

Appeal of Jaynes Corp.

REJECTION OF CONFORMING SUBMITTALS = CHANGE TO THE CONTRACT

INTRODUCTION

It is common knowledge that when the government issues defective plans and specifications, its actions constitute a “Constructive Change” under FAR 52.243-4 “Changes.” **But what happens when the government rejects a contractor’s submittals that are compliant with the contract plans and specifications?** This, too, is a Change.

This issue was recently decided by the Armed Services Board of Contract Appeals (ASBCA or Board) in the [Appeal of Jaynes Corporation](#), ASBCA No. 58385, 2013 WL 2157741 (Entitlement), and subsequent Quantum decision in the [Appeal of Jaynes Corporation](#), ASBCA No. 59234, 2015 WL 3500056. These decisions are discussed below, along with a brief discussion of Constructive Changes stemming from defective plans and specifications, generally.

Note: Jaynes is a client of Excell Consulting, and the appeals discussed in this post were brought and argued by Ms. Judi Mattox, Esq. of Mattox Law, who is also Vice President of Excell Consulting.

CHANGES FROM DEFECTIVE PLANS AND SPECS

Constructive Changes are those changes to the contract that occur without a specific government (or owner) order to perform Changed work, but a Change nonetheless occurred. A Constructive Change occurs when the government provides the contractor with misleading information – **including direct, indirect, or no action by the government** - and the contractor incurs additional costs in attempting to perform according to that information.

In the case of defective plans and specifications, a Change occurs because the government has breached its implied warranty of the specifications, and therefore no specific direction is needed, and the notice requirement is waived.

APPEAL OF JAYNES CORPORATION

In *Jaynes*, the ASBCA held that **“The government changed the contract when it rejected [Jaynes’] initial pipe submittal.”** In 2009, the Army Corps of Engineers (COE) awarded to Jaynes a contract to design and build an unmanned systems operations facility at Creech Air Force Base in Nevada. The specifications called for a “wet pipe sprinkler system,” which “shall be Schedule 40” pipe.

Jaynes submitted shop drawings that included “Allied” Schedule 40, ASTM A135/A795 pipe, which met the criteria in the specifications.

However, the Administrative Contracting Officer (ACO) rejected the submitted Allied pipe because, *in his experience*, “Allied...are a little crafty with their product line.” The ACO went on to explain (in internal emails) that the Schedule 10 and Schedule 40 materials are Allied’s trade names for the product submitted by Jaynes, but that the Schedule 40 pipe is “actually Schedule 10 pipe from an ASTM material standpoint.” Therefore, the ACO rejected the Schedule 40 Allied pipe because it did not meet the ASTM standards.

Jaynes re-submitted the Allied Schedule 40 pipe, only to receive a request to submit further documentation from the manufacturer, confirming that the Schedule 40 pipe meets the ASTM standards. Jaynes did submit further documentation, and the ACO rejected the submittal again. This type of communication went back and forth, even after the Allied Schedule 40 pipe was delivered to the site. Throughout, Jaynes maintained that the Allied pipe it

submitted met the ASTM standards detailed in the specifications, and included in a summary letter from Allied's Metallurgy Manager (who was a member of the ASTM at the time), stating that the pipe submitted by Jaynes did in fact comply with all of the requirements of the specifications.

After achieving no progress, and with delays to the Project schedules apparent, Jaynes resubmitted the Materials and Equipment submittal with a different pipe manufacturer – Wheatland Tube Company (Wheatland), which the ACO accepted.

Jaynes then submitted a certified CDA claim in the amount of \$56,305.00 for its alleged costs resulting from the ACO's rejection of the Allied pipe. The COE did not respond, and Jaynes appealed to the ASBCA based upon a "deemed-denial."

ON APPEAL

On appeal, Jaynes argued that the rejection of the Allied pipe was improper because the **ACO blindly ignored** the contract specifications, and that the **ACO misinterpreted the ASTM standards** for fire sprinkler piping.

The government maintained that the ACO's interpretation of the specifications was correct, and the rejection of the Allied pipe was justified. The government also raised a new issue on appeal, arguing that the Allied pipe was 0.01" under both ASTM A135 and A795 Standards.

The Board found that the ACO's interpretation of ASTM A135 was "**wrong**," and that the government's rejection of the Allied pipe was without basis. In fact, the Board noted that the ACO was **wrong** in its assessment of the pipe specifications – on six different occasions.

The Board further found that the government's assertion that the Allied pipe was 0.01" too thin did not take into account the allowances provided for in the specifications, which rendered the Allied pipe thickness acceptable. Therefore, the thickness argument failed.

The Board then summarized the effect of its findings by stating that, "**The government changed the contract when it rejected appellant's initial pipe submittal**. Appellant is entitled to recover its costs associated with the change, plus CDA interest on that amount from the date of receipt of the claim the contracting officer."

In the subsequent Quantum hearing, the government argued that Jaynes "caused its own damage" when it purchased the Allied pipe after the government had rejected it. The Board rejected this "**absurd**" argument, finding that the government never had the right to reject the Allied pipe that was in conformance with the contract requirements. The fact that the ACO was "consistently and persistently wrong" in his assessment did not shift the risk to Jaynes.

Finally, the Board rejected the government's argument that Jaynes was only entitled to recover the difference between the costs of the Allied pipe and the Wheatland pipe. The Board reasoned that this computation was inequitable when Jaynes had to pay for both types of pipe due to the government's Change. Therefore, Jaynes was able to recover the cost of the Allied pipe and Wheatland pipe, minus the salvage value of the Allied pipe.

CONCLUSION

The takeaway from the *Jaynes* appeals is that **when the government rejects submittals that are actually in conformance with the contract requirements, it is a Change to the contract**. This scenario is opposite to that of the government requiring performance after issuing or approving defective plans and specifications. But the result is the same – a Change to the contract, for which the contractor is entitled to an equitable adjustment.

Because so many pitfalls and potential additional costs loom over contract plans and specifications, contractors should become well educated on what constitutes defective plans and specifications, what they look like in real-time, and what options and remedies the contractor has when such defects are encountered.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel