

IF IT AIN'T BROKE, DON'T FIX IT: REPAIRS AND REPAIR ESTIMATES UNDER THE JULY 2013 DP3 CLAIMS AND LIABILITY RULES

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It represents an attempt to bridge any remaining gaps between MCO's, TSP's and Repair Firms.

Prior to the DP3 program and direct settlement with the TSP, most claimants filed directly with the Military Claims Office. The TSP was then sent a Demand on Carrier, for the purpose of carrier recovery. Under the old way of doing things, the claimant was required to get the estimate, and he chose the repair firm. As such, any issues with the repairs being unsatisfactory were the service member's problem - since he chose the repair firm.

One of the supposed benefits to the claimant under Families First/DP3, in addition to the right to receive FRV for missing and destroyed items, is that the obligation to obtain repair estimates was shifted to the TSP. In turn, pursuant to Section 1.1.2.1 of the DP3 Claims and Liability Rules (available on the SDDC website), the TSP was given the option to provide either a repair in kind or payment of repair cost.

Because the TSP is now in charge of obtaining estimates, and has the right to determine whether to offer repair in kind or a repair cost, the DP3 Rules contain over a full page setting forth the standards for the sufficiency of estimates, and the adequacy of repairs, at Section 2.3.5. There are three basic principles set forth in the Section, two of which were impacted by the changes to the Rules contained in the July 2013 version.

1. The TSP must send a copy of the estimate to the member if requested.
2. Estimates must be from a firm that is willing and able to make the repair within a reasonable time, for the amount stated.
3. Repairs must be to the "reasonable satisfaction" of the customer.

INSPECTION REPORTS/ESTIMATES

If the TSP uses an estimate to support an offer of settlement, and the customer requests a copy, the TSP must now provide a copy to the customer. The claims rules allow for "redactions of proprietary information" prior to sending however, allowing for removal of

interpretive remarks that are perhaps not suitable for a document provided to the customer. The best way to deal with this problem by far however, is for any such remarks to be on a separate document. The report itself should be in language that is professional in nature, since this may be sent to the claimant.

TSP estimates "... must identify a repair firm that is willing and able to make the repair within a reasonable time for the amount stated." See Section 2.3.5.2. This requirement is not new. In addition to being required by the Rules, any estimate that did not meet these standards would obviously not provide a solid basis to either the TSP or the claimant for settlement of damaged items. These requirements must be satisfied even if the person preparing the estimate, or the TSP's adjustor, believes that the TSP is not liable for some or all of the damage. In addition to being required by the Rules, the cost of repair provides information that may well be necessary to a settlement. Sometimes there may be genuine uncertainty as to whether a TSP is liable for damage to an item or not. The cost of repair may provide a basis for compromise.

While not contained explicitly in the Rules, common sense and experience have provided some standards for what should NOT be in an estimate. There should be recognition that repair firms are expected to have expertise in repairing furniture, but not necessarily in points of law or the claims business rules. For that reason the estimate should not attempt to interpret provisions of the Rules. Repair firms should not make statements suggesting that the TSP deny a claim, or opine about whether TSP has liability or not, but should state facts that may have a bearing on liability. It is still important to provide as much factual information as possible, so that the adjustor has what they need to make a determination. For example, instead of stating "scratches covered on inventory - DENY" - the report could say "scratches are consistent with those listed on the inventory, and/or "scratches have old dirt residue and do not appear to be new."

REPAIRS

In general, if a TSP provided estimate is the basis for a settlement, either by agreement on a repair in kind, or agreement on the exact amount in the estimate as the cost of repair, the TSP must stand behind the estimate. If it does not, the settlement is not binding on either the claimant or the Government.

The TSP's repair firm must be willing and able to perform repairs within a reasonable amount of time and for the amount stated - even if the adjuster believes that the TSP has no liability for some or all of the damage. The service member should be able to expect that the estimate be honored, even for items not paid, as he himself is reimbursing the repair firm.

There is currently NO standard for how long the repair firm should be expected to honor its estimates. Price inflation is one half of the picture; the other problem with extending the validity of the estimate would be that the item could have sustained additional damages, or the damage may have worsened due to being left untreated, or due to additional wear. The repair firm would have to have an adequate reason for any price changes that appear to be beyond the scope of normal inflation.

SETTLEMENT FOR COST OF REPAIR

If the amount paid is based on a repair cost, the TSP cannot escape their responsibility for ensuring adequate repairs, by taking the position that the claimant gave up the right to further reimbursement simply by accepting the money.

Like most things, there are exceptions to this rule, such as the repair firm, in the course of repairing the damage for which a TSP had already paid a sum of money based on a repair estimate, finding some additional damage for which the TSP may not be liable. In this case, the item would have to be renegotiated completely (not binding on either party). Another scenario would be if the customer failing to cooperate in allowing the repair firm access to make the repairs (more than one or two rescheduling of the appointment was given as an example by Mr. Kelly). There are of course many possible scenarios and this article cannot try to give a solution for each conceivable one. As the attorney co-author of this article is fond of saying, there is one answer for all legal questions: "It depends."

REPAIR IN KIND

When the claims rules for Families First (later to become dp3) were being developed, the provision for repair in kind was looked upon as a benefit to the TSP, more or less in exchange for imposing upon it the burden of obtaining estimates, and for the increased potential liability associated with FRV. The disadvantage for the TSP is that an agreement for a repair in kind of an item always leaves open the possibility that the claim for that item has not been finally resolved. This is the subject of an Information paper by the co-author of this article, which may be found in his Defense Personal Property Program Claims Handbook.

Section 2.3.5.6 states in part: "Repairs must be made to the reasonable satisfaction of the customer." The customer's remedy, if the TSP does not agree that the repair was not adequate, is to transfer the item to the MCO. Even though the item is settled, if the MCO determines that the repair was not adequate, it will pay the claimant based on his own estimate, or depreciated replacement cost if the item cannot be adequately repaired, and pursue recovery.

There are no standards in the Rules for deciding if a repair is adequate; however, the burden is on the claimant to prove the repair inadequate. One method, although not the only one, is to provide another estimate explaining why the repair was not adequate. In the absence of another estimate, the sooner the supposed inadequate repair is reported, the stronger the case will be, both to reduce or eliminate the possibility of damage subsequent to the repair, and to demonstrate the severity of the problem. If the claimant sits on a chair the day after the repair is completed and it collapses, this is a good indication that the repair was not adequate. If he decides, after 3 months, that the scratch the TSP agreed to repair is still visible to him and he can't live with it, he is unlikely to convince the TSP or the MCO. These are extreme examples, however, and not likely to provide much guidance in the typical case where the customer is not satisfied. For repair firms, we do recommend that when repairs are performed, that you take "before and after" photos of the damaged area. We suppose once again, that "it depends." ♦