

HOW TO EVALUATE A DIFFERING SITE CONDITION CLAIM

OWNER'S CHECKLIST

1. Did the contractor meet the contract notice requirements?
 - a. Timely?
 - b. Written?
 - i. Or Actual or constructive?
2. Did the contractor meet the other contract requirements?
 - a. Eg. site investigation clause
3. Has the contractor used the data properly?
 - a. Type 1 vs. Type 2 (if applicable in your contract, eg. Federal)
 - b. Is contractor's interpretation of contract document data reasonable?
 - i. Test = "reasonable & prudent" person
4. Did the contractor rely on the contract document data?
 - a. Did it review the data prior to bid?
 - b. Did it not obtain actual knowledge of DSC before contract was executed?
 - c. Did it rely on the "entirety" of the contract documents and not just a portion?
 - i. Cannot disregard unfavorable data
 - d. Did the contractor not "know better" based on similar experience?
5. Are there "exculpatory" or disclaimer clauses which impact this claim?
 - a. Are they material to this issue?
 - b. Are they enforceable in this jurisdiction?
 - c. Has your company or agency been upheld in enforcing these clauses?
 - i. Knowledge that they may be unenforceable may be seen as unfair, even bad faith
6. Is this truly a DSC claim?
 - a. Not a claim for adverse weather or climate?
 - i. Unless owner has superior knowledge of weather conditions vital to performing the contract – not shared before entering contract
 - b. Not a claim filed merely to recover from mis-bidding contract work?
 - c. Not a claim for conditions which are not usually encountered in that type of work?
7. Has the contractor proven entitlement?
 - a. Carefully review the contractor's claim
 - i. Does the contractor have evidence to support entitlement to its claim?
 1. Burden of proof is the contractor's
 - ii. Is the contractor in compliance with all contractual prerequisites to establish entitlement?
8. If entitled, has the contractor proven damages (quantum)?
 - a. Costs, inefficiencies, time delays
 - b. Carefully review the contractor's claim
 - i. Is the contractor's record keeping adequate?

1. Has the contractor “shown its work” in calculating damages?
 2. Can it be audited?
 - ii. Where estimates are used, are they reasonable?
 1. Are they verifiable by other authorities?
9. In loss of efficiency claims:
- a. Is the benchmark period “representative” of anticipated conditions?
 - i. Should include normal contract inefficiencies
 1. Bad weather
 2. Productivity losses for other reasons
 3. Should not be “ideal”
 - b. Questions to ask:
 - i. Was the soil excavated during the benchmark all the expected types or only the easy soil?
 - ii. Did the benchmark period include:
 1. a proper blend of anticipated low-productivity elements or was it all high-productivity work?
 2. a representative amount of bad weather days?
 3. a representative amount of equipment downtime?
 4. consideration of:
 - a. Learning curves?
 - b. Finishing costs?
 - c. Other normal contractor inefficiencies?
 - iii. Loss of Efficiency adjustments
 1. analyze costs in other period to demonstrate representative data
 - a. Cost codes become critically important here
 2. Adjust using estimates prepared by engineers, estimators, consultants, other knowledgeable persons
 - iv. What if no “measured mile” is available?
 1. Select another benchmark
 - a. Question: how do you make it fair?
 2. Selecting a productivity benchmark:
 - a. Bid’s productivity estimate
 - i. Testimony about decisions, assumptions, changes made in preparation of the bid
 1. bid work papers and supporting schedules
 - a. Clear, concise, detailed
 2. notes of the estimator
 3. bid escrow may be appropriate where DSC is highly probable
 - a. eg. environmental remediation
 - b. Contractor’s productivity on other similar projects
 - i. Problem: projects are seldom identical

- c. Another contractor's productivity on the same project
 - i. Problem: skills from one contractor to another are not homogenous
 - d. Productivity manuals and studies
 - i. Problem: not site specific
 - e. Expert evaluation or re-estimation after the fact
- 10. Owners should create documentation every time a DSC is alleged
 - a. Regardless of whether the owner's staff agree that it is a DSC
 - b. Segregate costs of impacted work
 - i. Verify timecards and rate information
 - 1. signed daily by owner's construction manager, resident engineer or inspector
 - c. Even so, you may not be able to capture all losses in productivity
 - i. Crowding
 - ii. Stop-and-start work flow
 - iii. Waiting
 - iv. Unproductive time
 - v. Low labor morale
 - vi. Ripple effect: impact on other trades and activities
- 11. Presentation
 - a. Owners are reasonable in expecting a clear, understandable, well-documented claim
 - i. Unsophisticated contractors may need guidance
 - 1. Refer them to industry associations
 - b. If you reject a claim as incomplete
 - i. Give specifics of what would be acceptable format and documentation
 - c. Fairness is good public policy
- 12. Assure your staff are "up to the task"
 - a. Continuing training programs
 - b. Ongoing evaluations of completed claims
 - c. Adequate time
 - d. Get assistance from expert consultants in areas of law, engineering, industry-practice
 - i. But watch for conflicts of interest
 - 1. Eg. construction managers evaluating claims against its actions
 - 2. Eg. designers evaluating claims involving allegations of inadequacies or conflicts in its plans and specifications
 - e. Always look for the "alternate" solution to resolution of the dispute