



## **Differing Site Conditions**

### **Owner Claim Evaluation 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?

**DSC OWNER CLAIM EVALUATION CHECKLIST**

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

**DSC OWNER CLAIM EVALUATION CHECKLIST**

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

**DSC OWNER CLAIM EVALUATION CHECKLIST**

- 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