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Law

An RFI can Satisfy Notice Requirement, said the Feds

Executive Summary: Possibly the leading cause of contractor claim denials – lack of proper notice – just got a little bit easier for contractors thanks to the U.S. Armed Services Board of Contract Appeals' conclusion that a request for information (RFI) can satisfy a notice requirement under F.A.R.

Here we go again. In the next section you'll hear about the case, but below is my Monday morning quarterback assessment of the sequence of events on the job leading to this great decision for contractors:

1. The specifications to build from were incomplete, weak at best.
2. The contractor requested clarity through RFIs.
3. The owner buried their head thinking avoidance was the best means of risk mitigation.
4. The contractor suffered time and cost impact and filed a claim.

And there you have it, the beginning of yet another construction dispute.

The case. Thank you to Construction Claims Monthly's May 2018 issue where on pages 37 and 38 we learn about the appeal of UNIT Company (UNIT), 2018 ASBCA No. 60581 Lexis 51 (February 12, 2018).

UNIT, the general contractor and Klebs Mechanical (Klebs) their mechanical subcontractor, both agreed early on that the HVAC design was insufficient – so much so that they submitted 20 RFIs citing lack of "design/engineering specificity".

The government argued that UNIT's claim was barred because of the contract inclusion of the applicable F.A.R. requiring submission of discrepancies to the Contracting Officer [CO] for prompt determination. And, of course, UNIT didn't appear to do that, via letter – they just submitted RFI after RFI after RFI.

The Board disagreed with the government when the government argued that the RFI process was meant to be a communication mechanism versus a notification one. The Board then stated that precedent demonstrated that the government shouldn't get hung up on the format of notice and cited some cases to support that.

Ok, this just keeps getting better.

The government then claimed that UNIT's first notification of this impact, via REA (Request for Equitable Adjustment), didn't give the government the proper chance to respond and chose the best manner in which to proceed. The Board shut that down too and said that the government would not have directed in a manner different to the Contractor's action.

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The bottom line. In the opinion of the editor for this May 2018 issue of Construction Claims Monthly this decision "appears to be the first one that holds that an RFI can satisfy a notice requirement under the F.A.R. The Board held: 'we see no reason why an RFI would be inappropriate for such communication' to notify the government of a discrepancy in the plans and specifications." The editor concludes with a quote from the Board in which the Board advises that form should not take precedence over substance in regards to evaluation of a contractor's notice.

My story. I don't have one! I don't have a story where my contractually atypical and deemed insufficient, yet perfectly logical, notice, qualified as acceptable and contractually compliant. All good project managers have been trained to write letter after letter quoting the Contract and applicable paragraph(s) to check boxes in the notification sequence. And we had beaten into our minds that if you didn't write these letters, you may invalidate the entire claim. Now I know that a request for information can be deemed proper notice. We have precedent!

This is a decision which could significantly affect the industry. Please pass it on.

Bonus tip! If you enjoyed this article, and if you do not subscribe to Construction Claims Monthly, it's a great publication which has been around for year. Check it out here: [QR].

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