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Notice Requirements Under Government Construction Contracts

In this Article, the author analyzes the notice requirements under government construction contracts in regard to discrepancies, changes, changed conditions, time extensions, and appeals from contracting officers' decisions. He concludes that although some of these requirements have been "watered down" considerably, a contractor's diligent compliance with the specified requirements not only best protects his contract rights but also does not prove unduly burdensome.

John J. Buford*

PROBABLY the most frequently quoted statement of the Supreme Court of the United States concerning the loss of a claimant's substantive rights for failure to observe a procedural requirement imposed by the federal government is: "Men must turn square corners when they deal with the Government."¹ However, in the field of government contracts, certainly most observers would agree that since Mr. Justice Holmes penned these words, the corners have been worn a little smooth, if not substantially rounded.

Of course the hard core of case law in government contracts is comprised of the decisions of the Supreme Court and the Court of Claims, but the handling of the great majority of contract disputes is done by the various government contract appeals boards created by administrative agencies. Unique practical problems make it especially difficult to predict the disposition of a particular case before an appeals board. In matters of procedure, as well as in cases involving substantive problems, the practitioner in this field must recognize that the doctrine of stare decisis is not so firmly rooted as in the court systems. This becomes more easily understandable when

* Attorney, United States Army Corps of Engineers. The views expressed herein are those of the author and do not necessarily represent those of either the Corps of Engineers, the Department of the Army, or the Defense Department.

1. *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

one realizes that contract disputes arising under similar documents are being resolved daily by at least seven major contract appeals boards,² none of which is bound by the precedents established by the others.

Furthermore, both between agencies and within the same board, there are voids created by the lack of a truly comprehensive case reporting and digest system at the appeals board level. Some boards do not publicly disseminate their decisions. Even at the court level, the rapid expansion of this field of law has out-stripped the existing digest and encyclopedia systems. Overhaul of the present systems, including a substantial enlargement of the categorization, would be of immeasurable service not only to the lawyer in private practice and to his clients, but also to the various boards and government lawyers advising contracting officers; such an overhaul is warranted by the expanded activity in this important field of law.

Although government contractors who are confronted with the consequence of a failure to observe some procedural requirement often complain that the government has taken unfair advantage of them, procedural compliance with government contracts is actually less burdensome and complicated than is often the case when one deals with the government in other matters. In contrast to the copious volumes of published regulations of some bureaus and agencies, the source of practically all procedural demands on a government contractor is the contract document itself. Furthermore, the obligations are not subject to change during performance of the contract, having been established by agreement of the parties at the time of contracting. And since these requirements are substantially logical and are based upon the practical necessities of the situation, they provide a framework for an orderly disposition of the parties' obligations and rights during the contract period. One should not overlook that the contract imposes procedural requirements on the government as well as on the contractor and that even when the burden is on the contractor, he often benefits from his compliance. This is particularly true of the various requirements for notice.

Basically, a contractor protects his substantive rights under a government contract by giving notice. Although the relatively few notice requirements are simply stated in the Construction Contract, Standard Form 23A,³ many contractors are lax in complying with

2. The seven major contract appeals boards are as follows: The Armed Services Board of Contract Appeals (with Army, Navy and Air Force panels); the contract appeals boards of the Department of the Interior, the General Services Administration, the United States Army Corps of Engineers, the Veterans Administration, the Atomic Energy Commission; and the recently created board of the Post Office Department.

3. Contractors should be cautioned that the particular bureau or agency will

them. A contractor's failure to give timely notice may result in his loss of a right which otherwise would have been preserved and almost certainly will make the contracting officer or the appeals board unsympathetic, or even antagonistic, toward him. This Article analyzes the notice requirements in regard to contract discrepancies, contract changes, changed conditions, time extensions, and appeals from contracting officers' decisions.

I. DISCREPANCIES

If the contractor should detect a discrepancy in the figures or the wording of the drawings or specifications, he is required to submit the matter *promptly* to the contracting officer for a determination of how the work shall be performed. Should he proceed to make his own adjustment without first having secured the contracting officer's written determination, his action will have been at his own risk and expense.⁴ The requirement is not that the contractor discover discrepancies but only that if he has knowledge of one, he must notify the contracting officer. In the case of conflicting provisions particularly, contractors will often proceed with the work without first securing a determination by the contracting officer as to which of the conflicting provisions should be followed. Later, the contractor might contend that the construction actually performed was in excess of the contract requirements (which often may be legally correct, consistent with the rule that when conflicting and ambiguous provisions cannot be otherwise resolved, the construction most favorable to the party not the author of the document will be chosen⁵). However, there are many situations where the contractor must necessarily admit that he knew of the discrepancy but that he failed to tell the contracting officer promptly. In such cases, he becomes automatically bound by the method which he followed, and where this proves more expensive than performing the work in accordance with the other possible choices, his failure to give the required notice of discrepancy would result in his incurring a substantial loss. This notice provision is substantially fair, because it requires the contractor to inform the contracting officer only of known discrepancies. If the contractor were permitted to proceed without giving notice, his action could prevent the government from selecting the best or the least expensive method of construction. The contract provision does not require the notice to be written, but it requires the contracting officer to make a determination in writing

probably impose additional requirements for notice in the general or special conditions or technical provisions of the contract.

4. Construction Contract, Standard Form 23A, cl. 2, "Specifications and Drawings."

5. See, e.g., *Garrison v. United States*, 74 U.S. (7 Wall.) 688 (1868).

after he has received the notice. A prudent contractor would, of course, notify the contracting officer in writing to avoid any later misunderstanding as to the fact and time of the notice.

II. CHANGES

By written order the contracting officer may, within the general scope of the contract, make changes both in the drawings and specifications. However, if the changes so require, he must make an equitable adjustment in the contract price or time. "Any claim of the contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt . . . of the notification of change."⁶

This requirement for a claim within thirty days, while seemingly a simple demand, has been the basis for many disputes. The situation where a contracting officer, fully recognizing that his action constitutes a change, directs the contractor to perform the work in an altered manner, seldom gives rise to notice problems. Even where the contracting officer's determination of what constitutes an equitable adjustment is not acceptable to the contractor, there are few problems, since the contractor ordinarily records his protest promptly.

If, however, the contracting officer does not recognize the order as a change—such as, for example, an order necessitated by a disagreement between the parties concerning the interpretation of a specification requirement—or if he makes only an oral order, problems often arise. The last sentence of clause 3 of the Construction Contract, Standard Form 23A, provides as follows: "Except as otherwise herein provided, no charge for any additional work or material will be allowed." Thus, with the exception of the "Changed Conditions" clause and a few other provisions which have an even more limited and specific application, claims for additional payment under the contract must be based on clause 3, "Changes."

In the case of an oral order by the contracting officer or his representative, the ensuing rights of the parties are not entirely clear. Clause 3 permits changes only "by a written order." In practice, however, oral orders sometimes are issued, and are acted upon by contractors. More often than not, these arise out of conflicts of opinion as to the contract requirements for a particular aspect of the work, but this situation does not constitute all the cases.

The Army Corps of Engineers Board of Contract Appeals has squarely held that where the contracting officer denies that a change

6. Construction Contract, Standard Form 23A, cl. 3, "Changes."

was ordered, he cannot rely on the contractor's failure to present a claim or a protest within the thirty-day period to deny a subsequent claim by the contractor.⁷ The Armed Services Board of Contract Appeals seems to be in accord with this position.⁸ Both boards apply the rule not only where the contracting officer denies that any order, oral or written, was issued⁹ but also where a written document is issued which the contracting officer contends was less than a modification of the contract, such as, for example, where the contracting officer's decision on a disputed interpretation of a specification is reduced to writing.¹⁰

The reasoning of the Army Corps of Engineers Contract Appeals Board is based upon the wording of the clause that "any claim . . . for adjustment must be asserted in writing within 30 days . . .," which it interprets to mean that the contractor must protest the *adjustment* contained in (or omitted from) the written order. Therefore, if the government denies that there was an order in writing, it cannot rely upon the contractor's failure to protest within thirty days. Literally taken, the above cases apparently eliminate the need for filing a claim or protest within thirty days, except where the contractor is dissatisfied with the equitable adjustment (or omission of the same) proposed in a recognized change order.

Temporarily excluding consideration of the effect of the thirty-day rule, whether a contractor can collect for performance of an oral change order is itself a questionable proposition of government-contract law. The Supreme Court of the United States, in the *Plumley* case, denied the contractor recovery, stating: "[Y]et Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract."¹¹ Although it is outside the scope of this Article to analyze in detail the decisions involving oral orders, one can observe at least that the Court of

7. Fuel Economy Eng'r Co., Corps of Engineers Board of Contract Appeals No. 1511 (1959) [hereinafter referred to as Eng. BCA]; Conn Structures, Eng. BCA No. 590 (1954).

8. Todd Shipyards Corp., Armed Services BCA Nos. 2911, 2912 [hereinafter referred to as ASBCA], 6 Contract Cases Federal 62, 126 (1957) [hereinafter referred to as C.C.F.]. *But cf.* Shepherd, War Dep't BCA No. 857, 4 C.C.F. 60, 116 (1946) (references in report are to "alleged changes," implying that the government denied that changes were actually ordered).

9. See Fuel Economy Eng'r Co., Eng. BCA No. 1511 (1959); Conn Structures, Eng. BCA No. 590 (1954).

10. Conn Structures, Eng. BCA Nos. 911, 912 (Serial No. 1) (1958). *But see* Hagstrom Constr. Co., Eng. BCA No. 1213 (1957), a decision of the same board sustaining the right of the contracting officer to reject a claim because of failure to assert a claim within thirty days, in a case where actions by the government upon which the claim was based were not considered to be changes by the government at the time.

11. *Plumley v. United States*, 226 U.S. 545, 547 (1913).

Claims has sometimes allowed¹² and sometimes denied¹³ contractors' claims predicated on oral orders. Considering the various court and board decisions, contractors have probably prevailed more often than the government when the issue has been litigated; however, it is by no means a universally accepted proposition that a contractor should be allowed to recover on an oral order where there is a specific requirement for an order in writing.¹⁴ In any event, the Court of Claims has consistently emphasized the contractor's obligation to present a timely protest. For instance in *J. A. Ross & Co. v. United States*, the court said:

But even if defendant had given plaintiff a direct command to place this material on this soggy ground, and even if this was in violation of the contract, there is no proof that plaintiff registered any protest against doing so. In the absence of a protest, we do not think plaintiff is entitled to recover. Whenever the defendant orders work done which the plaintiff thinks is in violation of the contract, or in addition to its requirements, plaintiff is required to protest against doing it, or to secure an order in writing before doing it. It is basic in all Government contracts that the plaintiff cannot do work which it is not required to do by the contract, without registering a protest against being required to do it, or securing an order for extra work, and then later make a claim against the Government for additional compensation.¹⁵

The "Changes" clause permits a contracting officer to receive, consider, and adjust a claim presented more than thirty days after the notification of change, "if he determines that the facts justify such action." The Court of Claims has held that a contracting officer's denial of a claim on its merits constitutes a waiver of his right to later assert that the claim was not timely.¹⁶ But the War Department Board of Contract Appeals held that a contracting officer's discretion in determining whether he should receive and consider a claim presented more than thirty days after receipt of notification of change is limited to those cases where it is shown that his ability to investigate and decide upon the claim has been prejudiced by the contractor's failure to file a timely claim.¹⁷

This principle has been justified on the basis that an appeals board, as representative of the head of the department, is the administrative superior of the contracting officer (as well as the arbiter of contract disputes), and can substitute its own judgment for that

12. *Stiers v. United States*, 121 Ct. Cl. 157 (1951); *Griffiths v. United States*, 77 Ct. Cl. 542 (1933).

13. *Globe Indem. Co. v. United States*, 102 Ct. Cl. 21 (1944); *Diamond v. United States*, 98 Ct. Cl. 428 (1943); *McGlone v. United States*, 96 Ct. Cl. 507 (1942); *Hardwick v. United States*, 95 Ct. Cl. 336 (1940).

14. See *United States v. Cunningham*, 125 F.2d 28 (D.C. Cir. 1941).

15. 126 Ct. Cl. 323, 329 (1953).

16. *Arundel Corp. v. United States*, 96 Ct. Cl. 77 (1942).

17. *Sanders*, War Dep't BCA No. 955, 3 C.C.F. 862 & 923 (1945).

of the contracting officer in determining whether the facts justified the contracting officer's waiving the requirement for timely notice. However, the provision does not mention a showing of prejudice and indicates that the waiver is discretionary with the contracting officer. In construing other contract provisions, appeals boards have held that they cannot review the discretionary act of a contracting officer.¹⁸ Despite the erosive effect of the various decisions on the contracting officer's right to refuse to consider a claim where timely notice has not been given, a prudent contractor will nevertheless present his claim within the thirty-day period, for the Court of Claims and appeals boards have, on occasion, fully supported contracting officers who have refused to consider claims asserted after expiration of the specified period.¹⁹

Most government construction contracts are complex documents, and questions frequently arise during the course of performance about the quality or type of work required by a particular specification. A government inspector may order the contractor to stop, on the ground that he is not proceeding with the work according to the specifications, and may require him to adopt a procedure or use a material in accordance with the inspector's interpretation of the contract requirements. This, if the *contractor* is correct in his understanding of the requirements, would constitute a change. Therefore, if he disagrees with the inspector, at this point the contractor should request a determination in writing by the contracting officer or his representative having authority to issue changes of the type indicated.²⁰ The contracting officer's letter setting forth his interpretation and directing the contractor to proceed in accordance with that interpretation would constitute the "order in writing" mentioned in the "Changes" clause, and the contractor would then be in a position to file a claim within thirty days. This procedure is consistent with the provision of the "Changes" clause that no charge for any extra work or material will be allowed except as "otherwise herein provided."

A contractor is under no compulsion to comply with an oral change order. And contractors who refuse to proceed without the issuance of an order in writing will not normally incur the displeas-

18. *Homogenette, Inc.*, ASBCA No. 3856, 57-2 Board of Contract Appeals Decisions 1469 (1957) [hereinafter referred to as B.C.A.D.].

19. *J. A. Ross & Co. v. United States*, 126 Ct. Cl. 323 (1953); *W. C. Shepherd Co. v. United States*, 125 Ct. Cl. 724, 817 (1953). The circumstances of these cases do not lend themselves to the theory that the orders upon which the claims were predicated were recognized by the contracting officer as changes or extras at the time the orders were issued and, therefore, do not seem to support the position taken by some boards, (see, for example, the cases cited in notes 7-10 *supra*) that the contractor need not file a claim within thirty days if the government denies that a change was ordered in writing.

20. Inspectors usually have no authority to make changes.

ure of the contracting officer. To the contrary, they will facilitate the orderly administration of the contract, and protect their own substantive rights under the contract. Therefore, a contractor acts most wisely by refusing to proceed with work which he considers outside the requirements of the contract, until he receives an order in writing from the contracting officer or a representative having authority to issue such orders. Also, from a practical viewpoint, presentation of a timely claim or protest is advantageous to the contractor. Obviously, his problems in sustaining the burden of proof of his claim increase as time passes. Timely notice should also insure prompt handling of the claim. And in a dispute involving a contract interpretation, the contractor's course of conduct at the time the matter arose is usually considered relevant in determining the most reasonable construction of the contract. His failure to manifest disagreement with the government's interpretation at the time the problem arises is at least some evidence that the government's interpretation of the ambiguous or conflicting provision is correct.

III. CHANGED CONDITIONS

If the contractor encounters physical conditions which he considers to be within the purview of the "Changed Conditions" clause, he must give the contracting officer written notice "promptly and before such conditions are disturbed." The clause further provides that "any claim of the contractor for adjustment hereunder shall not be allowed unless he has given notice as above required. . . ." However, as under the "Changes" clause, the contracting officer may, if he determines the facts so justify, consider and adjust the claim even though the required notice is not given.²¹

Notice of changed conditions is both an important and a reasonable requirement. The contractor's notice may initiate courses of action only indirectly related to performance of the particular contract. For example, investigation of the conditions may indicate that continuance of the contract work is no longer feasible. Probably more often than not, the discovery of an actual changed condition leads to an extensive modification of the contract to contend with the unexpected conditions. In that case the adjustment of the contract price will not be made under the "Changed Conditions" clause but under the "Changes" clause, since the contractor will not have had to cope with the adverse conditions. In any event, notice of changed conditions provides the government an opportunity to promptly investigate the conditions and to offer advice aimed at mitigating the contractor's increased costs.

21. Construction Contract, Standard Form 23A, cl. 4, "Changed Conditions."

The requirement for notice is absolute, and failure of the contractor to give the notice would seem to bar him from recovery, unless the contracting officer, in his discretion, decided to receive and consider the claim. However, the present standard "Changed Conditions" clause, which has been in effect since 1953, has seldom been construed in regard to this issue. Older clauses did not require written notice; and they required the contracting officer to make an adjustment if the contractor encountered, or the government discovered, changed conditions.²² Some of the cases under the old clauses held that an oral notice was sufficient and that the contracting officer could not bar the contractor from recovery for failure to give notice, if his own representative at the site knew of the conditions, but of course these cases are of dubious application now. Obviously, the present wording of the "Changed Conditions" clause leaves substantially less in the way of opportunity for watering down of the notice requirement than does the "Changes" clause.

IV. TIME EXTENSIONS

If the contractor encounters delays due to circumstances which would entitle him to a time extension, he is required to notify the contracting officer in writing of the causes of delay within ten days from the beginning of the delay, "unless the contracting officer shall grant a further period of time."²³

Under certain circumstances, however, the appeals boards have held that a contractor is not precluded from being granted a time extension by his failure to give notice within the ten-day period. It is sometimes said that the contractor does not have to give notice if the delay is known by the government; however, this statement is much too broad. Actually, the better view is that failure to give notice will be excused if notice would have served no useful purpose.

In obligating himself under a government contract, a contractor deals with one agency of the government. Often, however, the agency administering the contract differs from the agency in charge of the installation where the contract work is performed. For example, the Army Corps of Engineers administers contracts for construction at United States Air Force installations. Therefore, a delay may be caused by some action of the Air Force which is not within the control or knowledge of the Corps of Engineers personnel. Although this is a situation which might well entitle the contractor to a time extension, it is also a case where notice of the delay would serve the

22. There is no provision as such in the newer clause for discovery by the government.

23. Construction Contract, Standard Form 23A, cl. 5, "Termination for Default—Damages for Delay—Time Extensions."

intended purposes of apprising the contracting officer of the delay and of giving him an opportunity to remove the cause. Similarly, the contractor may be delayed by the defense priorities and allocations system. Although this is a delay caused by the "government," and one which might entitle the contractor to a time extension, the scope and cause of the delay are usually unknown to the contracting officer, and the contractor is in the best position to evaluate the delay and enlist the contracting officer's aid in expediting deliveries of his materials.

Even when the delay is in the contracting officer's own bailiwick, notice of the delay often should be given. Where, for example, the contractor is delayed by failure of the government to approve shop drawings, he should notify the contracting officer, because the effect of failure to receive approved shop drawings is a matter usually within the peculiar knowledge of the contractor. Again, if the contracting officer knows that the particular approval is delaying the contractor, he is in a position to alleviate the delay by expediting the shop-drawing approval.

The decisions of the various boards may not always support the above conclusions, however, because there is a tendency to refrain from penalizing the contractor when the government is at least as culpable as the contractor. But from a practical viewpoint, the practice of giving notice, whenever delayed, for whatever cause, will not only insure preservation of the contractor's rights but also remove the source of many delays.²⁴

V. FORM AND SCOPE OF NOTICE

All of the notice provisions previously discussed are required to be given to the "contracting officer." Since the contracting officer may be hundreds of miles from the construction site, valid notice may generally be given to the government officer at the site who is in charge of the particular project. Some contracting officers have adopted the desirable practice of issuing a letter at the time of making the contract designating the person or persons who are authorized to receive notice. Probably the notice should be addressed to the contracting officer and routed through the project, resident, or area engineer. However, it is doubtful that any contractor would be held to have failed to give the required notice if he addressed and delivered it to the senior representative of the government at the site.

24. Often the contracting officer and the project engineer at the site are concerned with the simultaneous administration of many contracts. While there are some instances where the delaying effect of governmental action on a particular contract is readily observable, there are many occasions where government personnel have no way of knowing of the delay. In almost every case, only the contractor can accurately assess the projected adverse effect.

With the exception of the notice of discrepancies required under the "Specifications and Drawings" clause,²⁵ the notices discussed in this Article are required to be made in writing. And although there is no requirement for the use of certified or registered mail, obviously any argument pertaining to receipt or timeliness of notice would be foreclosed by use of the special-handling mails. There is no requirement for notice in any particular form. An ordinary business letter signed by the person in the contractor's organization who is supervising the work at the site is the generally accepted mode for giving notice.

The letter should, of course, describe the circumstances in sufficient detail to facilitate an intelligent investigation. If the notice involves a request for additional compensation, there is no requirement that the original notice specify the exact amount claimed, so long as the contractor states that he expects the contract price to be adjusted commensurate with the increased work. Claims are often carried through the entire dispute procedure to the final administrative board without the monetary amount ever having been affixed. This procedure often proves convenient to both parties, since computation of the exact amount owed to the contractor may be made with facility once it is determined that he is entitled to any adjustment at all.

Although appeals boards and courts have sometimes referred to the "Changes" clause as requiring either a claim or "protest," the clause, in fact, refers only to a claim. Therefore, it is advisable for a contractor to phrase his notice under that clause in terms which indicate not only that he protests the action of the contracting officer but also that he considers this to be a situation entitling him to additional compensation.

The "Changed Conditions" clause does not require the initial notice to be in the form of a claim. If the notice is given "promptly, and before such conditions are disturbed . . .," the basis for a claim will not yet have arisen. However, the notice should describe with particularity and in detail the location of the problem area. Moreover, it should fairly extensively compare the actual conditions with those which might reasonably have been anticipated from the contract documents. This information is necessary in order for the contracting officer to proceed with his obligation to investigate the conditions.

VI. NOTICE OF APPEAL

. No discussion of the requirements for notice under government

25. As previously mentioned in this Article, there was no mention of written notice in connection with changed conditions in the former clause.

contracts would be complete without mentioning the appeal required under the "Disputes" clause. However, since the disputes procedure has already been analyzed commendably in other legal journals,²⁶ it will not be discussed in detail here.

The "Disputes" clause provides that the contracting officer's decision shall become final and conclusive, unless "within 30 days from the date of receipt of the decision the contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary."²⁷ The contracting officer's decision, with regard to questions of fact, becomes binding in the absence of an appeal within the thirty-day period, and the contractor cannot obtain further consideration of his claim. Moreover, contrary to the situations discussed previously, the appeals boards and courts have allowed little deviation from the literal requirement that the appeal be filed within the thirty-day period.²⁸ Cases in which a contractor has prevailed despite an apparent failure to appeal within thirty days have usually been limited to situations where the board has held that the decision in question was not a "final" decision of the contracting officer, or that a letter or other document delivered during the period actually was an appeal although not purported to be one.

A line of decisions of the Armed Services Board of Contract Appeals establishes one interesting exception to the rule with regard to supply contracts. If a contractor's right to proceed with the contract is terminated for default, two final decisions are involved. The contracting officer first issues a notice of termination followed sometime later by an assessment of the excess costs arising out of the termination. The Board now holds that, despite the fact that the contractor did not appeal from the notice of termination, he still may contest the issue of whether his failure to perform was excusable, if he makes a timely appeal from the assessment of costs.²⁹ The Board had previously held that the contractor could

26. See, for example, Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 *FORDHAM L. REV.* 11 (1956).

27. Construction Contract, Standard Form 23A, cl. 6, "Disputes." Some variation of the standard clause by the several departments is permitted, and the wording should be checked. For example, Corps of Engineers contracts provide for an intermediate appeal to the Chief of Engineers in the case of military works contracts. In civil works contracts, the Chief of Engineers is the final administrative appellate authority.

28. *Allied Contractors, Inc.*, ASBCA No. 4873, 58-2 B.C.A.D. 2026 (1958).

29. *Peterson*, ASBCA No. 1633, 57-2 B.C.A.D. 1474 (1957); *Homogenette, Inc.*, ASBCA No. 3856, 57-2 B.C.A.D. 1469 (1957); *Fulford*, ASBCA Nos. 2143, 2144, 6 C.C.F. 61, 815 (1955). In *Virginia Dare Extract Co.*, ASBCA No. 4916 (1959), the Board indicated that a contractor who appeals only the decision regarding assessment of costs can subsequently raise the question of whether his failure to perform was excusable. However, he cannot challenge the conclusion that he failed to make a

question only the reasonableness of the assessment of costs if he failed to appeal the decision terminating his right to proceed. The change is apparently based upon a revision in the wording of the supply contract termination clause, and it is doubtful that the rule can be applied to construction contracts.

Although the rules of the Armed Services Board of Contract Appeals and of the Army Corps of Engineers Board of Contract Appeals prescribe forms for the submission of appeals, it appears clear that a contractor will preserve his rights insofar as the timeliness of the appeal is concerned by simply filing within the thirty-day period a clear statement expressing an unequivocal present intention to appeal.³⁰ However, the Department of Interior Board of Contract Appeals appears to be less lenient in this respect.³¹

SUMMARY

The desirability of giving adequate notice pursuant to the terms of the government construction contract is apparent when one realizes that the primary reason for requiring notice is to inform the contracting officer that the contractor thinks he has encountered a situation which may entitle him to extra payment or additional time within which to accomplish the work. Since notice usually includes or precedes the contractor's request for additional money or a time extension, and since *he* is nearly always in the best position to discover the situation and assess its effect on his operations, it is reasonable to require him to give notice. Timely notice enables the contracting officer to make a prompt investigation which is necessary both to determine what course the construction work should follow and to evaluate the equitable adjustment, if any, which must be made in the contract price and time for performance.

timely delivery or that the supplies delivered failed to meet specifications, unless he appeals the decision terminating his contract.

30. New York Eng'r Co. ASBCA No. 289, 4 C.C.F. 60, 961 (1950).

31. Henkle & Co., Dep't of Interior BCA No. 212, 59-2 B.C.A.D. 2331 (1959).

