond the contract requirements?

Although there are two elements, constructive changes take many forms. The lesson will now briefly discuss frequently encountered areas in the construction environmental that may have constructive changes.



Over- Inspection

Another type of constructive change involves acts of over-inspection, often called overzealous inspection. While the government has the right to inspect work at any time until acceptance, it may not exercise this right in a manner that unduly interferes with the contractor's performance. There are different types of over-inspection. For example, we may demand a higher

standard than what the contract calls for, or reject something that should not be rejected.

Failure to Disclose Superior Knowledge

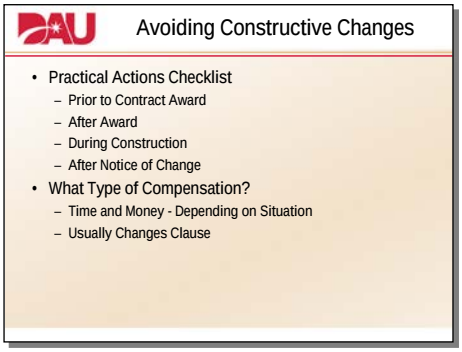
The Government possesses essential information that the contractor does not know nor could have known and fails to disclose this information. A typical example of this is the specification of proprietary items. In this situation, the government knows an item is proprietary but instead of notifying the contractor (in the solicitation), the government writes specifications so tightly that only one manufacturer can supply the item.

Acceleration

The Government takes no action on a known excusable delay. The government insists that the contractor comply with the original schedule. This topic will be discussed in more detail later in this chapter.

Government Furnished Property (GFP)

Many construction contracts incorporate material or equipment that is provided by the government. The contractor is entitled to this property
in accordance with the delivery schedule in the contract. A constructive change can occur if the GFP is not delivered in a timely manner or fails to meet the contract specifications.



Avoiding Constructive Changes

Contracting personnel may avoid constructive changes by:

Knowing the contract
Keeping open communication with the contractor
Ensuring the contractor understands who has authority to change the contract.
Reviewing the Practical Actions checklist below

Practical Actions for Controlling Constructive Changes

Prior to Contract Award

During contract preparation, try to structure the terms of the contract in order to minimize the risk to the government.

- Consider the type of procurement (i.e., fixed price, cost reimbursement, etc.).
- If possible, require pre-production samples.

- In negotiated contracts, negotiate for the contractor to author some of the more challenging forthcoming requirements (subject to government approval).
- Consider performance specifications instead of design specifications.
- Lengthen the time of performance to the maximum feasible limit.
- Make forthright disclosures of any problem areas that are anticipated. Exclude exculpatory language and include specific language (let the dynamics of competition handle the risk of higher bids/offers).
- Develop “redicheck” contracts.
- Perform comprehensive constructibility reviews
- After Award - Learn about the contractor’s manner of contract administration.
- Send a contracting officer’s letter that explains the duties, authority, and limitations of authority identifying all the key players by name and title. The letter should also delineate a procedure for the contractor
- to follow if they propose the contract has been constructively changed.
- After receiving the schedule, hold the pre-construction conference or a progress meeting. Keep detailed minutes, written by the government and counter-signed by the contractor. Get information from the contractor as to how the work will be done– specific methods, specific equipment, areas needing special assistance, etc.

During Construction

All correspondence should contain a concluding statement reminding the contractor of the duty to provide written notice if the contract has been constructively changed.

Review daily all daily reports for hints of notice. Consider all recorded actions of the construction representative, quality assurance evaluator, engineering technician, or other personnel (customer, A/E, suppliers, etc.).

Keep detailed written records.

Include a release statement on all bilateral modifications.

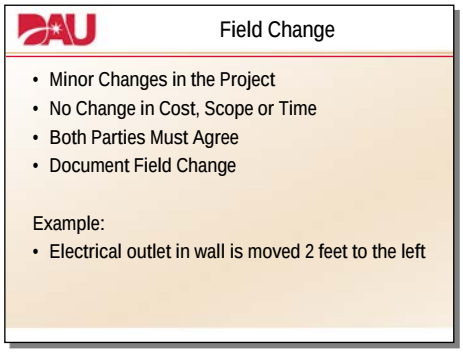
After Notice of Change

Get legal counsel involved immediately. If necessary, get technical advice.

Constructive Change Compensation

What compensation should a contractor receive if a Constructive Change has occurred?

Field Change



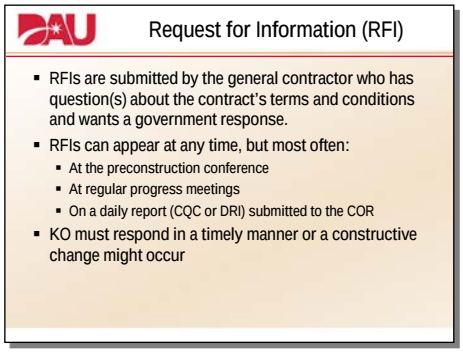
Introduction

As discussed above, constructive changes are unauthorized decisions made about the construction project in a number of ways. The term "field change" is a term derived to deal with very minor changes in the construction project encountered for a number of reasons.

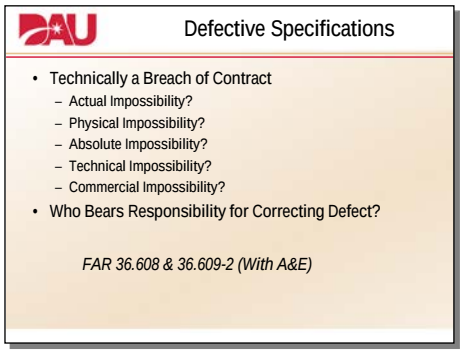
For example, the contract requires an electrical outlet in the wall. During performance, the contractor discovers if the electrical outlet is placed as required by the drawings, access to the outlet will be impeded. The contractor recommends and the Government's representative agrees to move the outlet "2 feet to the left." In this example the scope has not been changed, the electrical outlet is still required; no additional money is required, no additional costs have been cited; and no additional time is required to perform the "field change."

Even if a change to the construction project may not carry with it additional costs, this fact does not mean the change can be declared a field change. In the above example, if the electrical outlet had been completely removed, or been transferred to a different wall or the flooring, then this action would have been a change to the scope of the project (the three elements of a constructive change: scope, money, time) and would be classified as a constructive change.

Depending on agency policy, some offices have a field change form that would require, as a minimum, signatures by the Construction Company and Government representatives. Field changes should be forwarded to the Contracting Officer for official incorporation into the contract.



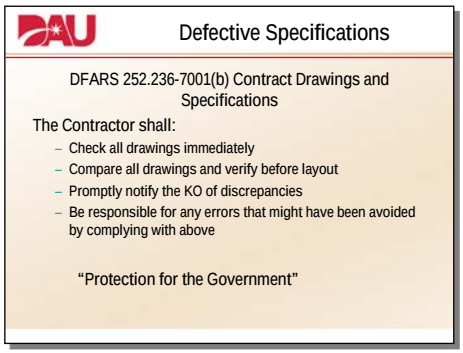
Defective Specifications Clause



Defective Specifications

Constructive changes can occur by the Government issuing defective specifications. In determining whether the specification was defective, there are a number of different types of impossibilities to consider:

- Actual Impossibility - Will not function properly if constructed as indicated.
- Physical Impossibility - Cannot physically be constructed as shown.
- Absolute Impossibility - Neither party can find or make the item.
- Technical Impossibility - Work is beyond state of the art.
- Commercial Impossibility - Not impossible to perform, but wasteful to do so.



DFARS 252.236-7001 Contract Drawings and Specifications.

CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000)

(a) The Government will provide to the Contractor, without charge, one set of contract drawings and specifications, except publications incorporated into the technical provisions by reference, in electronic or paper media as chosen by the Contracting Officer.

(b) The Contractor shall—

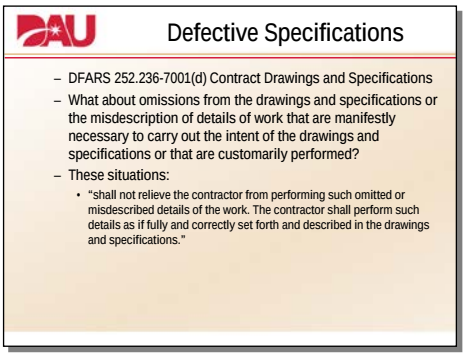
(1) Check all drawings furnished immediately upon receipt;

(2) Compare all drawings and verify the figures before laying out the work;

(3) Promptly notify the Contracting Officer of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

(5) Reproduce and print contract drawings and specifications as needed.



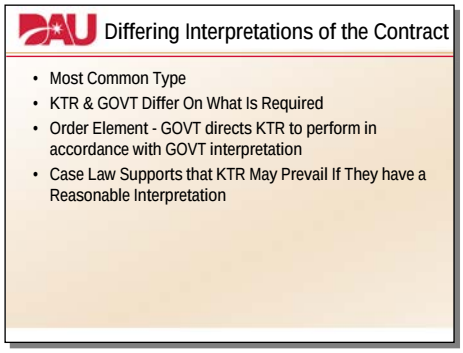
(c) In general--

(1) Large-scale drawings shall govern small-scale drawings; and

(2) The Contractor shall follow figures marked on drawings in preference to scale measurements.

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

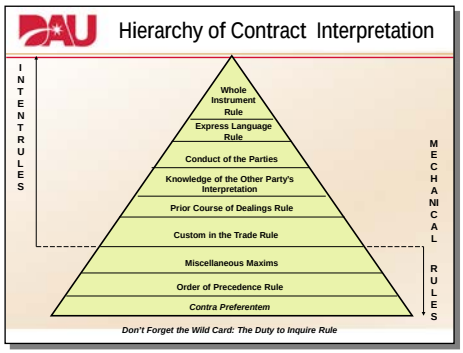
Rules of Interpretation



Differing Interpretation of the Contract

This is the most common type of constructive change. This type of situation begins with a disagreement between the government and the contractor about the work required to meet contract specifications.

How can a Contracting Officer determine what is an "appropriate" interpretation of the construction contract specifications? The zone of reasonableness principle holds that the contractor's interpretation must only be a reasonable conclusion, not necessarily the most accurate conclusion, nor the same conclusion that the government reaches.

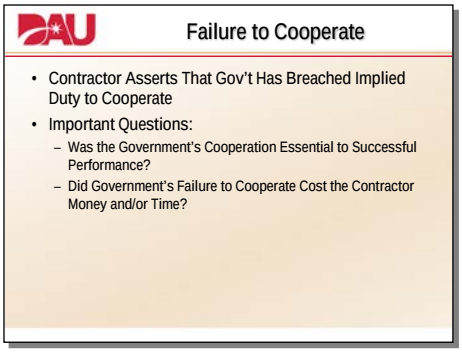


PRECEDENCE: In the event of conflict or inconsistency between any of the provisions of the various portions of this contract, for which the reconciliation of which is not otherwise provided in the RFP, precedence shall be given in the following order with the provisions of any particular portion prevailing over those of a subsequently listed portion:

(a) Typewritten portions of the contract.
(b) The provisions of the "Request of Proposals" issued in connection with this contract (including all addenda, amendments, or other modifications issued thereunder).
(c) Printed provisions of the contract form including printed provisions of added slip sheets.
(d) The contents of the contractor's proposal, including but not limited to his forwarding letter, drawings, outline specifications, accepted alternates or additives, and materials, tests or other data (including all supplements, amendments and modifications thereto).
(e) The Government reviewed contractor prepared final plans and specifications, except to the extent that any variation therein has been specifically approved in writing by the Government.[1]

[1] United States Court of Appeals for the Federal Circuit 13-5041 Metcalf vs. US

Failure to Cooperate



Introduction

Another type of constructive change asserted by contractors arises when the government breaches the implied duty to cooperate. This duty requires the government to work with the contractor to achieve the goals of the contract. In cases where lack of cooperation is cited, the question is whether the government's cooperation was essential to successful performance.

When applying the logic of constructive change to breaches of the government's implied duty, frequently relief is granted without analyzing whether there has been an order to perform extra work. Government fault may result where the contractor has notified the government that the government's failure to cooperate is costing the contractor money, and the government does not then move to correct the problem.

Failure to Cooperate Examples

As an example, a constructive change could occur when the contractor has notified the government that the site contained substantial amounts of pre- construction debris that was supposed to have been removed and the Government does not respond. The contractor, upon receiving no response to its notification, removed the debris in order to proceed with the work.

Another example is when a government project engineer, who knew that certain areas were not to be painted by the contractor, reprimanded the contractor's crew for not cleaning those areas as they were about to be painted.

In other examples, the government had knowledge that work was defective but did not inform the contractor and thereby knowingly permitted the performance of a substantial amount of defective work before directing rework later.

United States Court of Appeals for the Federal Circuit 13-5041 Metcalf vs. US

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Restatement (Second) of Contracts § 205 (1981) ("Restatement"), quoted in *Alabama v. North Carolina*, 120 S. Ct. 2295, 2312 (2010). Failure to fulfill that duty constitutes a breach of contract, as does failure to fulfill a duty "imposed by a promise stated in the agreement."

Restatement § 235. We have long applied those principles to contracts with the federal government. *E.g.*, *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010); *Malone v. United States*, 849 F.2d 1441, 1445-46 (Fed. Cir.1988).

Identifying some acts as breaches of the duty, like "[s]ubterfuges and evasions," *id.* at 1445, may require little reference to the particular contract. In general, though, "what that duty entails depends in part on what that contract promises (or disclaims)." *Precision Pine*, 596 F.3d at 830.

That is evident from repeated formulations that capture the duty's focus on "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party" (Restatement § 205 cmt. a), which obviously depend on the contract's allocation of benefits and risks. "The covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (emphases added). "Both the duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing." *Precision Pine*, 596 F.3d at 820 n.1[2].

Discussion Questions:

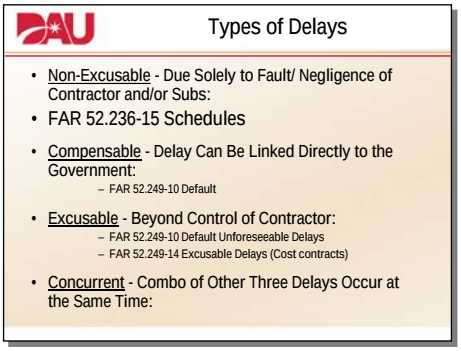
1. What is the difference between an RFI and a Field Change?

2. Who is responsible for correcting defective specifications?

3. What is the government's responsibility when there is an alleged differing site condition?

[2]United States Court of Appeals for the Federal Circuit 13-5041 Metcalf vs. US pg 9

Delays and Acceleration



Introduction

Delays, as previously stated, can be a part of any contract. There are different types of delays with different compensations and entitlements (i.e., time and/or money) due to the contractor or the government.

The schedule, if it is practicable, can identify whether the contractor is behind schedule or ahead of schedule. This fact is important because schedule analysis is crucial to determining what caused the delay, what impact the delay had on performance, and the computation of any liquidated damages.

There are four types of delay based primarily on which party, the government or the contractor is responsible for the delay:

- Contractor-caused delays
- Government-caused delays
- Excusable delays
- Concurrent delays

Contractor Caused Delays

These delays are due solely to the fault and/or negligence of the contractor or the subcontractors. These delays typically do not include material suppliers, which are covered under the Default clause.

What compensation may the contractor receive under the Schedules for Construction Clause?

This clause is used to determine construction progress and delays. Any compensation due would be handled under another clause. For instance, if the Contractor's schedule and construction progress analysis determine the contractor is not diligently correcting their delay, this clause in conjunction with the Default Clause would be used to terminate the contractor's right to proceed.

The contractor is liable for any additional cost incurred or any resulting increase in performance time. If the contractor fails to complete the construction by the contract completion date, the government can collect liquidated damages.

Government Caused Delays

These delays are the result of the government acting in its contractual capacity. This means the action can be directly linked back to the contracting officer. Examples of government-caused delays include:

- Delay in issuing the Notice to Proceed (NTP)
- Delay in making construction site available to contractor
- Interference with contractor's work
- Failure to provide timely submittal approval
- Delay in inspection of work
- Delay in processing modifications

Under these situations, the contractor is entitled to both time and money in accordance with the Changes clause. However, if the government- caused delay is a formal suspension, the contractor is compensated for additional costs (excluding profit) under the Suspension of Work clause and is granted time under the Default clause.

Excusable Delays

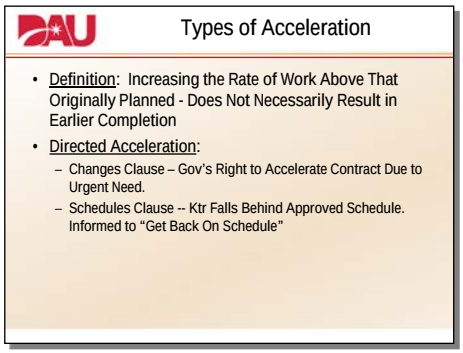
As previously discussed in the Default Clause, excusable delays are those delays beyond the contractor's control. If the contractor does not perform the work, the government has grounds for Termination for Default unless the contractor could not meet the schedule due to an excusable delay.

The contractor bears the financial responsibility of an excusable delay. The government must, however, grant a time extension if the contractor can show there was a delay to the overall contract (critical path).

Concurrent Delays

A concurrent delay exists when any combination of the other three delay types occur at the same instance in time.

Compensation for a concurrent delay varies but is generally covered the same as the Suspension of Work clause or Default clause. Precedence for compensation of concurrent delays is found in case law. The contractor is entitled to time but no money for concurrent delays.

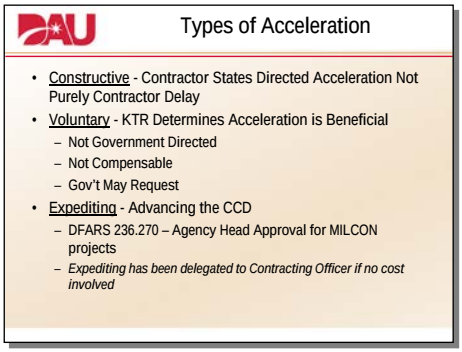


Acceleration

Definition In the construction environment, there are situations requiring changes to the contract completion date. These situations can come in varying capacities and be generated by both the Government and the contractor. One such situation is Acceleration.

FAR Clause FAR 52.243-4(a)(4), Changes allows the Government to direct acceleration in the performance of work. Acceleration may be viewed as an attempt to complete a contract earlier than the contract completion date, by making the contractor work faster. That definition; however, is based on the assumption that when a contractor accelerates, the project completion time is decreased, which is not always the case. The actual definition of acceleration is "increasing the rate of work above that originally planned."

In other words, making a task (or several tasks) of a contract go faster than what was originally planned, which means that acceleration is not strictly time-related. There may be times when a task can accelerated and not affect the contract completion date. How can that be? When the particular task accelerated has float time (that is, the task is not on the critical path), the acceleration may not shorten the project duration. Any task, whether on the critical path or not, can be accelerated



Types of Acceleration

There are four general types of acceleration:

- Directed
- Constructive
- Voluntary
- Expediting

Directed Acceleration

Directed acceleration can only be ordered by the government. It can be ordered under the direction of either the Changes or Schedules clause.

Directed Under the Changes Clause 52.243-4

This direction can be either bilateral or unilateral. The contracting officer can direct the contractor to add shifts, work overtime, increase the crew size, or take other measures to expedite progress. The Changes clause gives the government the right to decide how the contractor will accelerate.

This type of acceleration is generally invoked due to an urgent need that is more cost effective to accelerate, or is due to operational needs. Therefore, if the government needs to accelerate a task (or the contract) due to an urgent need, site the Changes clause as the authority.

What type of compensation is due the contractor?

Directed Under the Schedules Clause 52.236-15

The most common type of acceleration arises under circumstances involving the Schedules clause. This subparagraph (b) of this clause states in part that “if in the opinion of the contracting officer, the contractor falls behind the approved schedule, the contracting officer can direct the contractor to work over time, increase shifts, etc." The contracting officer can determine if the contractor is behind schedule by looking at the work in place and comparing it to the approved schedule.

The government does not usually direct the manner of acceleration when citing the Schedules clause. Usually the contractor is informed (in writing) that they are behind schedule, then the contractor is required to tell the government how they will get back on schedule.

What type of compensation is due the contractor?

Constructive Acceleration

If, from the contractor’s point of view, the needed acceleration was not purely contractor delay, the acceleration order may be construed as a constructive change and considered “constructive acceleration.”

Also there is a danger associated with a Schedules Clause Directed Acceleration and it is a good practice to formally Remove the Order to Accelerate
If the contractor is simply directed to “get back on schedule,” the contracting officer must be diligent to remove the order when the contractor has caught up.

It is recommended that the government’s original acceleration letter contain words to the effect of "once caught up, desist the acceleration."

Voluntary Acceleration

As the name implies, voluntary acceleration is a choice the contractor makes on their behalf; however, the government can request a voluntary acceleration.

Essential points to acknowledge regarding voluntary acceleration are: It is for the contractor's benefit.
It is not government directed and therefore it is not compensable.

The Government should take notice if a government representative goes out to the job site and notices the work has accelerated and ask the contractor why acceleration is occurring. Maybe another authorized representative directed the acceleration, or maybe the contractor just wants to get the job finished. It is best to know immediately in order to document the contract file and avoid possible problems later. If the government notices the contractor has accelerated and does nothing, essentially the government has agreed to allow the acceleration, and could potentially be held to have constructively accelerated the contractor.

Expediting

Expediting is defined as “advancing the contract completion date of a contract.” Expediting is acceleration, but when a construction project involves the Military Construction Appropriations Act contracting personnel must pay special attention regarding additional funding requirements. DFARS 236.270 states:

10 USC 2858 requires agency head (which is the Secretary of Army, Air Force…) to expedite the completion date of a contracted funded by a MILCON project, if additional costs are involved. The approval authority may not be redelegated.

The approving authority must certify the additional expenditures are “necessary to protect the national interest.”

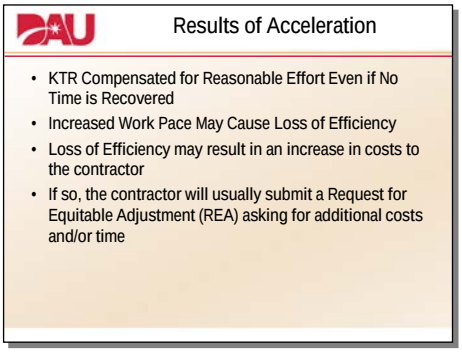
The contracting officer may approve an expedited completion date if no additional costs are involved.

Reasonable Effort

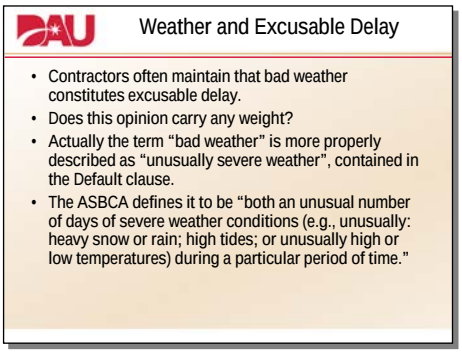
If the contractor is constructively accelerated or ordered to accelerate, and never recovers the time, but makes a reasonable effort, the contractor is still entitled to compensation.

Efficiency

When a contractor accelerates the pace of the work, the resulting impact is that efficiency may go down. When evaluating contractor compensation due to acceleration and loss of efficiency, the methods listed on the following pages have historically aided in determining the appropriate compensation.

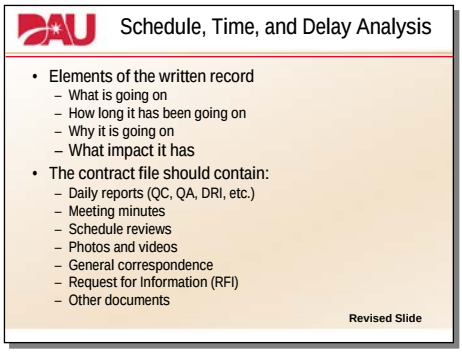


In considering weather delays, you need to analyze construction project progress and how changed conditions may require contracting personnel to look at the contractor's schedule and determine if there is any time due the contractor, what type of delays have been encountered, if any, and if the Government is due any liquidated damages.



For contracting personnel to make the best decisions it is extremely important that there be substantive documentation to support those decisions. The quality control and quality assurance reports are a good source of information.

Construction Schedule, Time, and Delay Analysis



Introduction

This lesson now will address the Government's and contractor's action or inaction during project performance by looking at construction schedules, time, and delay analysis.

As a contracts manager, contracting officer, contract specialist, or quality assurance specialist, one of the most vital tasks that will be performed in construction contracting is documenting the progress of the project.

Elements of the Written Record

Construction documentation is used when determining project progress schedules and any delays.

If the construction written record is complete then it can fully describe four things:

- What is going on
- How long has it been going on
- Why it is going on
- What impact (if any) it has

Components: The file should contain the following documents:

- Contractor's daily QC report
- Govt.'s daily QA report
- Minutes of Meetings
- Contractor Monthly Schedule Review Letters
- Progress photos and videos
- Existing conditions
- Material damage
- Safety problems
- Quality deficiencies Correspondence
- Labor standards interviews
- Records of phone calls
- Certified payroll records Material submittal logs
- Change order log
- Requests for Information (RFI)
- Non-compliance notices
- Schedule Analysis

Schedule Analysis

The four types of delays described above, if they are documented in the written record, can now help determine the proper time and money entitlement. The schedule analysis alone may not necessarily determine how much money the contractor is due, but whether the contractor should be financially compensated.

To establish delays and determine compensation, there are five types of schedules that have historically aided in this determination. These schedules are:

- As Planned
- As Built
- Could Have Been
- Properly Extended
- Adjusted

As Planned

The as-planned schedule is the duration of the contractor's originally approved schedule. This could be the contract duration or less, if the contractor's schedule shows an early completion.

Could Have Been

The could-have-been schedule is calculated as the "as planned" schedule plus any impact caused by the contractor (contractor-caused delay).

Properly Extended

The properly extended schedule is the original contract duration plus any government, excusable, and concurrent delays.

As Built

The as-built schedule represents the actual construction of the project from start to finish, and is calculated as the "as-planned" schedule plus contractor, government, excusable, and concurrent delays.

Adjusted

The adjusted schedule is calculated as the "as-planned" schedule plus contractor, concurrent, and excusable delays

Delay Analysis

When conducting delay analysis using the above equations, contracting personnel should create a time line that assists in visually representing each of the five schedules. This simple time line exercise will aid in differentiating between Properly Extended, As Built, etc.

Equations

The following equations use the five different schedules in determining the proper time extension, the number of days of extended overhead (extended overhead will be discussed later in the lesson) and the number of days of liquidated damages that should be applied from the delay:

Number Days of Time Extension = (Properly Extended) - (Original Contract Duration)

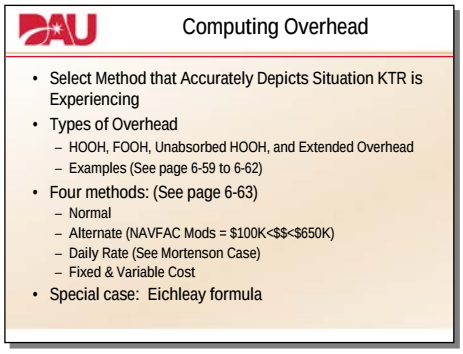
Number Days Extended Overhead = (As Built) - (Adjusted)

Number Days Liquidated Damages = (As Built) - (Properly Extended)

OR

(Could Have Been) - (Original Contract Duration)

Methods for Computing Overhead



Introduction

When discerning contractor entitlement, money gets broken down into composite elements, costs and profit. Costs are further broken-down into direct and indirect costs and further investigation of the money components leads to overhead.

In construction, indirect costs include field and home office overhead. There are many different formulas used to calculate overhead. Unless the contract states otherwise, the same computation method is not required throughout the contract. Separate change situations may be very different from each other.

In view of the erratic and often unpredictable nature of overhead rates in the construction industry, a standard or flat rate should not be used. The only exception is when the contracting officer feels the dollar value of the work is too low to warrant the preparation of an itemized estimate of job overhead costs.

Overview

This section of the lesson will introduce four different methods of determining field and home office overhead, plus an additional method for determining an adjustment due to extended overhead. The goal is to select the method that most accurately represents what the contractor is actually experiencing.

Definitions and Examples of Overhead Components

In order to properly select an overhead calculation formula, contracting personnel should first determine those overhead elements unique to construction. The tables on the next two pages summarize the definitions of the various components of construction overhead, and provide specific examples of some common items included in construction overhead pools.

Overhead Costs Associated with Delays

Overhead

This can be viewed as one such indirect cost pool or grouping into which contractors place a majority of the company's "G & A" type costs.

Home Office Overhead

Refers to the cost pool in which costs are generated by the running of the business. These costs, which include rent, clerical salaries and utilities, are treated as indirect costs for the purpose of pricing claims on delays. They are general and administrative expenses, consisting of indirect costs needed to conduct the business as a whole.

Field Office Overhead

Refers to the pool of indirect costs that are associated with maintenance of an on-site office. Unlike a manufacturer, a construction contractor's workplace is wherever the construction project happens to be. It very often consists of a trailer that can be moved from place to place, or a temporary type structure that can be mounted and trailered. These costs commonly include rent, utility charges, telephone, etc. The cost of maintaining a job office at the project site can, and should, be charged in full to that project.

Job overhead differs from direct cost in that job overhead costs are not allocable to a single work item, but to several work items within a single project.

Unabsorbed Overhead

Unabsorbed overhead is a term used to identify an element of cost normally claimed by contractors in delay claims. The term is, in reality, a misnomer, since all overhead costs are allocated to, and absorbed by contracts that are in process. Nevertheless, it has become generally accepted by contractors and by the boards of contract appeals.

Unabsorbed Home Office Overhead

The amount of indirect expense actually incurred that would have been allocated to the contract had the delay not occurred and which is not recovered revenue from any other work. Note that a delay **does not increase** a contractor's fixed indirect costs.

What it does is lower the contract allocation base, or reduce it to zero if the contract work has actually stopped, while the indirect home office overhead costs continue to mount. If other work cannot be substituted for the contract work that is not performed during the delay period, then the contractor experiences unabsorbed overhead.

Extended Overhead

Extended overhead refers to the additional overhead necessary to be absorbed by a particular contract as a result of a time extension. It has been described as a concept unique to construction contracting. It has as its premise the fact that extending the performance period will increase home office overhead costs. Allow, or find merit to a claim for extended home office overhead during a period of delay only if the particular circumstances of the delay prevented the contractor from accepting the other work. (This element can be somewhat agency specific.)

Allowable Field Office Overhead Costs

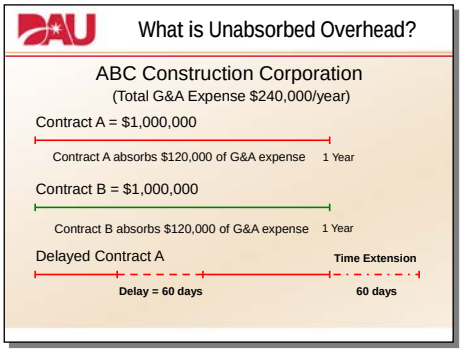
	ALLOWABLE	NOT ALLOWABLE
Field Office Overhead	Field Superintendent Timekeeper/Clerical CQC costs** Site cleanup Vehicle for Superintendent Field Office (Including utilities & maintenance) Equipment for material handling Janitorial Office Supplies Payroll Taxes on Field Overhead Scheduling/Updates Builders risk/general liability Insurance Small tools	Direct Costs Home Office Overhead

**CQC Costs are classified as direct costs. Some contractors; however, may consider CQC costs to be part of their field overhead.

Allowable Home Office Overhead Costs

	ALLOWABLE	NOT ALLOWABLE
Home Office Overhead	Office Salaries* Admin/Clerk Salaries Office Rent Utilities Office Equipment Payroll Taxes Depreciation* Leased ADPE* Purchasing Expediting Insurance* Labor Relations Advertising for People, Jobs Bidding Costs* Civil Defense Travel Employee Morale Normal Maintenance Economic Planning Costs Engineering Services Consulting Fees* Professional and Consultant Services	Duplication of Field Overhead Contributions Entertainment Bad Debts Advertising for Business Legal Fees on Claim Depreciation Leases on ADPE Contingencies Fines and Penalties Insurance Interest Professional Fees (claims) Legislative Lobbying Losses on Other Contracts Organization Costs Taxes* Public Relations

*See FAR subpart 31.2 For Exceptions. Some contractors; however, may consider These costs to be part of their field overhead or as direct costs.



The Four Methods

The four methods commonly used to calculate overhead on DoD construction contracts are:

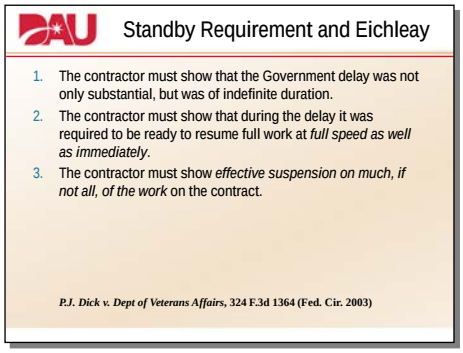
Normal Method: also known as the "percent method." This formula computes the overhead as a percentage of direct costs. This method uses the approach that if the overhead rate for the original contract can be determined, then that rate can be applied to contract modifications.

Alternate Method: like the normal method, this formula computes the overhead as a percentage of direct costs. However, this method is simple to apply because it uses standard percentages rather than performing an analysis of the contractor's indirect costs. Because this method does not examine the contractor's actual indirect costs, it is typically only used on modifications below$100,000.

Daily Rate Method: also known as the "per-day method." This formula computes the overhead allocable to a single day of operations. This method is typically used when the modification requires a lengthy time extension.

Fixed & Variable Cost Method: This complex method is recommended only for contract administrators with significant experience in dealing with construction contract overhead. Used in cases where there is both a cost increase and a time extension, this method eliminates duplication of overhead reimbursement that can occur when applying other methods.

The formulas used in each of these methods are described in detail in the appendix material.



The Eichleay Formula for Extended Overhead

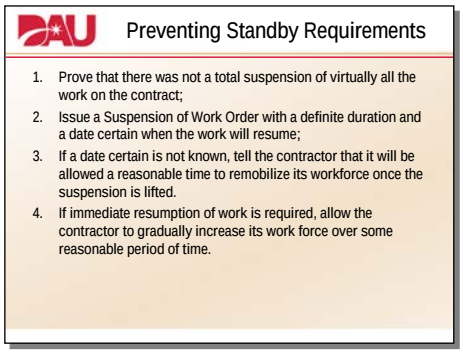
Occasionally the four methods described above do not fairly compensate a contractor for home office expenses, particularly when there is a suspension of work or government-caused delay which results in little or no direct costs but a significant amount of fixed overhead costs. The Eichleay method is typically applied in these situations so that the contractor can absorb the home office overhead expenses. It is important to note that the Eichleay method is unique to construction contracting. Historically, this method is preferred by contractors in suspension of work situations. If Eichleay is used, the formula must be followed without modification. The formula is explained in the appendix material.

Necessary Elements of Eichleay Applicability

The Eichleay method can be used if a contractor can prove two basic elements:

A distinct period of suspended operations or pure delay caused by the government. The formula may not be used simply because the total performance time has been extended. For instance, if a series of government-caused delays extends contract performance several days beyond the original schedule, but does not stop the progress of work, the contractor cannot recover unabsorbed home office overhead.

An actual economic impact on the absorption of the contractor's home office overhead expenses. One aspect of proving an actual economic impact is showing that it was impossible for the contractor to obtain other work during the period of suspension. If the contractor fails to make a reasonable effort to obtain other work, they will not be allowed to recover unabsorbed home office overhead.



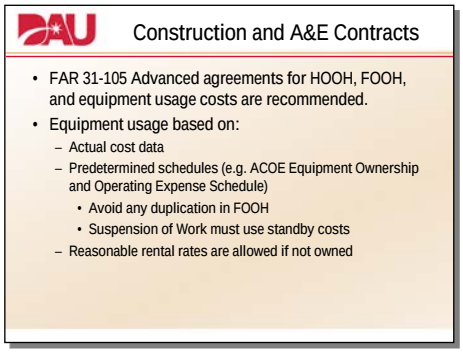
Preventing Standby Requirements

1. Prove that there was not a total suspension of virtually all the work on the contract;

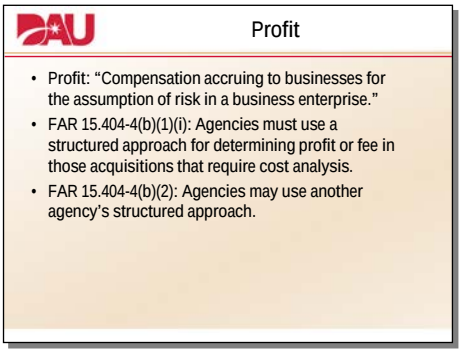
2. Issue a Suspension of Work Order with a definite duration and a date certain when the work will resume;

3. If a date certain is not known, tell the contractor that it will be allowed a reasonable time to remobilize its workforce once the suspension is lifted.

4. If immediate resumption of work is required, allow the contractor to gradually increase its work force over some reasonable period of time.



Profit -



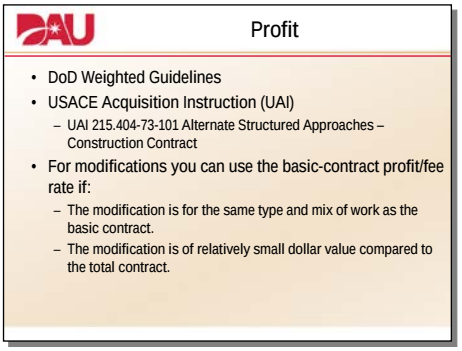
Profit: "Compensation accruing to businesses for the assumption of risk in a business enterprise."

FAR 15.404-4(b)(1)(i): Agencies must use a structured approach for determining profit or fee in those acquisitions that require cost analysis.

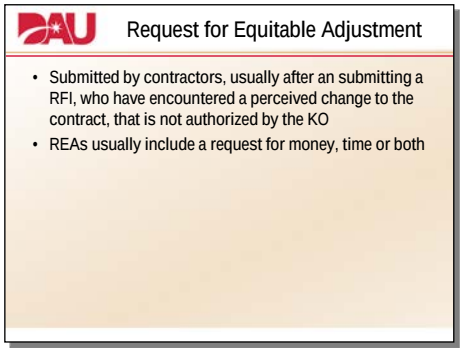
FAR 15.404-4(b)(2): Agencies may use another agency's structured approach.

DoD Weighted Guidelines vs. USACE Acquisition Instruction (UAI)
UAI 215.404-73-101 Alternate Structured Approaches – Construction Contracts

For modifications you can use the basic-contract profit/fee rate if:
The modification is for the same type and mix of work as the basic contract.
The modification is of relatively small dollar value compared to the total contract.



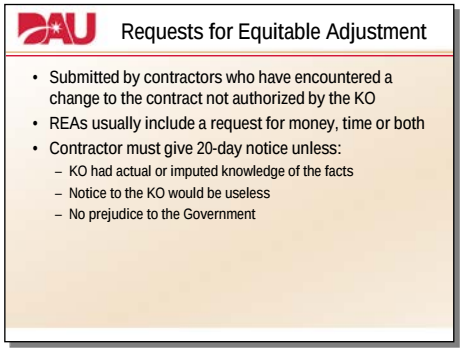
Request for Adjustment (REA)

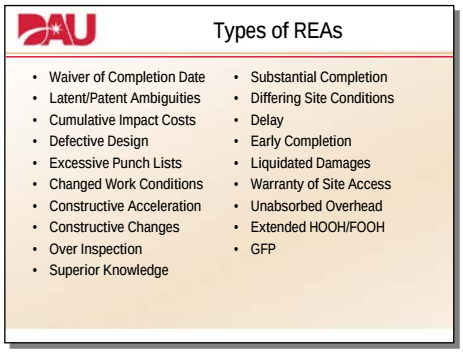


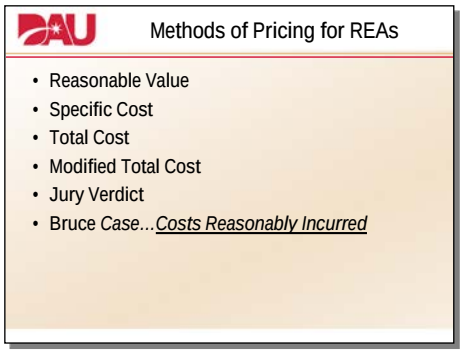
An equitable adjustment, in government contracting, is a contract adjustment pursuant to a changes clause, to compensate the contractor expense incurred due to actions of the Government or to compensate the Government for contract reductions.

An equitable adjustment includes an allowance for profit.

Clauses that provide for adjustments, excluding profit, are not considered "equitable adjustments."







Pricing REA's

Use one of the following methods for determining the amount of compensation that a contractor is entitled to when requesting an equitable adjustment and to develop your negotiation position.

There are six methods used for pricing REA's:

- Reasonable Value or Objective Method,
- Specific Cost or Subjective Method
- Total Cost Method
- Modified Total Cost
- The Jury Verdict Approach
- The Bruce Case Rule

Reasonable Value or Objective Method

The Reasonable Value method is based on the idea that remuneration to the contractor should be equated with the reasonable value of the goods or services obtained from the contractor. Restated in another way, the contractor is compensated on the basis of what the change should cost rather than what it actually cost. In the eyes of the law, value may not always be equated with cost.

In the application of this method, the determination of the equitable adjustment is an objective procedure, which involves the determination of the reasonable value (what "should be" the reasonable costs of a prudent contractor similarly situated) of the work involved as opposed to the costs actually incurred by the contractor. This procedure is admittedly, more difficult than ascertaining actual incurred costs.
Support is primarily derived from S. N. Nielson Company v. U.S.,1958.

Specific Cost or Subjective Method

In direct contrast with the Reasonable Value method, the subjective theory of specific cost propounds that the proper measure of an equitable adjustment is the actual cost of the change to the particular contractor effected. This theory rejects the elusive standard of reasonable value and instead defines an equitable adjustment in terms of actual costs incurred by the contractor under the circumstances.

Total Cost Method

The Total Cost method determines the cost of the change by calculating the difference between the original (unchanged) contract price and the actual cost of performing the work as changed. This method is universally criticized as being the least preferable because (1) the total costs include not only those properly attributable to the change but also those which were incurred through the fault of the contractor, and; (2) the costs of performing the original contract is assumed to be reasonable.

This method is used only when the contractor can prove:

(1) There is no other reasonable way of estimating the damage

(2) The contractor's bid estimate was reasonable

(3) The actual costs incurred by the contractor were reasonable

(4) Inefficiencies caused by the contractor have been segregated.

The Jury Verdict Approach

When costs cannot be segregated and identified, an equitable adjustment may have to be approached on the basis of estimates and testimony alone. In these cases where meaningful comparisons cannot be made from the available cost data, use of expert testimony to estimate the cost of the change has been permitted. From all of the evidence, including the opinions of qualified experts, one can then make a reasoned approximation of what should be paid in the same manner as a jury.

The Bruce Case Rule

The rule emanating from the Bruce Construction Corporation cases is that the proper measure of value of an equitable adjustment is the contractor's costs, reasonably incurred.

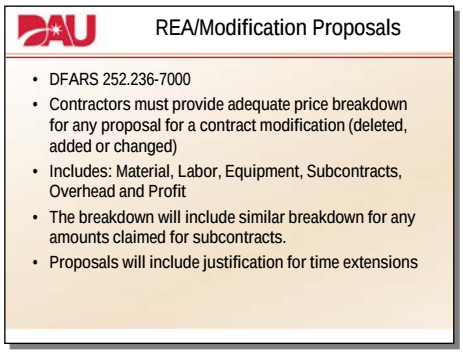
The Bruce case involved a fixed-price construction contract at Homestead Air Force Base, Florida. A fine-textured building block was required by the original specifications, but the requirement was later changed to sand block, which had a higher production cost. However, the contractor's supplier furnished the sand block at the same price as the originally required concrete block.

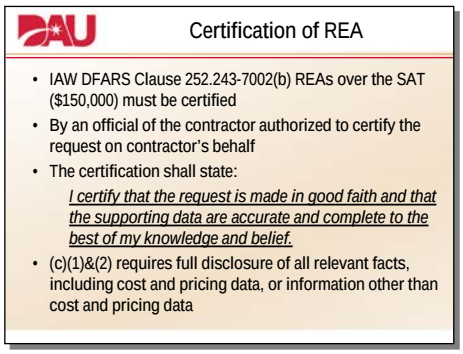
The Court of Claims resolved the issue in Bruce Construction Corp. v. U.S., 324 F. 2d 516 Ct. Cl. (1963). The court held that the fair market value was not the proper measure of damages. The party contending the reasonableness of a contractor's historical costs (in this case, the actual costs) has the burden of proof of showing the unreasonableness.

To date, the Bruce Case rule has not been overturned, but the FAR is very specific about determining the reasonableness of a cost. FAR 31.201-3 states:

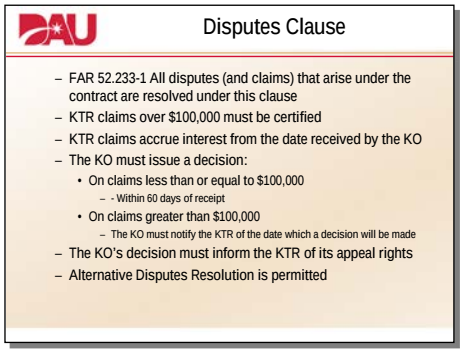
"No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such a cost is reasonable."

The FAR and the Bruce case rule appear to be in conflict with each other. However, further analysis reveals that the contractor is due those costs reasonably incurred, and it is up to the parties involved to show whether or not the costs incurred are indeed reasonable





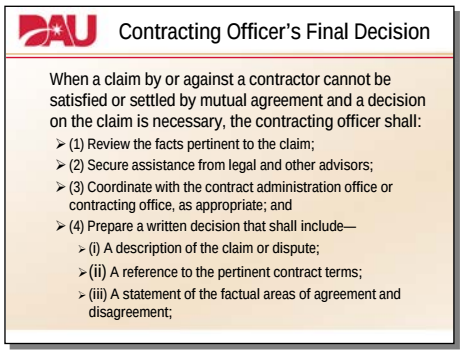
Disputes Process-



Introduction

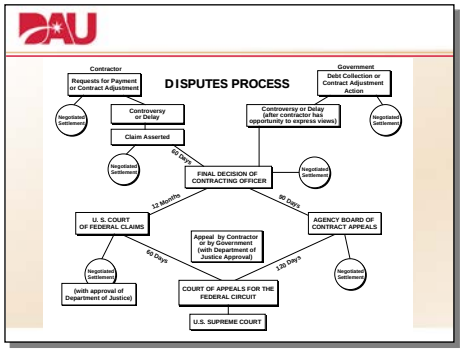
Differences arising between the government and the contractor are a possibility on any construction contract. These differences may involve extra work, differing site conditions, errors or omissions in the specifications or drawings, unreasonable delays, damage to the work, wrongful suspension or interference by the government, liquidated damages for late completion, a reduction in contract price due to defective workmanship or nonconforming work, failure of warranty, latent defects, differing site conditions in favor of the government, or where a change results in a decrease in contract price. Usually, the contractor seeks additional monetary compensation or extensions of time for completion, or both.

The majority of these issues are resolved by negotiation and the issuance of a modification acceptable to both sides.



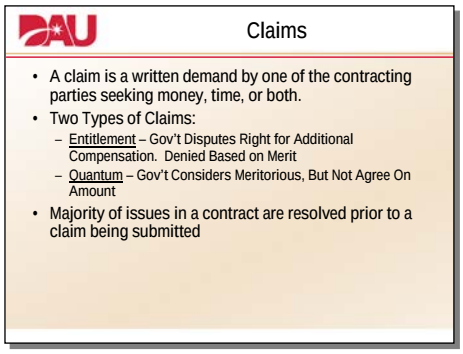
In construction, similar to any other contracting, there may be times when issues cannot be satisfactorily resolved, either by the Contracting Officer or Alternative Disputes Resolution. The following information provides some discussion of construction and claims.

Claims -

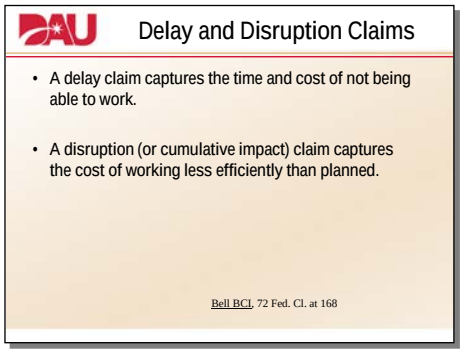


Types of Claims

There are basically two types of claims that may arise under the Disputes Clause of the contract. These are claims to entitlement and quantum. In an entitlement dispute the government disputes the contractor's legal right to receive additional compensation. In such disputes, the government does not recognize the contractor's entitlement to receive additional compensation and the claim is denied based on merit.



In a quantum claim, the Government may consider the claim meritorious, but may not agree with the amount sought by the contractor. In these cases, the Contracting Officer will issue a unilateral change order. The contractor may then submit a claim disputing the quantum that is entitled under the Disputes Clause of the contract.



Administration

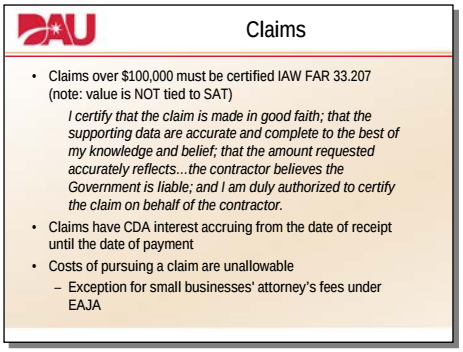
When determining the measure of entitlement, the processing of construction claims is in large measure no different than processing claims in other contracts. However, determining quantum in construction contracts is unique because of the requirement to examine documentation of the written record (plans, specifications, daily reports, etc.), delay analysis using the construction schedule, and calculation of field and home office overhead rates.

The key to effective claims management actually begins prior to any submission of a claim. Awareness of the situations listed below may allow the parties to resolve problems before they escalate into disputes and may also assist in resolving any disputes before they become claims.

Warning Signs of a Potential Claim

While the appearance of any of these signs does not mean a claim is imminent, their presence can be indicators of an increased likelihood of a claim situation.

- There is a lack of specific information from the contractor during the Pre-Construction Conference as to how the job will be completed.
- Failure of the contractor to begin work within approximately 10% of the total contract duration.
- Repeated failure of the contractor to meet dates on the critical path of the project schedule.
- Repeated safety violations/accidents, indicating poor management. Repeated incidents of poor quality or rework.
- Complaints from site workers to Government personnel about conditions. Refusal by the contractor to sign bilaterally negotiated contract modifications or agreements containing the required release-of-claims language.
- Letters are received from the contractor that alludes to field problems, but without specific details regarding the problem.
- Receiving a barrage of correspondence from the contractor requiring replies to very insignificant matters.
- Persistent complaints from the contractor concerning the behavior, motives, or requirements of the inspector or contract administrator that are found to be without foundation.
- Receipt of complaints from subcontractors concerning late payments or non-payments.
- Excessively long punch lists.
- The claims process for contracting is the same process for construction contracting.



Criteria for Effective Dispute/Claims Management

Meet the issues head-on:

Before disputes can escalate, separate the issues and concentrate on resolving the issues.

Resolve disagreements quickly:

After the issues have been identified and the facts have been gathered, the parties should resolve disputes quickly.

Manage the dispute:

Duties do not end with the identification of a dispute. Sometimes, resolution may be difficult because of “unreasonable” positions taken. Avoid surmising that the situation is “hopeless”. Reassess and request that the contractor do the same. Do not hesitate to ask for assistance.

Negotiate the dispute:

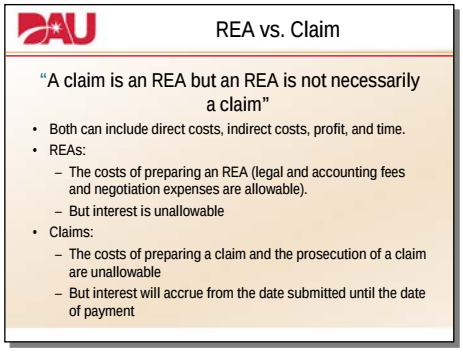
Be timely. Be prepared. Know the issues. Be fair. Be professional. Once a bona fide compromise is reached, delineate all of the matters discussed and promptly obtain a satisfactory agreement.

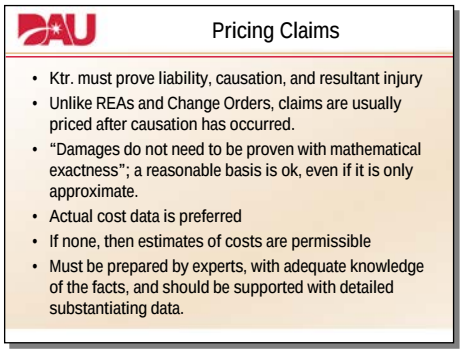
Recognize that claims are time-sensitive:

FAR claim procedures require time sensitivity to any dispute resolution.

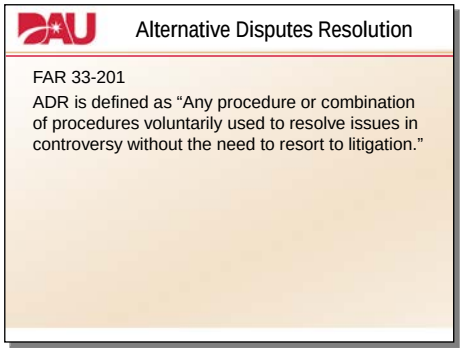
Proper contract file maintenance:

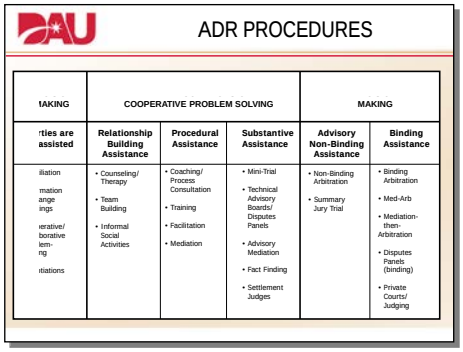
Documentation aids in recording the facts, analyzing all situations, providing the project “trail” resolution.





Alternate Disputes Reslolution -



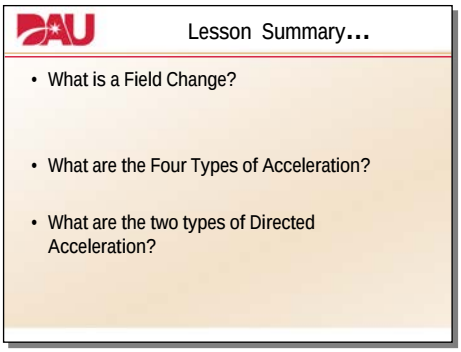


Summary

Conclusion In the event that the parties are unable to resolve differences or disputes through negotiation or Alternate Dispute Resolution (ADR) techniques, the FAR provides contractors with the claims process.

In settling changed construction conditions, it is important to remember that the goal is coming to an agreement on the amount of equitable adjustment due the contractor, or the remedy available to the government. The objective remains the same: timely completion of the construction contract.

This lesson covered changed conditions in construction contract administration. The next lesson will present construction invoice processing and contract closeout.



What Is a Field Change?

What are the Four Types of Acceleration?

What Are Two Types of Schedule Formats?

What Are the Four Types of Delay?