

## CHAPTER 7. CONTRACT ADMINISTRATION

### SECTION 15. SPECIAL CONSIDERATIONS

**7.15.1 General.** This section discusses a variety of situations, based on past experience, that are probable and possible during the life of the CDSP systems contract effort.

**7.15.2 Modification Accepted with Reservation.** Make every effort to resolve the substance of the contractor's reservation prior to issuing the modification. Each qualification represents a claim or potential claim and could result in an open-ended change. Such modifications are a form of unpriced contractual actions. Consult with CD-CA for advice prior to issuing a modification with a qualification.

**7.15.3 Time Extensions.** Resident Engineers, as Administrative Contracting Officers (ACO's), are authorized to execute contract modifications only under the designated clauses as outlined in Section I and within the delegated authorities extended by the PCO.

*a.* The *Changes, Differing Site Conditions, and Suspension of Work Clauses* provide for an equitable adjustment of costs. The *Changes and Differing Site Conditions* clauses provide for equitable adjustments for time. Time associated with a Government Suspension of Work is provided for under the *Defaults Clause*. The ACO's Appointment Document (SF-1402) does not restrict an equitable adjustment for time. However, Huntsville Center's policy, in keeping with the Memorandum of Agreement with the PCO (IOC), is as follows:

(1) Both the Resident Office ACO and the Huntsville Center's ACO may, on modifications within their monetary authority, consummate with full accord and satisfaction, contract time extensions with concurrence and approval by IOC and PMCD.

(2) Coordinate with CD-CA, CH, and IOC, before negotiations, any request for acceleration (buying back a time extension).

(3) Exercise sound business practice on all decisions. Document all discussions and decisions in the modification file. Fully explain the rationale, need, and coordination in the pre-One negotiation objectives. Document time negotiations and summarize the agreement and the basis for the time extension in the price negotiation memorandum.

(4) Coordinate all actions for proposed time extensions related to delays in completing the work arising from unforeseen causes beyond the control and without fault or negligence of the contractor, with CD-CA, OC and the HNC-ACO prior to establishing a position with the contractor. These examples are listed in subparagraph (b) 1 of the *Default Clause*. Upon validation of the allowability of the time extension, HNC and the Resident Office will coordinate concurrence or other strategy (e.g.; buy back time) with PCO and the PMCD.

*b.* Unreasonable delays incurred under a suspension of work may entitle the contractor to an extension of time under the *Default Clause*. The Resident Office ACO shall coordinate concurrence with the PCO and PMCD.

#### 7.15.4 Weather - Time Extensions.

*a. General.* When considering time extensions for weather delays, two fundamental principles must be followed: (1) The contractor must have been actually hampered in a manner that would delay final completion of the job, and (2) the weather conditions must have been different from those anticipated when bidding the job based on weather data included in the applicable contract special clause and anticipated in the approved schedule. Also, the contractor must not have willfully or negligently caused the delay.

*b. Legal Basis.* The Armed Services Board of Contract Appeals has outlined a tripartite test for determining whether a contractor is entitled to a time extension based on unusually severe weather. The test requires "a delay in the completion of the work which is (1) beyond the control and occurs without the fault or negligence of the contractor and (2) the result of an unforeseeable cause, e.g., unusually severe weather." (Essential Construction Co., Inc., ASBCA 18652, 18941, 78-2 BCA 13314 (1978).) Generally, unusually severe weather is weather in excess of the norm which could not reasonably be anticipated at the time of contracting (id); see U.S. vs. Brooks-Calloway Co., 318 U.S. 120 (1942) (construing the term "flood" which is included in the listing of unforeseeable causes along with "unusually severe weather"). The Contracting Officer may determine if severe weather was foreseeable by comparing previous years' weather patterns with the weather actually occurring during the contract period. See Wallace Roofing Co., ABSCA 27896, slip op. (Sep 13, 1983) holding that comparison of five-year weather averages with weather occurring during the contract period is a "reasonable method to determine specific days of unusually severe weather . . ." "The Contracting Officer should also consider any additional circumstances affecting the foreseeability of the severe weather. (Essential Construction Co., Inc., id. (criticizing use of a formula which relied on weather averages but ignored other additional factors such as the effect of the severe weather on contract performance and actual job site conditions.) In addition to satisfying the foreseeability requirement, the unusually severe weather must actually cause the delay without the fault or negligence of the contractor.

*c. Responsibility.* The Contracting Officer bears the burden of extending the contract time for delays in construction completion caused by unusually severe weather. Although the contractor is required to document the occurrence and the effect of adverse weather on the work, the Government is not relieved of its responsibility to investigate and determine if an excusable delay has occurred.

*d. ACO Authority.* Pursuant to the Certificate of Appointment (SF 1402), and as designated by individual contract, the ACO's authority for granting allowable time extensions under the *Default Clause* is confined only to unusually severe weather.

*e. Objectives.* The objective of this required procedure permits Field Operating Agencies (FOA), i.e., Divisions and Districts and their elements, to accomplish the following:

(1) Establish procedures for monitoring actual weather conditions, which will provide for timely evaluation of potential delays for unusually severe weather. Such procedures will use contract data that defines the monthly-anticipated adverse weather for the contract period, based upon National Oceanic and Atmospheric Administration (NOAA), or similar data for the geographic location of the project.

(2) Insure that the contractor's daily CQC reports and Corps of Engineers daily QA reports list the weather conditions that day and describes activities affected by the weather.

(3) Evaluate the time entitlement monthly and modify the contract quarterly for any applicable unusually severe weather.

(4) Specifically relate weather to critical and non-critical activities to determine overall delay in contract period and other individual construction activities.

(5) Complete evaluation and determination within a maximum of 30 days after the end of any month.

(6) When it is determined that the contractor is entitled to a time extension, the Resident Engineer will coordinate with the PCO, PMCD, and CH. The ACO may change the final completion date of the FFP phases of the contract only with the prior concurrence of the PCO and PMCD.

(7) After CD-CA receives and concurs with the recommendation, the Resident Engineer will advise the contractor of the determination and request his concurrence or rebuttal within 10 days.

(8) Direct the contractor to revise progress schedules to reflect the agreed upon adjustment.

*f. Special Clause (Work Days).* ER 415-1-15 was revised in October 1989. The revised special clause for unusually severe weather now reflects monthly anticipated adverse weather delay based on work days. It encompasses the average number of work days lost in each month due to the effects of various weather parameters (e.g., greater than .10" precipitation, less than 32 degree F, 40 degree F, and/or 50 degree F, days of measured snowfall, and days of high wind) on the contractor's critical activities. The activities involved and applicable parameters are based on a preliminary project schedule developed before solicitation.

*g. Monthly Evaluation.* ER 415-1-15 requires monthly evaluation and notification of the contractor's entitlement to time extensions for weather. The regulation also requires quarterly adjustment in the contract date, as appropriate, by issuing a modification. The appropriate contract clause and a definite period the contractor was delayed by "unusually severe weather" must be cited. Do not postpone the investigation, evaluation, and extension of time for unusually severe weather until the contractor requests and justifies it, or until the end of the job. In this manner, both parties know the contract requirements, and the schedule can be updated, thus it remains useful for work management and impact analysis as the work progresses. It is equally important to notify the contractor of negative determinations on a monthly basis so that the Government's intentions are clearly understood.

*h. Terminology.* The following definitions are relevant to weather:

(1) Adverse Weather: Atmospheric conditions at a definite time and place that are unfavorable to construction activities.

(2) Unusually Severe Weather: Weather that is more severe than the adverse weather anticipated for the season or location involved.

(3) Weather Impact: Work delay resulting from adverse weather.

*i. Methodology.* Use administrative procedures for adverse weather data based on five-day workweek. These procedures will be used for determining monthly-anticipated weather delays using the different aspects of weather and concurrence consideration for work days.

*j. Weather Delay Schedule.* Under ER 415-1-15, data for the revised special clause relative to time extensions for unusually severe weather, is based on a five-day workweek. The anticipated normal weather delay schedule was developed, by month, for each geographic location using National Oceanic and Atmospheric Administration data and other sources, analyzed for concurrence.

*k. Development of Weather Days for Revised Special Clause(Work Days).*

(1) Weather Parameters. The raw weather data from NOAA specific stations, necessary for technical personnel to implement ER 415-1-15, has been processed by a computer program entitled, "The Weather Averaging System." The printout provides the monthly average occurrence of unusually severe weather for each station. The data for each month separates the weather parameters into the following categories:

- Precipitation greater than .10 inches.
- Average daily temperature less than 32 degrees.
- Average daily temperature less than 40 degrees.
- Average daily temperature less than 50 degrees.
- Measured snowfall.
- High winds.

The computer program can be altered to provide other parameters, if necessary.

(2) Application of Adverse Weather Data to Estimated Contract Performance Time. In accordance with detailed instructions in ER 415-1-15, CD-CA computes the estimated total contract performance time for each proposed project. This time will also include the total time for adverse weather for the construction duration. CD-CA will coordinate the results with PM.

*l. Analysis of Actual Adverse Weather During Construction.*

(1) Collect and record actual weather data on a work day basis. Maintain monthly summaries, using the Adverse Weather Data sheets, to indicate actual adverse weather conditions and the impact on work activities. The scheduling of work by the contractor on a Saturday, Sunday, or holiday (normally a non-work day) will be stated in the contractor's daily report; otherwise, it will not be acceptable as a scheduled workday. The Resident Engineer will also verify these reports.

(2) Each month, compare the number of actual adverse delay days to that given in the special clause schedule. If the number of actual delay days is greater than that in the contract, the contractor has experienced unusually severe weather. However, this determination does not automatically mean that the contractor receives a time extension for the difference of days between the anticipated and actual adverse weather delay days. The adverse weather must cause a delay in the work activities critical to contract completion.

(3) Convert the actual adverse delay days above those shown in the contract schedule into calendar days, e.g., if the contractor is working a five-day work week and lost six scheduled working days during January, the conversion to calendar days is  $6(7/5)=8$  calendar days due for January. Round fractions to whole numbers.

(4) Once the original contract completion data has passed, the contractor is entitled to a day-for-day delay (suitable working days) when critical weather sensitive scheduled work is affected by adverse weather conditions, unless time extensions granted already considered normal weather delays. Where applicable, workdays must be converted to calendar days. The key is determining the contractor's *normal* scheduled workdays. This is a judgmental decision to be made by the ACO. If the contractor is on or ahead of schedule, his or her normal scheduled workdays would or could probably continue. If (s)he is behind schedule, a prudent contractor would or should schedule every day as a work day. The conversion for workday delay into calendar days is:

$$\text{days delayed} \quad \times \quad \frac{\text{days per month}}{\text{scheduled workdays}} \quad = \quad \text{calendar days}$$

If questions arise regarding this issue, contact CD-CA.

*m.* Inform the contractor, monthly, of any time entitlement due because of adverse weather. The contractors will concur by his signature on the Adverse Weather Data Sheet. Also inform him or her of any negative determinations and request his or her rebuttal within 10 days. In addition, notify the contractor to revise his or her progress schedule to show any applicable weather time extension.

*n. SF 30 and MOF.* Pursuant to the contract clause, *Default (Fixed-Price Construction)* and upon prior concurrence from the PCO, the ACO will prepare and execute modifications on a quarterly basis. The SF 30 will also cover any previous quarterly periods during which no contract time extensions were applicable. This procedure ensures that all delays resulting from adverse weather have been considered.

A Memorandum of Fact, signed by the ACO, will support the modification. Attach the original adverse weather data sheets to the MOF. Upon acceptance by the contractor, file and distribute the modification in accordance with the records' management plan. If the contractor refuses to sign the modification, forward all documents to the CD-CA, with the Resident Engineer's recommendation.

**7.15.5 Exhibits.** Exhibit 7-15\*1, Format for Adverse Weather Data (CEHND Form 967) is provided as reference and exhibit 7-15\*2 is an example of a Memorandum of Facts covering time extensions.

**7.15.6 Variations in Estimated Quantity of Unit Price Items (Adjustment to Unit Price).**

*a. General.* The contract clause, "Variations in Estimate Quantity (April 1984)(VEQ)," applies only to unit-priced bid items. Use the clause in circumstances when the exact quantity of work to be performed under a bid item cannot be precisely determined. Items such as paving, riprap, crushed stone, and excavations are examples of the types of work which may use the clause.

b. The *Variations Clause* is one of the least understood and most misused clauses. It is also the most controversial clause. The proper determination of equitable adjustments for overruns under the clause has been the subject of major law suits in recent years and has left estimators divided on the proper way to perform variations' estimates.

c. As the result of a November 1993 Court of Appeals Decision (Foley Company versus United States, 26 cl. Ct 936 1992), the latest guidance for evaluating overruns reverts to what is known as the Victory Principle. Guidance as a result of what is known as the Bean Dredging Case (ENGBCA, June 1989), is no longer valid for contracts containing the April 1984 version of the VEQ clause.

d. Theoretically, a unit price should contain:

(1) Direct cost for material, supplies, labor, and equipment to perform one unit of work.

(2) A proportionate share of one-time indirect costs (e.g., mobilization, layout).

(3) A share of variable indirect costs (e.g., field office supplies, quantity surveys, etc.).

(4) A share of fixed, indirect field overhead costs (supervision, quality control, rent, etc.) which are time-related, not directly proportional to the volume of work.

(5) Proportionate shares of home office overhead, profit and bond.

Note: Indirect costs should theoretically be proportionately spread over all bid items they are associated with, not unbalanced or loaded into one or more items.

e. The Government is required to evaluate all bids or proposals by price or cost analysis to assure that there is no significant unbalancing of bid items. The result of this is that when the contract is signed, both parties legally agree that each unit price is fair and reasonable for the contracted scope of work.

f. The VEQ clause, in essence, states that the unit prices are good, *absent a change to the work*, even if the actual quantity varies within 15 percent above or below the estimated quantity. For actual work quantities outside the 15 percent band, the unit price is still binding, unless the contractor's unit cost to perform the work outside the 15 percent band is more or less than the unit cost to perform the amount of work within the 15 percent band. Unit prices for work performed within the 15 percent is never adjusted under the VEQ clause.

g. *Time extensions.* The VEQ clause also allows a time extension if the variation from 100 percent of the estimated quantity causes additional time to the critical path. The 15 percent plus or minus band does not apply to determination of time extension.

h. *Overruns.*

(1) The Victory Principle addresses adjustments in the overrun quantity exceeding 115 percent of the estimated quantity. You analyze and compare the contractor's unit cost to perform the first 115 percent. If there is a difference, more or less, you adjust the contract unit price for the overrun beyond the 115 percent by the unit cost difference. Under the Victory Principle, you do not completely re-price the overrun based on actual unit cost. The contractor retains windfall profits or bears his or her unit losses, if the original bid unit price is not realistic for the work. This is why it is so important to accurately estimate contract quantities and to analyze unit prices for errors or unbalancing prior to award.

(2) Either party can demand an adjustment. The demanding party has the burden of proof that there is a change in the unit cost for the overrun. Government personnel need to be aware of progress versus estimated quantities. When the contractor reaches the 115 percent point, you need to analyze his or her or her operations for possible changes in unit cost.

(3) Generally, one-time costs, such as mobilization and demobilization, are recovered at 100 percent of the estimated quantity. If the overrun does not cause a time extension, fixed (time related) indirect costs, such as equipment rental, field office rent, telephones, supervision, quality control, etc., are also recovered. Another savings could be in quantity discounts for materials. Thus, the contractor's unit cost for the overrun should be less than the unit cost for the first 115 percent, and the ACO should demand a credit for the unit costs saved, if, in the ACO's judgment, they are significant.

(4) Conversely, the overrun could cost the contractor more per unit than the first 115 percent. If it does, you should anticipate a demand for adjustment and reserve sufficient funds to cover the adjustment.

*i. Under-runs.*

(1) The under-run philosophy, under the current clause, allows the contractor to recover 85 percent of his or her fixed unit costs and one time cost (mobilization, demobilization, etc.), *not to exceed what (s)he would have recovered had (s)he performed 85 percent of the estimated quantity.* **Do not re-price the under-run work on actual cost.**

(2) Estimated under-runs.

(a) Under-run estimates can be somewhat more difficult to perform because under-run estimates are basically forensic estimates. The estimator has to reverse his or her estimate to see what cost is unrecovered due to the under-run. As indicated above, a theoretical unit price should contain both direct and indirect costs. The direct cost is of no concern in an under-run situation because no work is performed, none is paid for, and none should be paid for. The problem with under-runs is in the area of under-recovered indirect cost. As we covered in the section on indirects, there are several types of indirect costs: Those that are nonrecurring are one-time costs and those which vary either directly or indirectly with the amount of work placed are the variable indirects. There are also costs, which vary with time, but not necessarily with volume, such as supervision, field office rent, quality control, etc.

(b) Since the variable indirect costs vary with the amount of work performed, they are of no concern in an under-run estimate because, like direct costs, none are incurred.

(c) The one-time costs, which are allocated to the unit price, are the problem. The unit price should contain a proportionate share of the indirects necessary to do 100 percent of the bid item quantity. When the bid item quantity has been fully performed, the contractor will then fully recover the one time cost necessary to do the item. However, if there is an under-run, that cost will not be fully recovered. The contractor takes the risk of not recovering 15 percent of that cost for the under-run portion between 85 percent and 100 percent, and the Government agrees to an adjustment for the portion, which exceeds 15 percent. The question the estimator must answer is, How much of the bid item price is for one-time indirects? This is where the reverse estimating comes in. It is relatively easy to determine the direct cost for material, labor, etc., for a unit cost. To this direct cost are applied a reasonable amount home office overhead, profit and bond, and the resulting number is subtracted from the unit price. If there is nothing left, the estimator knows that the bid item was unbalanced to the low side and that no one-time indirects were allocated to the bid item, thus, no contract price adjustment is due. If there is a large amount left, the estimator knows that the bid item was unbalanced to the high side and great care must be exercised in trying to sort out which dollars are one-time and fixed indirects and which are the unbalanced dollars.

(d) Most indirects are variable or semi-variable; only a very few are fixed and one-time. Therefore, of the bid item amount left after the marked-up directs are subtracted, only a small portion should be fixed and one-time indirect dollars. However, the exact amount can only be estimated since no formula exists to make a precise determination. Items to consider are any one-time indirects specifically associated with the bid item. For instance, if the contract contains only one bid item for asphalt paving, it is safe to assume that mobilization and demobilization costs of the paving machine and pavement rollers are included in the bid item. Similarly, if a rip-rap item includes the cost slope preparation, this cost, while a direct cost to the job, becomes an indirect cost to the bid item and the unrecovered portion up to 85 percent should be included in the adjustment.

(e) Some contractors will ask to recover the profit which had been assigned to the under-run quantity saying that they bid the job to make a certain amount of profit. Paying profit on work not performed is generally disallowed, as backed up by case law.

*j.* The ACO can establish a separate bid item for overruns beyond 15 percent. The ACO can also pay for the overrun in the original bid item and add a bid item for the incremental adjustment for the overrun exceeding 15 percent. For under-runs, the normal practice is to add a new bid item for a lump sum adjustment for 85 percent of the unrecovered one-time and fixed costs. Do not re-price the work within 15 percent of estimated quantities.

#### ***7-15.7 Quantity Adjustment for Overruns and Under-runs from Estimated Quantities.***

*a.* Overruns/under-runs are differences between actual quantities and bid items estimated quantities for the contractually required scope of work. Work added or deleted by a change request or differing site condition is not an overrun or under-run. Do not include an increase or decrease as an overrun or under-run for payment on a unit-priced item when it is the result of a change request. Payment for a change request can only be made after execution of the appropriate contract modification and then included for payment on ENG Form 93.

- b. When there are differences in quantities on unit-priced items, the resulting monetary increase or decrease must be reflected in the finance accounts.
- c. At the time a net overrun is anticipated, prepare and execute a commitment document to properly record and commit or reserve such increases. Resource Management (RM ) will pay the actual quantities from the ENG Form 93 and the Overrun/Under-run Statement, as long as the total contract amount is not exceeded by the total earnings, and sufficient funds have been committed. The amount committed for a contract overrun can be increased or decreased, based on the anticipated maximum liability, using the commitment document.
- d. When total earnings exceed the total contract amount, because of net overruns, you must prepare an administrative modification to adjust the bid item quantities and increase the contract amount. You cannot pay a contractor more than the obligated contract amount. Base the administrative modification on the best estimate of anticipated actual quantities, if funds allow, or the actual amount exceeded.
- e. Once the administrative modification adjusts the quantities, only use an Overrun/Under-run Statement with the payment estimate to vary from those adjusted quantities.
- f. Before final payment, a closeout modification is necessary where there are still overruns, under-runs, and/or unit price adjustments due to variation in estimated quantity (outside the 15 percent band). The total contract amount must equal the actual placement.
- g. For the closeout modification, if all unit-priced quantities actually placed are within 15 percent of the original estimated quantities, as modified by changes, the field will prepare a unilateral closeout administrative modification. It should state that the modification provides for adjustment of unit-priced bid items to reflect actual quantities performed.
- h. When any of the final quantities are less than 85 percent or more than 115 percent of the original estimated quantities, as modified by changes, determine any unit price adjustments necessary, settle with the contractor, and reflect this agreement in a bilateral modification written under the *Variations in Estimated Quantities Clause* (in case this has not already been done). Prepare the modification for either the signature of the ACO or the CO, depending on the amount. If there is no re-negotiation of quantities, the modification will state that the parties have agreed. There is no unit price adjustment for actual quantities less than 85 percent or more than 115 percent of the estimated quantities. Include quantity adjustments to items within 15 percent in the same modification.

<b>ADVERSE WEATHER DATA</b>				DATE _____
CONTRACT NUMBER: _____		LOCATION: _____		
DESCRIPTION:				
MO/DA/YR	SCHED WK YES/NO	ACTUAL DELAY	TYPE ADVERSE WEATHER	WEATHER SENSITIVE WORK AND/OR REMARKS
/1/				
/2/				
/3/				
/4/				
/5/				
/6/				
/7/				
/8/				
/9/				
/10/				
/11/				
/12/				
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/30/				
/31/				
ANTICIPATED DELAY _____ ACTUAL DELAY AFTER ANTICIPATED DELAY _____ CONV. CALENDAR DAYS _____				
<div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div style="width: 45%; border-top: 1px solid black; text-align: center;">(CONTRACTOR SIGNATURE)</div> <div style="width: 45%; border-top: 1px solid black; text-align: center;">(GOVERNMENT SIGNATURE)</div> </div>				

CEHND FORM 967  
1 NOV 94

Exhibit 7-15\*1. Adverse Weather Data Sheet Example

**DEPARTMENT OF THE ARMY  
MEMORANDUM OF FACTS  
IN SUPPORT OF A MODIFICATION**

On 12 September 1993, the United States of American entered into Contract DACA01-86-C-0149 with Dicey Mechanical Contractors, Inc., Kingsport, Tennessee, for Construction of Lacquer Preparation Facility, at Holston AAP, Tennessee.

Daily quality control data was analyzed for the period 24 October 1993 through 31 January 1994 to determine the contractor's entitlement to a time extension for other than normal weather. Monthly evaluations of the Adverse Weather Data Sheets reveal an actual delay attributable to adverse weather after the anticipated calendar-day delay. A summary of the enclosed data stipulating the applicable time extension converted to calendar days is as follows:

Month	Scheduled Work Days	Unanticipated Delay	Conversion (x) Factor	Time Extension (=) Calendar Days
24 Oct 93	6	2	8/06	3
24 Nov 93	18	3	30/18	5
24 Dec 93	18	7	31/18	12
31 Jan 94	31	8	31/31	<u>8</u>
TOTAL				28 days

A review of daily records verified that adverse weather conditions during the described period delayed the contractor's progress by hampering his ability to perform critical items of work, i.e., clearing and grubbing, mechanical and electrical rough-in, and forming and concrete foundation placement. The contractor will concur with the 28 calendar-day delay by signing the data sheets.

Based on the recorded facts, the Contracting Officer determines that the contractor was delayed in performing the contract for reasons beyond his control and without his fault or negligence. Therefore, a modification will be issued in accordance with the Default Clause (Fixed-Price Construction), to provide for 28-calendar days extension of contract time and to revise the completion date from 2 January 1994 to 29 January 1994.

1 Encl  
Adverse Weather Data Sheets

Seymour Weathersby  
Administrative Contracting Officer

Exhibit 7-15\*2. Memorandum of Facts in Support of a Modification