

CEMP-CR

Regulation
No. 405-1-21

14 August 2017

Real Estate
CLAIMS AND DAMAGES

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CHAPTER 1

Introduction

1-1. Purpose. This Engineer Regulation (ER) describes the policies and procedures governing the administration of claims involving real estate that are founded on express or implied-in-fact contracts.

1-2. Applicability. This regulation applies to all HQUSACE elements and all USACE elements having responsibility for administration of claims involving real estate.

1-3. Distribution Statement. Approved for public release; distribution is unlimited.

1-4. References.

a. 31 USC § 3902(a), <https://www.gpo.gov/fdsys/granule/USCODE-2011title31/USCODE-2011-title31-subtitleIII-chap39-sec3902>

b. 41 USC § Chapter 71, Contract Disputes, <https://www.gpo.gov/fdsys/granule/USCODE-2011-title41/USCODE-2011-title41-subtitleIII-chap71>

c. Army Regulation (AR) 27-20, Claims, http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/r27_20.pdf

d. AR 405-10, Acquisition of Real Property and Interests Therein, http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/AR%20405-10.pdf

e. AR 405-80, Management of Title and Granting Use of Real Property, http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/r405_80.pdf

f. ER 27-1-1, Claims, Litigation, and Procurement Fraud, http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/r405_80.pdf

g. ER 405-1-11, Real Estate Acquisition, http://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_405-1-11.pdf?ver=2014-12-19-150155-847

1-5. Scope.

a. Claims governed by this regulation include:

(1) Disputed amounts for rent and payment for janitor, custodial, utility, and other similar contractual services, which are based on express or legally implied provisions of an existing lease, license, easement, or other real estate agreement executed or ratified by a properly warranted Real Estate Contracting Officer (RECO);

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(2) Property damages when based on express or legally implied provisions of an existing lease, license, easement, or other real estate agreement executed or ratified by a properly warranted RECO;

(3) Damages for breach of contract when an existing written lease, license, easement, or other real estate agreement executed or ratified by a properly warranted RECO expressly provides for monetary damages or the right to monetary damages is legally implied;

(4) Claims for rent or other payments, or for property damages, based on Government use of real property not subject to an existing lease, license, or easement, when the Government's use is continuing; and

(5) Affirmative claims based on unauthorized use of Government real property when the use is continuing and a properly warranted RECO determines that issuance of an outgrant is appropriate.

b. If after thorough review by District Real Estate it is found that the claim received is not governed by this regulation or consistent with policies and procedures described in ER 27-1-1 and AR 27-20 all other claims should be referred to the District Counsel, Area Claims Office, or Claims Processing Office, as appropriate for resolution. Questions about the authorities, policies, or procedures that apply to a particular claim should be directed to the District Counsel.

CHAPTER 2

Policies and Procedures

2-1. Policies. The following general policies should be applied when considering a claim:

a. Avoidance of Claims. Where feasible, efforts should be made to minimize the number of requests for money presented. For example, the prompt negotiation of a lease will often avoid the subsequent submission of a claim for use and occupancy of real property.

b. Duplicate Payments. Care should be exercised to avoid making duplicate payments of a claim. This possibility exists particularly where litigation is pending involving the same subject matter as contained in the claim. In this case, payment of the claim should be withheld pending the outcome of the litigation.

c. Mixed Claims. In contingency operations and deployments, there is a large potential for overlap between contractual property damage claims and noncombat activity/maneuver claims. Claims for damage to real property and incidental personal property damage during noncombat activities of the Army may be payable under chapters 3 and 10 of AR 27-20. Damage also may have been anticipated when the noncombat activities were proposed when negotiating the real estate agreement and provision made in the document. If the property is occupied by means of a lease or easement and Operation and Maintenance (O&M) funds are available for payment of damage, payment is possible under the document or a supplement agreement. Care should be exercised to avoid splitting the claim and considering the real property vs. incidental personal property part under AR 27-20.

2-2. Procedures.

a. Processing Claims Under an Existing Real Estate Agreement.

(1) In General. Disputed amounts, property damages, or damages for breach of contract, regardless of amount, arising out of the use and occupancy of real estate under an existing written real estate agreement will be processed under the agreement's dispute resolution provisions, provided those provisions are not otherwise contrary to law.

(2) Inleases and Certain Outgrants Qualifying as Multi-Purpose Contracts. Claims arising under inleases and certain outgrants in which the Government procures services or construction, alteration, repair, or maintenance of real property for the direct benefit of the Government are governed by the Contract Disputes Act, codified in chapter 71 of Title 41 of the U.S. Code. If such an agreement's dispute resolution provisions do not reference the Contract Disputes Act, a properly warranted RECO should negotiate an amendment or supplemental agreement to resolve claims consistent with the statute. District Real Estate should consult with the District Counsel.

(3) Real Estate Agreements Not Containing Dispute Resolution Provisions. If a real estate agreement does not include dispute resolution provisions, or the dispute resolution provisions are inadequate, the following procedures should be followed for processing claims if mutually agreeable in writing to the party contracting with the Government and not otherwise contrary to law:

(a) A claim against the Government must be made in writing and submitted to the RECO for a written decision. The claim will state the payment being sought as a sum certain. The claim will be accompanied by a certification that the claim is made in good faith, supporting data are accurate and complete to the best of the claimant's knowledge and belief, and the amount requested accurately reflects the adjustment for which the claimant believes the Government is liable. If the claimant is an individual, the certification must be signed by that individual. If the claimant is not an individual, the certification must be executed by the senior company official managing the leased premises or a senior officer or general partner of the claimant having overall responsibility for the conduct of the claimant's affairs.

(b) Upon receipt of a properly submitted claim, the RECO may, at any time prior to rendering a final decision, request additional supplementary information from the claimant.

(c) The RECO will, if requested in writing by the claimant, render a decision within 60 calendar days of a properly submitted claim by the claimant. If a written decision is not provided within 60 days, it is deemed to be denied and can be appealed.

(d) The RECO's final decision will be final unless the claimant provides the RECO with a written appeal and any other evidence in support of its appeal within 30 days of the RECO's decision or a deemed denial. Appeals will be decided by a designated RECO with a higher level warrant based solely on the written record within 60 days of receipt of the appeal unless the designated RECO with the higher level warrant notifies the claimant of a later date. All appeals decided by the RECO with the higher level warrant will be final.

(e) At the time a claim is submitted to the RECO, the parties, by mutual consent, will agree to use alternative means of dispute resolution. When using alternative dispute resolution procedures, any claim involving money must be accompanied by the certification described in paragraph 2-2a(3)(i) above.

(f) The Government will pay interest on the amount found due and unpaid from (1) the date the RECO received the claim (properly if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims must be paid at the rate, fixed by the Secretary of the Treasury per 31 U.S.C. section 3902(a), which is applicable to the period during which the RECO receives the claim and then at the rate applicable for each six-month period as fixed by the Treasury Secretary during the pendency of the claim.

(4) Legal Advice. When a claim against the Government for rent or other payments, property damages, or damages for breach of contract is not based on express provisions in a real estate agreement, the RECO should request the opinion of the District Counsel as to whether a right to payment is legally implied.

b. Ratification of Claims Associated with Unauthorized Commitments or Use.

(1) In General. Claims against the Government for rental or other payments, property damages, or damages for breach of contract expressly provided for, or legally implied in, an unauthorized written real estate agreement may be resolved through ratification of the written agreement by a properly warranted RECO. When the Government uses real property without the benefit of an agreement, and the Government's use of the real property is continuing, a properly warranted RECO may resolve claims associated with past use through the acquisition of a leasehold or other appropriate real property interest per the policies and procedures described in AR 405-10 and ER 405-1-11.

(2) Findings. To ratify an unauthorized commitment or use by the Government of another's real property, a RECO must make the following findings in writing:

(a) The benefits of a leasehold or other real property interest have been provided to and accepted by the Government or the Government has otherwise obtained such benefits;

(b) The ratifying RECO could have granted authority to enter into or could have entered into a lease or acquired the appropriate real property interest at the time the unauthorized commitment was made or at the time the Government occupied the real property;

(c) The resulting lease or other real property interest would have otherwise been proper if executed or acquired by a properly warranted RECO;

(d) The RECO reviewing the unauthorized commitment or use determines the price to be fair and reasonable in line with applicable law and guidance; and

(e) Funds are available and were available at the time the unauthorized commitment was made or at the time the property was occupied.

(3) Claims that Cannot be Ratified. After thorough review by District Real Estate claims associated with unauthorized commitments or use that cannot be ratified should be forwarded to the District Counsel, Area Claims Office, or Claims Processing Office, as appropriate per the policies and procedures described in ER 27-1-1 and AR 27-20.

c. Statute of Limitations. All contractual claims against the Government, as well as affirmative claims brought by the Government under the Contract Disputes Act, must be filed within six years of the date of accrual as determined by Federal law. Other types of claims may

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be subject to a different statute of limitations. Questions about the applicable statute of limitations, particularly in the context of mixed claims, should be directed to the District Counsel.

d. Affirmative Claims Associated with Unauthorized Use of Government Real Property. Affirmative claims for rent or other payments, or for property damages, associated with unauthorized use of Government real property where the use is continuing may be resolved through issuance of an outgrant, if a properly warranted RECO determines that issuance of an outgrant is appropriate per the policies and procedures described in AR 405-80.

e. Work for Other Agencies. Claims associated with real estate agreements entered into on behalf of another agency, including Air Force, are covered by that agency's authorities, policies, and decision levels.

f. Claims arising Outside of the Continental United States (OCONUS). Claims arising OCONUS may be governed by the Status of Forces Agreement (SOFA), treaty, or use agreement with the host nation.

FOR THE COMMANDER:



RICHARD L. HANSEN
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Chief of Staff

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