



CONTRACT MODIFICATIONS, CHANGES, AND CLAIMS

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TYPES OF CHANGES

1. Constructive Change
2. Express Change
3. Changes Clause (Fixed Price) FAR Part 52.243-1:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract. [Emphasis added.]

e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed. [Emphasis added.]

WHEN YOU ENCOUNTER A CHANGE – LEGAL FIRST STEPS

1. Have we put the government on notice
2. Did the Government give direction and does that individual have the authority to give direction
3. Review the Contract and Modification – Did we waive our rights?
4. Letters and correspondence between the Government and the Contractor on the Issue
5. Confirm new WBS codes have been created AND are being used correctly
6. If a Subcontractor claim is involved, confirm that the Subcontractor is properly accounting for the change, and confirm that no inadvertent waiver occurs in Subcontractor lien waivers and modifications language
7. CONTRACTORS MUST CONTINUE TO PERFORM

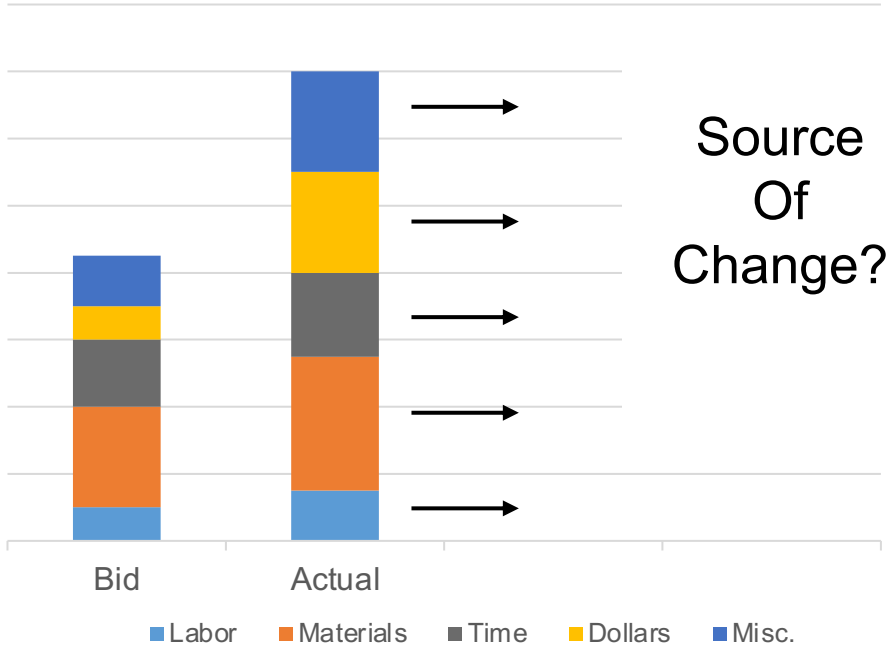
REA VS CLAIM – IS THERE A DIFFERENCE?

1. Request for an Equitable Adjustment – Administrative action to increase/decrease the contract price
2. Claim – A claim seeking monetary relief must meet the following three elements:
 - a) Meet the requirements of the Federal Acquisition Regulation definition of a “claim”(found in FAR 2.101 and FAR 52.233-1(c));
 - b) Contain a certification if over \$100,000; and
 - c) Request a final decision from the CO (RqCOFD).
- c. New case law determining whether a final decision has been requested:
 - a) Hejran Hejrat Co. Ltd. v. U.S. Army Corps of Eng’r, 930 F.3d 1354 (Fed. Cir. 2019)
 - b) Zafer Constr. Co. v. U.S., 40 F.4th 1365 (Fed. Cir. 2022) (implicit RqCOFD?)

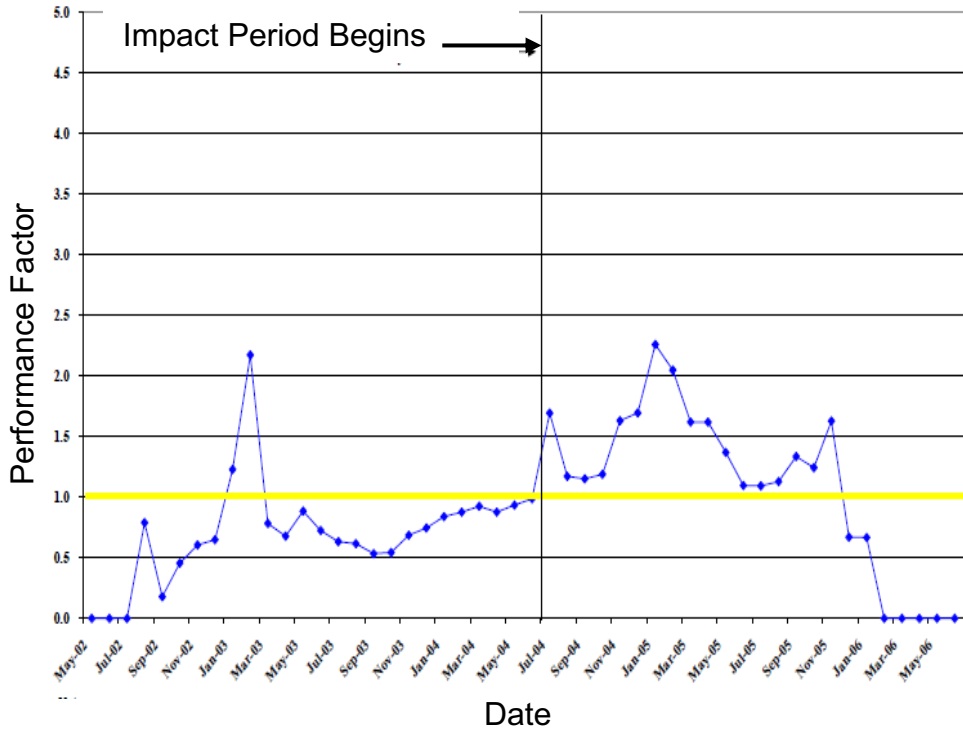
INVESTIGATING THE FACTS

Approaches

Bid v. Actual Cost

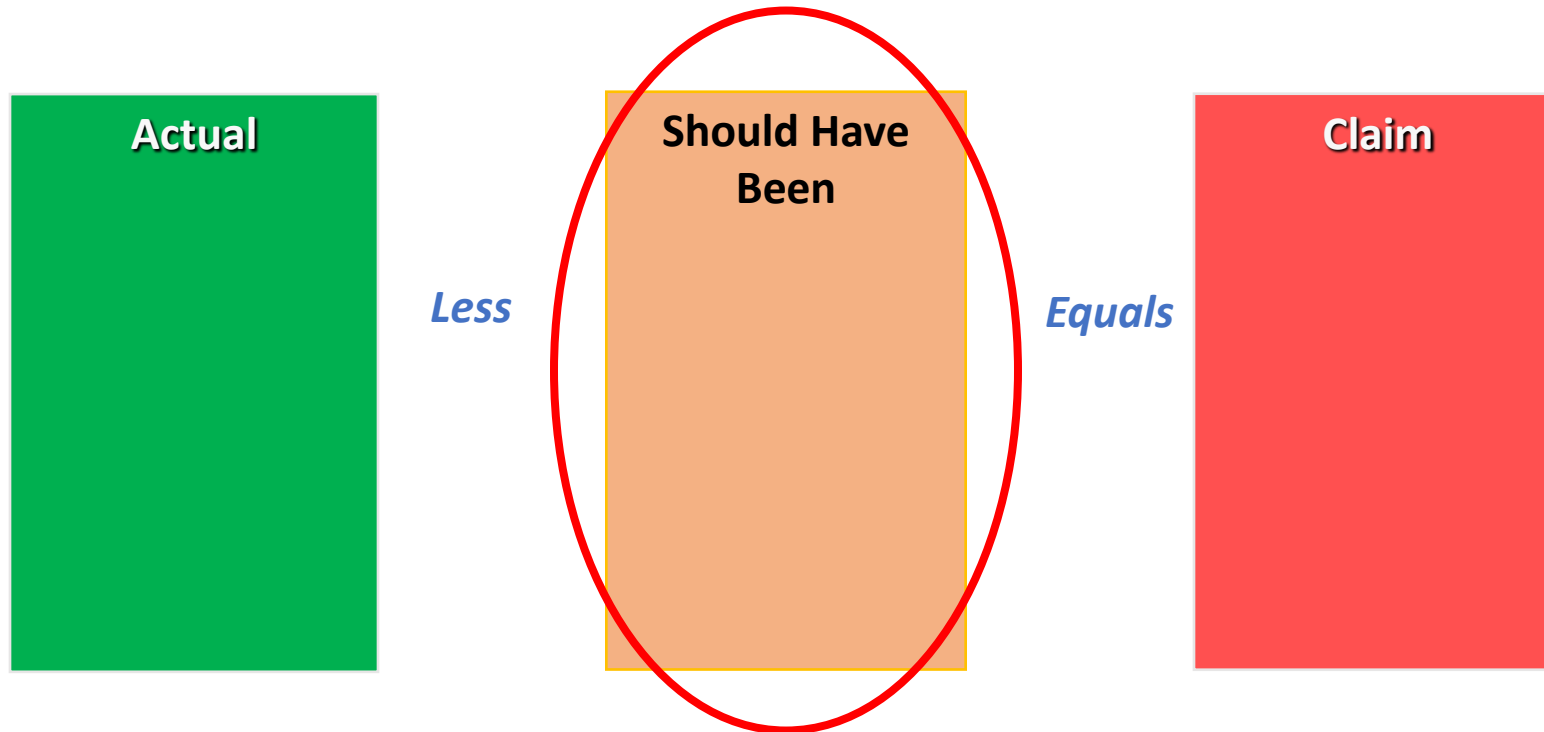


Event-Oriented

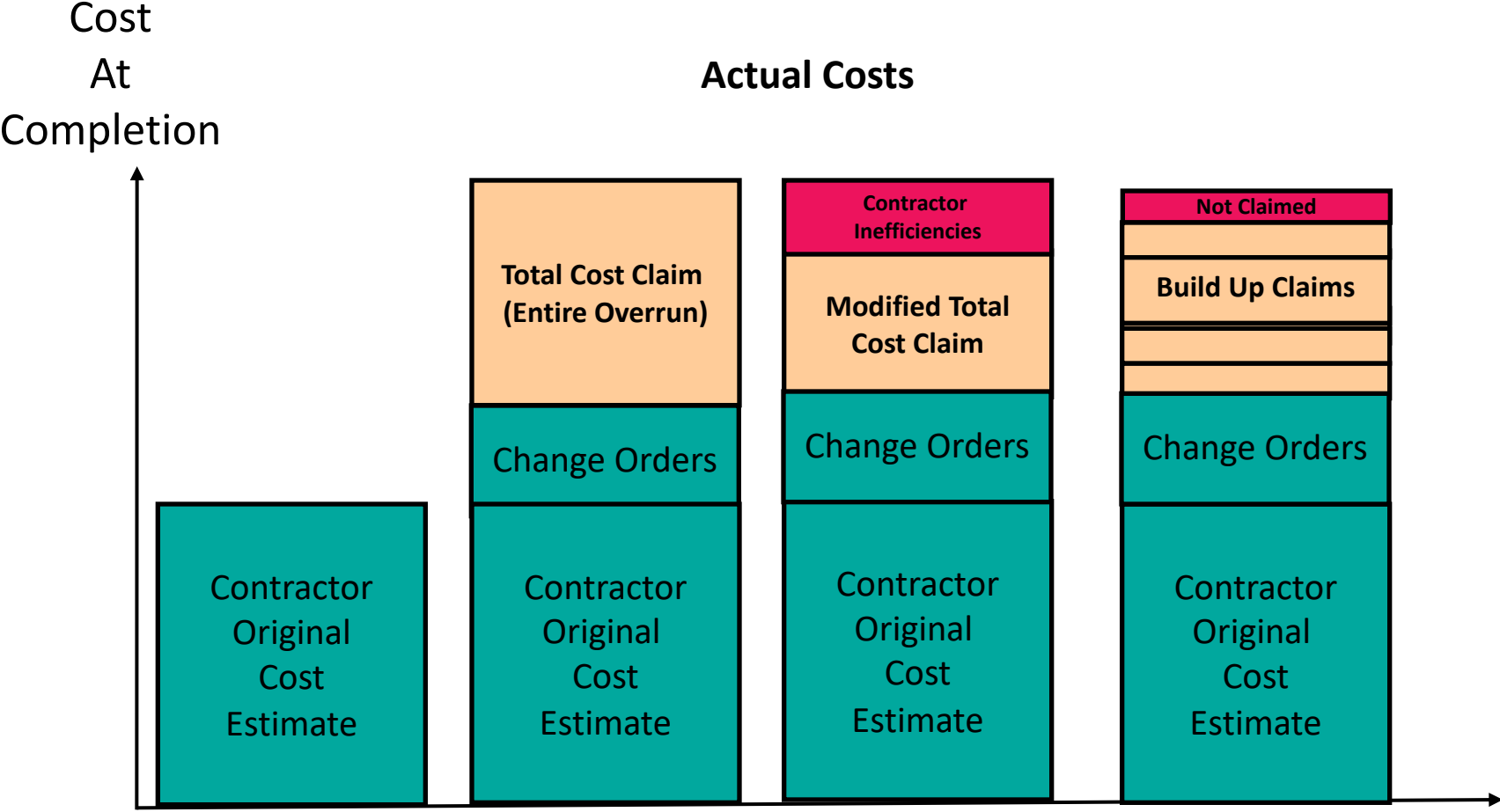


RECOGNIZED QUANTUM THEORY

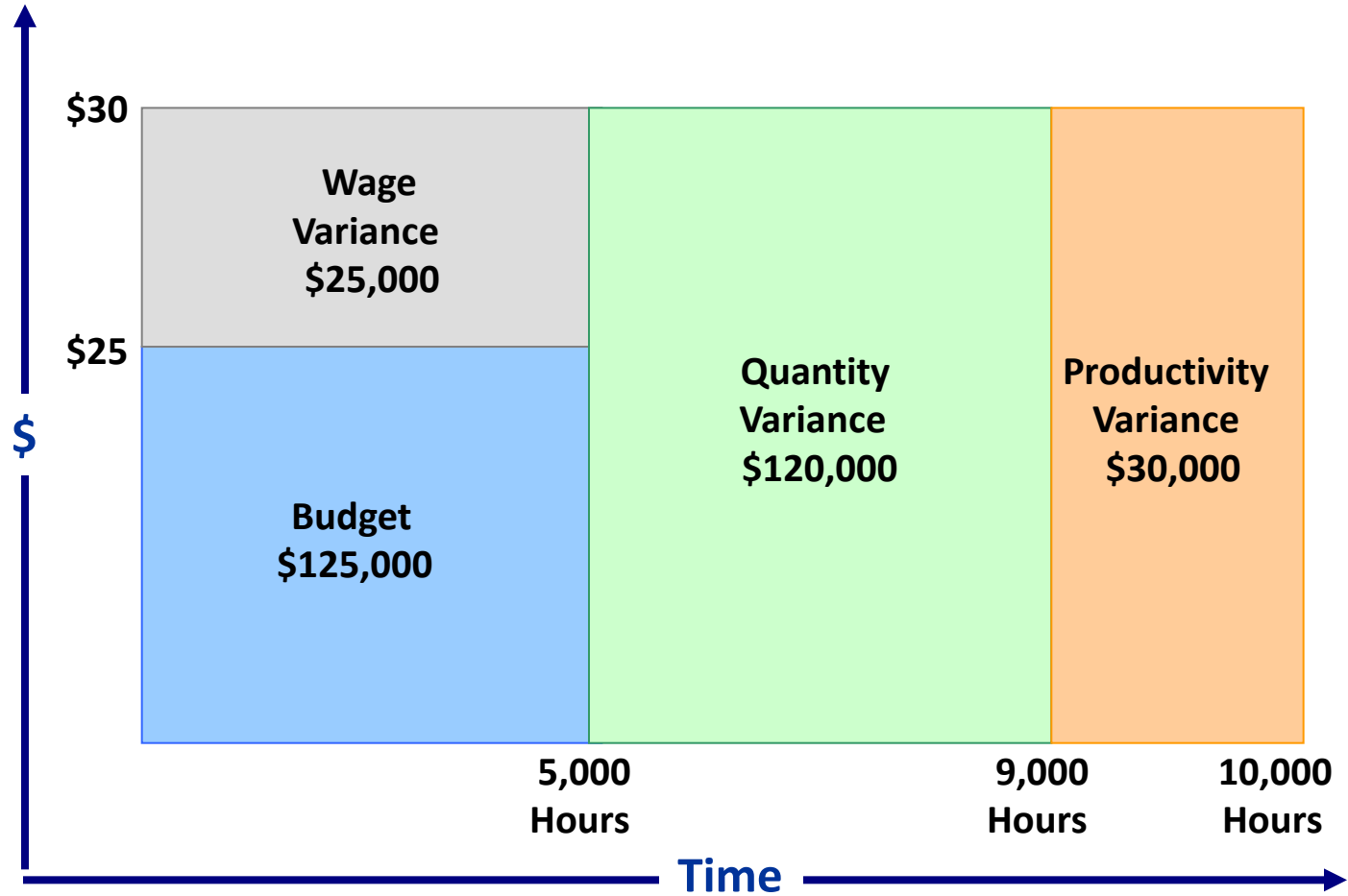
“Three Column Approach”



CLAIM METHODS



LABOR OVERRUN COMPONENTS

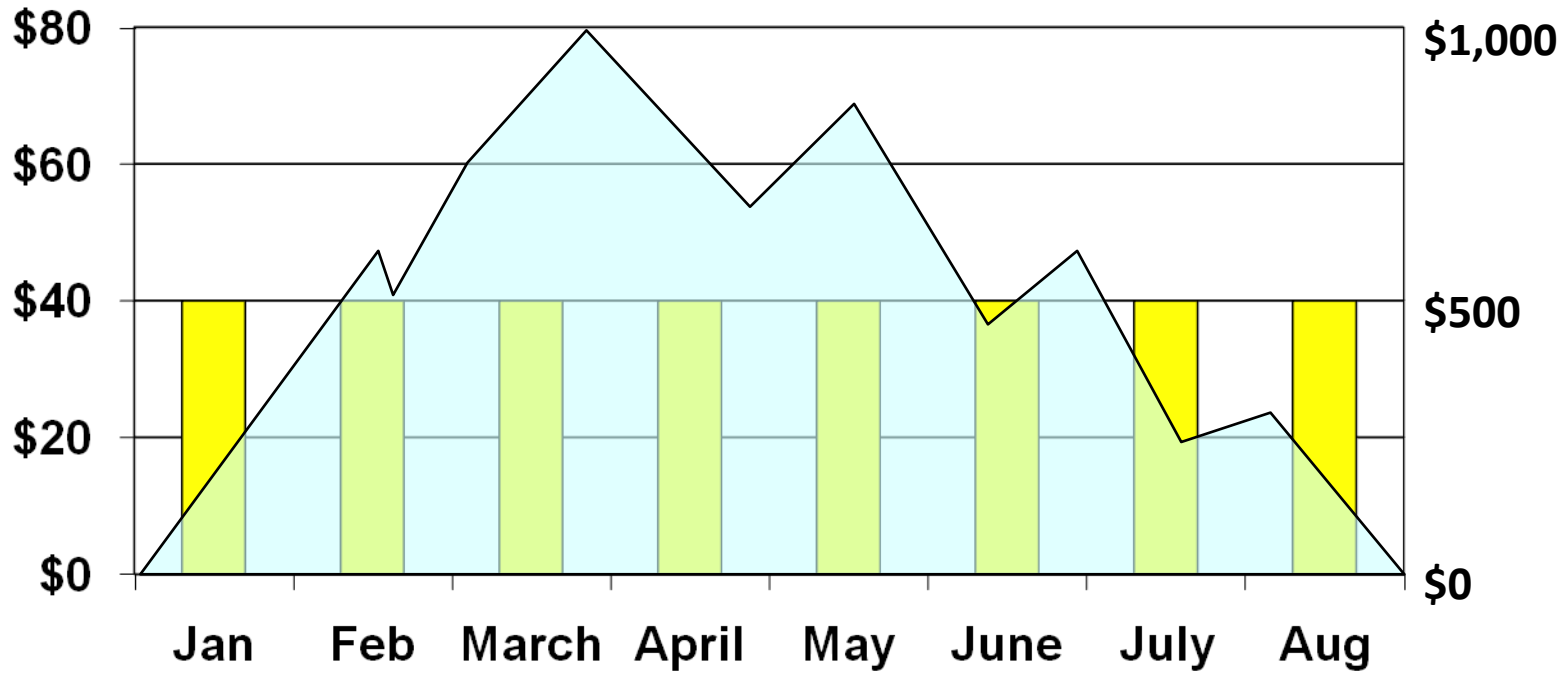


DISRUPTION OR LOSS OF PRODUCTIVITY

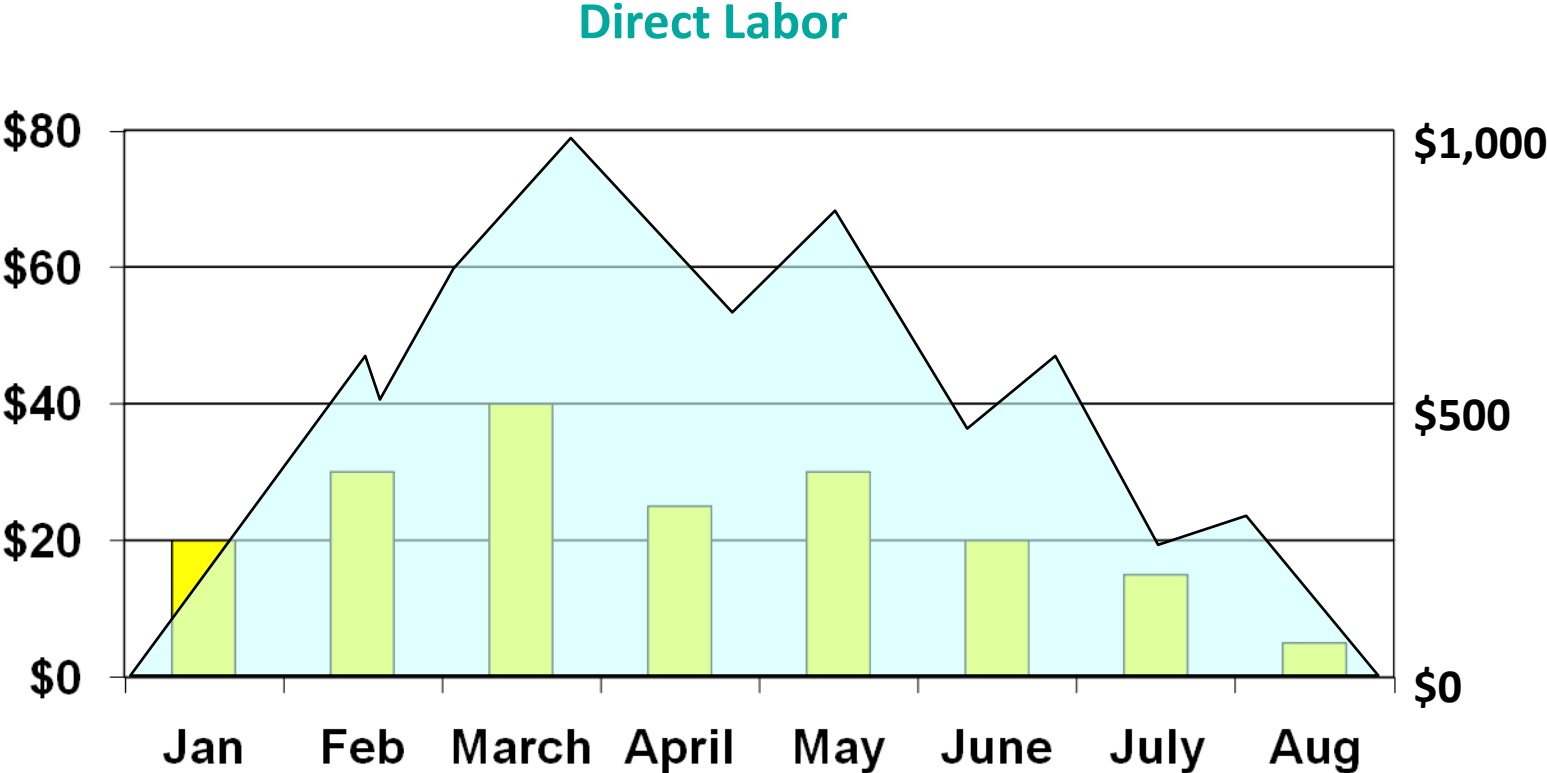
- Loss of productivity on original scope of work
- Change in working conditions, resources or manner of performing work
- Change orders can affect work not otherwise thought of as changed
- Example causes of disruption:
 - Changed Work - Rescheduling of planned work, excessive overtime to avoid schedule slippage, less than optimal work sequencing, changes in manufacturing or design work methods, excessive rework, loss of learning
 - Customer Delays - Unnecessary starts and stops to contract activity, more loss of learning, underutilization of work force, loss of economies of scale
 - Acceleration - Excessive overtime, congestion in the work place, re-sequencing of work performance

TIME-RELATED COST

Direct Labor



ACTIVITY-RELATED COST



HOME OFFICE OVERHEAD

- Generally represents the cost to the project for support from a remote home or division office, which provides some services to the project. Also called General & Administrative (“G&A”) costs.
- The [Eichleay Formula](#) is often used as a means of allocating some portion of home office overhead to projects, which have been delayed by owner caused interference (billings to billings).

POTENTIAL SOURCES OF INFORMATION AND DATA

Schedules

- RFP
- Bid
- Contract
- Project
- Updates
- Other

Project Records

- Contract
- Change Orders
- Status Reports
- Cost/Quantity
- Reports
- Other

Correspondence

- Letters
- E-mails
- Memos
- Phone Logs
- Other

Fact Witnesses

- Interviews
- Depositions
- Affidavits
- Other

AVOID COMMON PRICING CHALLENGES

- FAR 31.201-2(d) - A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.
- Double Counting Between Claim Elements
- Improper Baseline
 - Overstated Claims
 - Understated Claims
- No Linkage Between Entitlement And Pricing (Cause And Effect)

THE RESOLUTION PROCESS

1. Reach agreement and modify the contract value
2. Negotiation / Mediation
3. Arbitration?
4. Appeal Litigation: Choice of Board of Contract Appeals (BCA) or Court of Federal Claims (COFC)?

Considerations: Agency Counsel versus DOJ Counsel

Time Frame for filing– 90 days versus one year

BCA Judges versus COFC Judges

Time Frame for Adjudication of Claims

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