

THE IMPORTANCE OF TIMELY NOTIFICATION OF CLAIMS

By Richard D. Lieberman, Consultant and Retired Attorney

If you have a copy of the Federal Acquisition Regulation, or access to it on the internet, look at the Changes clauses:

- FAR 52.243-1, Changes-Fixed Price
- FAR 52.243-2 Changes-Cost Reimbursement
- FAR 52.243-3, Changes-Time and Materials or Labor-Hours
- FAR 52.243-4, Changes-Fixed Price [Construction]

All of these clauses include a notification provision, such as this one in FAR 52.243-1 (fixed price goods and services) and FAR 52.243-4 (construction contracts):

The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written [change] order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

The need for timely notification was an important part of *K-Con Bldg Sys. Inc., v. United States*, Fed. Cl. No. 05-1054C (Jan. 28, 2014), which involved a contract for construction of buildings. In this case, the contractor's claim was denied for lack of timely notice. When work was delayed due to K-Con's actions, the agency assessed liquidated damages, and K-Con objected to the agency in a claim filed 5 months after completion of the building. More than a year later, K-Con submitted a second claim demanding payment for additional work and an extension of time. The first claim was denied by the court because the claim was improper and the court lacked jurisdiction.

The second claim was submitted while litigation on the first claim was pending, and part of it was dismissed because the claim was improper and the court lacked jurisdiction. But there was a second part of this claim concerning agency changes to the contract and a request for time and money. The court first noted the requirement in the changes clause for notice, and stated, however, that the case law for evaluating compliance with notice requirements was more flexible: "written notice as to constructive changes must be supplied by the contractor before such time that the Government would suffer if not apprised of the facts." *Calfon Const. Inc. v. U.S.*, 18 Cl Ct 426, 438 (1989) and other cases cited. So the Court noted that if the agency had knowledge of the facts or problems, the government was not prejudiced by a contractor's failure to submit a precise claim notification, but if silence by the contractor foreclosed less costly solutions, timely notice was required.

The Government contended that K-Con never presented notice at any time to the Agency regarding the basis of the claim. K-Con asserted that giving notice was meaningless since the Government would have acted over its objections. The Court rejected this reasoning, noting that

K-Con had not provided any legal support for its “granting of a futility exception to the contract’s changes clause.”

There were no valid written notices of the claim, and the court concluded that “[t]o recover on its claim that the [agency] ordered changes....plaintiff must show that it complied with the requirements of the contract’s changes clause.” Because no evidence of notice was presented to the court, judgment was made for the agency, and the contractor’s claim was denied. This simply goes to show that, the requirement for notice is an important aspect of all claims and requests for changes, actual or constructive.

TIPS: The changes clauses require that the contractor “assert its right to an adjustment under this clause within 30 days from the date of receipt of the written [change] order.” This would also apply to a constructive change. The language of the clauses *do not* require submission of a formal claim—only the notification of the contractor stating it has a right to an adjustment under the changes clause, and stating that it will provide a formal claim when the costs have been settled, along with other details. But the important thing is that *written notification* to the contracting officer should be provided early—even if it takes time to price and draft the claim.