

CHAPTER 7. CONTRACT ADMINISTRATION

SECTION 16. CONTRACT CLAIMS AND DISPUTES

7.16.1 General Principles. Basic policy of the Corps of Engineers involves a duty on the part of all concerned to eliminate, without prejudicing the substantive rights of the Government, the cause of all claims and consequent appeals. However, where claims and appeals do occur, they will be handled as quickly as possible with full and impartial consideration of all factors. The competency, wisdom, and diligence of the Contracting Officer and staff, which includes the Resident Office, usually are reflected in the final record of an appeal. The initial decision in each claim must be the studied, considered judgement of the Contracting Officer based upon substantial evidence and established legal principles. For the Contracting Officer to carry out his or her responsibilities, (s)he must of necessity rely upon the Resident engineer to present all factors involved so that in the final analysis (s)he can give full and impartial consideration to the rights of the Government as well as to contractor's rights. In many cases there are facts which are adverse to the Government's case as well as supportive to it. It is imperative that all adverse points, whether or not specifically raised by the contractor, be included in the file forwarded to Huntsville Center. The successful settlement of most claims depends primarily on detailed preparation and presentation of facts, rather than on intricate questions of law. The primary concern then is to get all the facts as a basis for correct action. It is important to assure the contractor that his problem is receiving fair treatment.

7.16.2 USAESCH/ACO Authority. Delegated authority from headquarters, **OSC** Procuring Contracting Officer, is for HNC to prepare Findings of Fact and issue decisions under the *Disputes Clause* on matters in which the ACO has the authority to take definitive action, represent the Government on construction contract matters before the Armed Services Board of Contract Appeals (ASBCA), and assist the United States attorneys in defense of construction contract matters initiated or appealed to the United States Court of Federal Claims within the guidance of FAR 33.2 Disputes and Appeals and within the following parameters:

a. Claim Less Than \$50,000. If the claim is less than \$50,000 it will be processed by the Resident ACO in accordance with procedures of this plan. The Resident ACO has no authority to deny a claim. If the Resident ACO recommends merit on a claim, the HNC-ACO must issue any modification which includes payment of interest under the Contract Disputes Act. Coordinate any result impacting the overall contract with the **OSC** procurement contracting office, through USAESCH.

b. Claim Greater Than \$50,000. If the claim is greater than \$50,000, it will be processed by the USAESCH ACO in coordination with the **OSC** Office of Counsel and with the concurrence of the **OSC** procurement contracting office.

7.16.3 The Disputes Clause. The current *Disputes Clause* in fixed-price construction contracts is dictated by the Contracts Disputes Act of 1978, which became effective 1 March 1979, and amended in 1995. This clause is the contract provision, which establishes the right of a contractor to an administrative remedy for settling disputed matters. This provision binds the parties to dispose of disagreements arising within the contract. It gives the Contracting Officer authority to decide certain questions arising during performance which are not settled by agreement at the job site, while the contractor is given the privilege of appealing an adverse decision of the Contracting Officer to an impartial administrative board or a court. The process extends to all disputes, claims, or disagreements concerning questions of fact and intends that the parties attempt to resolve differences by mutual agreement.

7.16.4 Resident Engineers' Responsibility in Disputes . The Resident Engineer will try to resolve all questionable and/or disputed items as soon as they arise. There have been some questions in the past about identifying or classifying certain items as claims. For guidance, a claim is defined as ...a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. Use this definition in administering disputes. By regulation, the Contracting Officer must become personally and thoroughly familiar with all the facts of a claim and must discuss the claim with the contractor prior to a final appealable decision. While the Resident Engineer's authority as COR is limited in that (s)he may not finalize action on a claim, his or her authority does permit him or her to settle many disagreements which may arise. The Resident Engineer will personally participate in those problems in the same manner that the Contracting Officer is required to participate. Recognizing this responsibility and taking appropriate action at the proper time can result in prompt and early settlement of disputed matters.

7.16.5 Certification of Claims . A claim may be filed under any of the various contract provisions. The *Changes Clause*, *Differing Site Conditions Clause*, and *Suspension of Work Clauses* all contain provisions for equitable adjustments under special circumstances. The *Changes Clause* expressly provides payment for changes in the method or manner of work performance, such as acceleration, changes in the work site, etc. It also provides payment to the contractor for increased costs of unchanged work or delay expense, provided they are a foreseeable result of the change. The contractor will make all claims in writing and submit them to the Contracting Officer for a decision. Any claim \$100,000 (\$50,000 at Anniston Chemical Demil Facility) or less is a formal claim. Any claim, defined above, which exceeds \$100,000, is not a formal claim until the contractor certifies such in accordance with procedures described in the *Disputes Clause*. For example, the claim is made in good faith, the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. However the *Disputes Clause* also states that: **A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act.** If a contractor submits a voucher, invoice, or other routine request for payment that is not in dispute and includes a certification in accordance with the *Disputes Clause* (amounts more than \$100,000), the contractor will be notified, in writing, that the matter is not in dispute and, therefore, the certification provided in accordance with the *Disputes Clause* does not apply. This also includes requests for contract adjustments (i.e., variations in estimated quantities) and proposals for changes in response to an RFP. This will help alleviate any questions and/or misunderstandings as to when interest begins, should the matter become a dispute as defined in the *Disputes Clause*. For certifiable claims, as per the *Disputes Clause*, the contractor will execute the certification if the contractor is an individual. When the contractor is not an individual, the certification will be executed by a senior company official in charge at the contractor's plant or location involved, or by an officer or general partner having overall responsibility for conducting the contractor's affairs. It is the Resident Engineer's responsibility to inform the contractor if the certification has not been provided for a claim exceeding \$100,000.

7.16.6 Prompt Resolution of Disputes . In accordance with the *Disputes Clause*, the Contracting Officer must render a decision within 60 days, if the contractor's claim is \$100,000 or less and such decision is requested. For claims more than \$100,000, the Contracting Officer must either decide the claim or advise the contractor as to when a decision will be issued. If the decision is not rendered within 60 days, or the contractor notified when the decision will

be issued, it is assumed that the claim is denied and the contractor has the option of appealing. In addition, if the claim is certified in accordance with the Act, interest on the ultimate settlement will be due. Accordingly, it is necessary to handle all claims in an expeditious manner. Since disagreements and disputes arise in many ways, it is inappropriate to delineate a firm procedure for the Resident Engineer in handling every case on a fixed basis. Each case encountered will require exercising judgement and discretion coupled with the recognition of the responsibilities required to administer the contract as an authorized representative of the Contracting Officer. The following topics establish a framework for exercising the judgement and discretion in each case encountered.

a. Receipt and Acknowledgment of Contractor's Claim. The Resident Engineer will always acknowledge letters from contractors and state in his/her reply either the disposition being made or establish a proposed schedule for disposition. Depending on the status of construction or contract performance, it is usually appropriate to meet with the contractor soon after any letter of claim or dispute is received to determine the nature of the claim and establish the basis for handling and disposition. Contractors should be requested to furnish backup data; e.g., facts, cost breakdown, contract clauses, etc. However, the absence of such data or a response from the contractor does not preclude the Contracting Officer from making a final decision within the required 60 days, nor does it stop the contractor's accrual of interest. Some claims can be resolved in a relatively short period of time; e.g., requests for time extensions, minor change order adjustments, etc. Every effort should be made to resolve these claims as soon as possible. Additionally, there are claims that may have separable parts, some of which can be resolved. Matters which can be resolved should be either separated and finalized by modification (cutting off interest) or by mutual agreement to withdraw, thus leaving only those disputed issues.

b. Control.

(1) When a claim or dispute is received, the Resident Engineer will personally review the contractor's letter or submission to determine whether the matter is a claim, as defined under the Contracts Dispute Act of 1978, or a matter of contract administration, i.e., as a directed or constructive change, etc. If considered a claim, the RE will immediately forward a copy of the contractor's submission to CD-**TS**-CA. Other processing procedures are discussed in section 7.16.9, Forwarding Claim to Huntsville Center.

(2) Within the RO, the claim will be assigned to the proper element for appropriate action. Procedures will permit the office engineer or assigned person to establish suspense dates and controls, which permit orderly and timely scheduling of necessary actions at the Resident Office level, or for submission to the Contracting Officer.

(3) The receipt date of a claim, certified, if applicable, will be the controlling factor. If resolution is not made at the field level, submit the claim to CD-CA as soon as possible, but not later than 30 days after a claim is received since the Contracting Officer must either render a decision within 60 days or advise the contractor when a decision will be issued.

7.16.7 Review and Analysis of Dispute. Prompt and proper resolution of any dispute is dependent upon taking timely actions. Delay in handling may prejudice the rights of both the Government and the contractor, so it is essential that immediate action be taken to obtain all pertinent and relevant facts for an objective review and analysis of the merits of the claim. If a contractor's letter of claim is not considered adequate, (s)he should be given a deadline

(approximately 10 days) to submit further information to more clearly express his basis of claim and to support his or her entitlement to relief. Refusal to submit such data may be the basis for issuing a unilateral modification, thus minimizing the accrual of interest. Analysis of a claim involves many steps to achieve resolution. No attempt is being made here to identify all steps that should be done, since each case will involve different facts and circumstances; however, significant elements are:

a. Assemble all pertinent fact.

b. Coordinate with all pertinent Resident Office elements. Every person who might have been involved in the complaint should review the claim, i.e., surveillance personnel, field engineers, project engineers, shop drawing reviewers, and any other Government representatives. Each person who may have some personal knowledge of the complaint should comment in writing on each and every allegation made by the contractor. Type all comments, check for accurate recording of facts, and sign by the writer. Encourage personnel to participate in this manner so that timely and current knowledge will be preserved. Early participation will also preclude later embarrassment in the event errors in judgement may be involved. There should be no fear of reprimand for disclosure of the true facts in the matter.

c. After all pertinent and relevant data and facts have been assembled, the Resident Engineer and his staff will objectively analyze the file to determine a course of action.

7.16.8 Action Based on Determination.

a. In some instances, reviewing a claim file may lead to the conclusion that a letter to the contractor clearly explaining a basis for agreement will suffice. Reviews may also reveal that the contractor may be entitled to complete or partial relief. The need for a conference with the contractor to attempt a disposition by agreement may be necessary. In either event, meet with the contractor for a full and frank discussion of the claim. Conferences with the contractor are absolutely essential before referring the case to the Contracting officer for resolution, unless the contractor specifically indicates or states that he does not want to meet further with the Resident Engineer.

Resolving differences by mutual agreement strengthens the Government's relations with its contractors and/or suppliers and makes them more responsive to government requirements. Although meetings or discussions are sometimes time-consuming and sometimes contribute to delay, we believe that advantages outweigh disadvantages. Conduct conferences in such a manner that encourages the contractor to settle his or her disagreements at the Resident Office level. The Resident Engineer should be courteous and show the contractor that his claim may not be valid or may lack merit, but at the same time furnish him or her the basis for the Government's position. If this is done objectively, experience indicates that the Resident Engineer will generally obtain a just and equitable determination of dispute without unnecessary delay. Every attempt should be made to reach equitable agreements by this method.

b. Since the contractor has the burden of proof, the Resident Engineer has the right to request all backup information, facts, and data, which the contractor can produce in support of his claim. Do not hesitate to reveal pertinent, relevant, and material facts in the Government's possession to the contractor. The Government's position should be presented to the contractor clearly and objectively in an attempt to obtain the contractor's agreement and resolve the dispute.

c. All correspondence with contractors concerning claims, disputes, or disagreements should be prepared according to the policies stated above. Letters should be clear and concise, and reflect that due consideration and an analysis of the matter are included. It is important that a response is made to any question, issue, or an allegation raised in the contractor's letter of claim. As in a conference, analysis or response by correspondence should be done in a courteous, convincing, and persuasive manner so that the Resident Engineer, where possible, can obtain disposition by agreement. Any letter to the contractor furnishing an opinion, denial, allowance, etc., should end with an appropriate statement requesting a reply within, as a general rule, a maximum of 10 days. From a pure documentation standpoint, it is desirable to obtain a written withdrawal or communications form from the contractor for the record. However, this is not an absolute requirement and should not be encouraged in those cases where the contractor may be offended as a matter of principle. If a withdrawal is obtained in a conference, make an appropriate notation on the letter of claim or the matter recorded in conference notes or the resume of negotiation.

7.16.9 Forwarding Claim to Huntsville Center. When the Resident Engineer is unable to dispose of a claim by agreement, (s)he will send the claim to the Contracting Officer for further review and appropriate action. Send the entire claim file through CD-**TS-CA (Chemical Demilitarization Directorate, Technical Support, Contract Administration)**, to OC (Office of Counsel) by memorandum with an attached Facts Sheet (See exhibit 7-16*1 for a sample format.). **The important thing to remember is to give the Contracting Officer all of the facts necessary for a fair and impartial consideration.** An adequately prepared record will help to avoid costly and time-consuming duplication of efforts by the reviewers. The claim fact sheet should be a complete narrative presentation so that an independent reviewer will be able to fully understand the case. Completeness will eliminate the need to return claim files to the Resident Office for additional data or information in most cases. The fact sheet should include marked-up drawings, photographs, if applicable, copies of office records, QA/QC daily reports, claim letters and enclosures, and all pertinent correspondence. If a dispute or disagreement is known to exist, regardless of how it developed, it should be considered as a clear signal toward requiring more documentation and continued surveillance of the problem to fully record the sequence of events and happenings which may bear on the dispute or issue. Inspectors and field engineers should make a complete record in their daily reports of things said and done. The value of such timely records is extremely important if the dispute results in appeal or litigation. Photographs should be made that will logically reflect how the construction developed. If this cannot be done, it would at least be desirable to have photographs in the claim file that depicts the situation either before or after the fact, or both. Marked-up drawings made at the time an event occurs are also helpful and, if available, at least three to four copies should be submitted to the Huntsville Center. Efforts toward documentation should, of course, be balanced with other considerations such as a claim amount, costs of photographs, or other efforts. There is no excuse for inadequate documentation when it is known that a dispute is developing, and appropriate action should be taken accordingly.

7.16.10 Alternative Review Process . In view of the Government's policy to try to resolve all controversial contract issues by mutual agreement at the COR's level, the Contracting Officer will use Alternative Dispute Resolution (ADR) procedures to the maximum extent practicable in the CSDP. These ADR procedures include the PARTNERING concept and an Alternative Disputes Review Process. Sample contract requirements for these considerations are shown in exhibits 7-16*2 and 7-16*3. Implementation of the Disputes Review Board will be as specified in the contract requirements and accomplished only after coordination with the Huntsville Center and the Contracting Officer.

7.16.11 Huntsville Center Action.

a. When the original claim file is received, CD-**TS**-CA will assign an identification number that will be used in all correspondence and interoffice communications pertaining to the contract claim. The claim number will be a 6-digit alphanumeric designation, such as Claim No. 910078A. The first two digits of the number represent the year of the contract. The next three digits are the last three numbers of the actual contract number. The last digit, a letter, represents the particular claim under the contract in alphabetical sequence. CD-**TS**-CA will make three to five copies of the claim file, as necessary, and immediately send one copy to the office of counsel. If the claim comes directly to the Division Office from the contractor or his attorney, CD-**TS**-CA will provide a copy to the field. CD-**TS**-CA will begin a division analysis.

b. CD-**TS**-CA will make a detailed technical review and an analysis of the claim. Expedite the process within the Huntsville Center. At this point, it is essential that the Office of Counsel become involved. The analysis of claims or proposals is made for Counsel's benefit and at their request. The analysis becomes an ATTORNEY-WORK-PRODUCT, and establishes an Attorney Work Product Privilege. This procedure allows data to be prepared and analyzed on a protected basis. Under the Expedited Process and upon completion of the analysis, CD will make a recommendation either denying the claim or recommending merit. Forward the claim file to the Office of Counsel with a copy to ED for completion of a technical review and finalization of their recommendations. CD-**TS**-CA will coordinate a meeting of the Division Claim Determination Team (Construction, Engineering, and Counsel).

c. *Claim Approved.*

(1) The Huntsville Center ACO may, after coordination with the IOC PCO and after consideration of recommendations from the Division Claim Determination Team, determine that the claim has merit. If this decision is within the PCO's delegated monetary authority and the contractor is entitled to an equitable contract adjustment, CD will either negotiate a settlement of the claim, return the claim to the Resident Engineer for negotiation, or assist the Resident Engineer in negotiating a settlement.

(2) Once the Government's pricing position is developed, pre-validated or request funds based on the Government's Estimate, where applicable. When a Government Estimate is not required, necessary funds should be based on the Government's cost analysis or a detailed review of the contractor's proposal.

(3) Any time a settlement contains monies for interest, the modification must also be written under the *Disputes Clause*. Therefore, the Contracting Officer must execute the modification. It is important to remember that interest starts on the date the contractor submits his claim, in writing, to the Contracting Officer for a written decision, certified, if applicable. The modification will be supported with documentation as required for a normal modification. The documentation requirements are included in section 7.1.3.1.

(4) Where interest is applicable, add a separate computation to the Government's Estimate or cost analysis after settlement of the claim. Also, include separate bid items involving interest on the SF 30 and, if applicable, the Government Estimate Cover Sheet. (Data is being developed for examples of an estimate containing interest calculations and separate bid items for interest rates provided by PL 92-41 and also format for computing interest.)

d. Claim Denied.

(1) The Huntsville Center ACO may, after coordination with the **OSC** PCO and **OSC** Office of Counsel and review, deny the claim based on available information. CD-CA will prepare an indicated decision letter, signed by the Director, Directorate of Chemical Demilitarization Construction, advising the contractor that the claim appears to be without merit and request the contractor to withdraw the claim. Also, the letter will offer the contractor the opportunity to meet with the ACO to discuss the issues.

(2) The purpose of the contractor/ACO meeting is to ensure that the ACO understands the issues and to provide the contractor an opportunity to respond to the indicated Government position. The parties may voluntarily elect to participate in the Alternative Dispute Resolution procedures.

7.16.12 Contracting Officer's Decision (COD).

a. Regulations prescribe the basic requirements for a final decision as follows:

(1) The contractor will be informed of the facts and reasons upon which the decision is based.

(2) It must appear from the express language, or by necessary implication, that the writing constitutes the final decision of the Contracting Officer. The written decision, if appealed, is the basis for an administrative hearing before the Armed Services Board of Contract Appeals, or the Court of Claims. Therefore, the decision form and substance are very important.

(3) As soon as practicable after conclusion of the Contracting Officer/Contractor meeting or in instances where the contractor declines a meeting or does not agree to implement the ADR Process, the Contracting Officer must make a decision. If the Contracting Officer decides to deny the claim, the CO will advise Office of Counsel of the decision and the Counsel Office will prepare a Contracting Officer's decision.

b. The Office of Counsel is responsible for putting in proper form all final decisions of the Contracting Officer. However, the decision must reflect that the determination is the personal decision of the Contracting Officer. The Resident Engineer and CD-**TS**-CA may be required to furnish technical advice to the Office of Counsel when necessary. The CD-**TS**-CA will provide a copy of all final decisions to the Resident Engineer for information.

CESAM-FC-RA

5 March 1998

MEMORANDUM FOR CEHNC-CD-CA

SUBJECT: Request for Contracting Officer's Decision, Contract DACA01-97-C-0201, Electrical Maintenance and Repair, Phase III, Redstone

1. Enclosure 1 is a letter from Short Circuit Electrical Company, Inc., dated 29 January 1998, requesting a Contracting Officer's decision.
2. It is the opinion of this office that the claim has no merit. Enclosure 2 is the Fact Sheet for this claim, summarizing our analysis, findings, and recommendation.

I. M. Fair
Resident Engineer

Exhibit 7-16*1. Memorandum to Forward Claim

FACT SHEET ANALYSIS

SUBJECT: Contract No. DACA01-96-C-0201, Electrical Maintenance and Repair, Phase III, Redstone Arsenal, Alabama, Claim No. 91201A, Costs to Furnish Temporary Power Hookup

CONTRACT DATA:

Contractor: Short Circuit Electrical Company, Inc.

Date of Award: 30 Sep 96

Notice to Proceed: 4 Nov 96

Original Contract Amount: \$2,780,000.00

Contract Modifications to Date: 3

Revised Contract Amount: \$2,787,600.00

Original Completion Date: 28 Dec 98

Modified Completion Date: 20 Jan 99

Liquidated Damages: N/A

SUMMARY OF CLAIM:

The dispute concerns whether the contract required the contractor to extend temporary primary power lines to furnish temporary power to the job site. The contractor disagreed with the Area Office's oral interpretation that it does.

BACKGROUND:

The contractor submitted a claim for \$2,497.00 increase and a 4-calendar-day time extension by letter dated 29 January 1998, received by the Redstone Arsenal Area Office on 30 January 1998 (Exhibit 1). The claim proposal represents costs; the work was performed between 20-22 January 1998 according to daily Quality Control and Quality Assurance Reports (Exhibit 5).

CONTRACTOR'S POSITION:

The contractor claimed he did not anticipate additional work to run primary power lines to furnish temporary power to the job site. In his 29 January 1998 claim, he asserted that SC-31, **AVAILABILITY AND USE OF UTILITY SERVICES** (Apr 1984) FAR 52.236-14, states The Government will make.... utilities available. He went on to say, There is no indication on the plans that the contractor would furnish primary power. The undersigned called Mr. Steve Brooks of Short Circuit Electrical Company, Inc. On 22 February 1998 to discuss the claim.

Mr. Brooks explained that the claim is for extending primary power from a 4160-volt distribution line approximately 1000' to the project site. Mr. Brooks explained that at bid time, they had contemplated only making a secondary connection (240 volts) at the site; approximately \$500 had been budgeted for that work. The claim does not include any costs for the secondary connections. Mr. Brooks explained that Short Circuit Electrical Company, Inc. has had contracts at Redstone Arsenal for several years. He asserted that the base always provided primary power to their job sites, extending lines if necessary.

GOVERNMENT POSITION:

The Government's position is that the claim is without merit.

Contract Clause 68 (Exhibit 2) requires all bidders to familiarize themselves with site conditions, including temporary power requirement; and Special Contract Requirement Clause (Exhibit 3) requires the contractor to provide any distribution lines necessary for temporary power. Short Circuit Electrical Company, Inc. could have determined from a pre-job site investigation where the nearest electrical source was located. Notwithstanding possible past practice by the base on their contracts, nothing in this contract with the Corps of Engineers suggests or requires that the Government will extend primary power to the job site.

Discussion and Analysis:

The project primarily involved electrical work. Short Circuit Electrical Company, Inc. is an electrical contractor.

Contract Clause 68, **SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK** (Exhibit 2), requires that the contractor investigate and familiarize itself with the nature and location of the work and conditions which can affect the cost of the work, including the availability of power. A site visit and examination of the plans by a qualified electrical firm would have revealed that there is no primary power source immediately available at the project site for temporary power. There are several high-voltage power lines shown on the drawings. However, according to Redstone Area Office personnel, an electrical firm would realize that those sources weren't available for step-down secondary service. Mr. Brooks confirmed this in the above-mentioned 22 February 1998 telephone conversation.

Special Contract Requirement 31, **AVAILABILITY AND USE OF UTILITY SERVICES** (Exhibit 3), states that the Government will make utilities available to the contractor from existing supplies and outlets. It further states that The Contractor, at its expense...shall install and maintain all necessary temporary connections and distribution lines... and shall remove all temporary connections, distributions lines... at the end of the job. Thus, the contract language is explicit and unambiguous that the Government will only make electricity available from existing sources, and the contractor must extend distribution lines, if necessary, for temporary power.

In the 22 February 1998 telephone conversation, Mr. Brooks agreed that there wasn't any alternative source available closer than the location they actually tied into. Mr. Brooks explained that when they made the arrangements with the base, after award, for temporary power connections, they learned that they would be responsible for extending the primary high-voltage line to the site a distance of 1000' feet. The base loaned the contractor a step-down transformer to install at the project site. Short Circuit Electrical Company, Inc. had not anticipated extending primary power, according to Mr. Brooks, because the base had previously provided or extended primary power to their job sites. Therefore, their claim is based on prior dealings with the base. The undersigned contacted Redstone Area Office personnel who stated they had no knowledge of this past practice; apparently, it involved base contracts. They were aware that the base loaned step-down transformers to contractors. This is beyond the Government's obligation, as stated in SCR 31. Normal practice on Corps of Engineers contracts is for contractors to make their own arrangements for the installation of temporary power using whatever means is necessary to connect to existing high-voltage or low-voltage sources.

There is no prior course of dealing between Short Circuit Electrical Company, Inc. and the Corps of Engineers to demonstrate conduct constituting a waiver of the contract requirements. Short Circuit Electrical Company, Inc. assumed that the base would extend primary power to this project site based on their experience with the base, without checking during the bid period, according to Mr. Brooks on 22 February 1998.

RECOMMENDATION:

The claim is without merit and should be denied.

I.M. FAIR
Resident Engineer

EXHIBITS:

1. Contractor's 29 January 1998 claim letter, stating their position and requesting a Contracting Officer's Decision
2. Contract clause 68, **SITE INVESTIGATION & CONDITIONS AFFECTING THE WORK.**
3. Special Contract Requirement 31, **AVAILABILITY AND USE OF UTILITY SERVICES.**
4. Daily Quality Control and Quality Assurance Reports. 20-22 January 1998.

Exhibit 7-16*1 Attachment. Fact Sheet Analysis (cont'd)

PARTNERING

In an effort to most effectively accomplish this contract, the Government proposes to participate in a concept called Partnering with the contractor and his subcontract. This cooperative would strive to draw on the strengths of each organization in an effort to achieve a quality project the first time, within budget and on schedule. This effort would be bilateral in make-up and participation will be totally voluntary. Any costs associated with effectuating this partnering effort will be agreed to by the parties and will be shared equally with no change in contract price. Accordingly, the contractor shall not include costs associated with this partnering effort as part of this contract, nor will such costs be allowable under the contract.

It is noted that this partnering effort conveys no legally enforceable rights or duties. Any changes to the contract must be made by the Contracting Officer under the terms of the written contract. Rather, the Partnering concept is a team relationship that promotes the achievement of mutually beneficial goals. This Partnering effort will be governed by the principles and procedures set forth in IWR Pamphlet-91-ADR-P-4.

Exhibit 7-16*2. Partnering Concept Procedures

ALTERNATIVE DISPUTES REVIEW PROCESS

(SEE SPECIFIC CONTRACT REQUIREMENTS)

1. In order to assist in the timely resolution of disputes or claims arising out of this project, this contract clause establishes an Alternative Disputes Review process, to be brought into play by mutual agreement of the parties. When deemed mutually beneficial, a Disputes Review Board will consider disputes referred to it and will provide non-binding recommendations to assist in the resolution of the differences between the Government and Contractor. Specific procedures to be followed for disputes referred to the Disputes Review Board will be as decided upon by Government and Contractor. Nothing herein shall limit the right of the parties to agree to any or all other alternate dispute review processes. However, the procedures below are general guides for establishing such procedures.
2. Should a dispute arise between the Government and Contractor, either party may propose utilization of these procedures and, upon agreement of both parties, the matter(s) in issue will be referred to the Disputes Review Board. If such submittal to the Board is not agreed to by the parties, the matter will be pursued under the normal claims and appeal procedures in accordance with the Disputes clause of the contract.
3. The Disputes Review Board shall consist of one member selected by the Government and one member selected by the Contractor. The first two members shall be mutually acceptable to both the Government and the Contractor. The parties shall exchange lists of three individuals acceptable as a Board member. The Government and the Contractor shall each select one individual from the other's list. If no individual on the first list is acceptable to the other party, a second list with three (3) individuals will be proposed. If no one on the second list is acceptable to the other party, the selection process shall not continue and the mutual decision to submit the dispute to a Disputes Review Board shall be considered terminated.
4. The two members acceptable to the Government and the Contractor will independently select the third member from a list of 10 names developed by the Government of individuals respected in the field of engineering and construction for their ability and integrity, one of whom should be acceptable. If the two members are unable to select the third member from this list, the decision to submit the dispute to a Disputes Review Board shall be considered terminated.
5. The Contractor and the Government shall each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. The procedures for conducting such hearings shall be as mutually agreed to by the Government and Contractor. The Disputes Review Board recommendations toward resolution of a dispute will be given in writing to both the Government and the Contractor within 30 days following conclusion of the proceedings before the Disputes Review Board. Such recommendations are advisory and non-binding upon both the Government and the Contractor.
6. Within 30 days of receiving the Disputes Review Board's recommendations, both the Government and the Contractor shall respond to the other in writing, signifying that the dispute is either resolved or remains unresolved. If the Government and the Contractor are able to resolve their dispute, the Government will expeditiously process any

Exhibit 7-16*3. Alternative Disputes Review Process

required contract modifications. Should the dispute remain unresolved after 30 days following receipt of the Board's recommendations, the procedure will terminate and the Contractor will be entitled to pursue his claim with the Review Board. Except for fee-based consulting services on other projects, no Board member shall have been employed by either party within a period of two years prior to award of the contract.

7. If at any time during the existence of the contract, the parties mutually agree that a Disputes Review Board should be established for work performed under this contract, the Government and the Contractor shall commence the selection procedures, as above, and negotiate an agreement with their member within 30 calendar days. The selection of the Disputes Review Board Alternative Disputes Review procedure for resolution of contract disputes shall be void if the two members are unable to select a third member within 30 calendar days. This Board shall serve during the existence of the contract, to attempt resolution of the other disputes which may be mutually referred to the Board.

8. In appropriate cases, the Contractor and the Government may agree that a dispute should be submitted to the Disputes Review Board, but the dispute only warrants the mediation efforts of one Board Member. In such cases, the third Board Member will mediate the dispute without participation of the other two members.

9. The Disputes Review Board will formulate its own rules of operation, and may request of the Government that they visit the site to familiarize themselves with the controversy.

10. Should the need arise to appoint a replacement Board member, the replacement member shall be appointed in the same manner as the original Board member were appointed. The selection of a replacement Board member shall begin promptly upon notification of the necessity for a replacement, and shall be completed within 30 calendar days.

11. Compensation for the Disputes Review Board members, and the expenses of operation of the Board, shall be shared by the Government and Contractor in accordance with the following:

a. The Government will compensate directly the wages and travel expenses for its selected member.

b. The Contractor shall compensate directly the wages and travel expense for its member.

c. The Government and Contractor will share equally in the third member's wages and travel, and all other expenses of the Board.

d. The Government, at its expense, will provide administrative services, such as conference facilities and secretarial services, to the Board.

12. The establishment of the Alternate Disputes Resolution Procedure under this contract may be terminated at any time by written notice on the other party. Board members may withdraw from the Board by providing notice. Board members may be terminated for cause only by their original appointer. Therefore, the Government may only terminate the Government's appointed member, the Contractor may only terminate the Contractor's appointed member, and the first two members must mutually agree to terminate the third member.

Exhibit 7-16*3. Alternative Disputes Review Process (Continued)

13. The principal objective of the Disputes Review Board is to assist in the resolution of disputes, which would otherwise likely be resolved through the traditional litigation processes. It is intended that if mutually agreed to by the parties to constitute a Disputes Review board for the purpose of attempting to resolve contract disputes, that the mere existence of the Board will encourage the Government and the Contractor to resolve potential disputes without the necessity of resorting to the formal appeal procedure under the Disputes clause of the contract.

14. Primarily, the BOARD will consider claims and disputes involving interpretation of the Plans and/or Specifications, delays, acceleration of the work, scheduling, classification of extra work, changed conditions, design changes, and the like.

15. If the Board's recommendations do not resolve the dispute all Board findings and written recommendations, including any minority reports, will be inadmissible in any subsequent litigation or hearing before the Boards of Courts contemplated by the Disputes clause procedures, involving the dispute at issue.

Exhibit 7-16*3. Alternative Disputes Review Process (Cont'd)