

Presenters



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Preserve Your Right to Obtain an Equitable Adjustment: Practical Legal and Accounting Advice

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What We Will Discuss

- ▼ What is a change
- ▼ Types of changes
- ▼ Formal changes
- ▼ Constructive changes
- ▼ Authority, Notice, and Duty to Proceed
- ▼ Cardinal Changes
- ▼ Quantum
- ▼ Claims certification and appeals

What is a Change?

- ▼ Any addition, subtraction, or modification of the work required under a contract made during performance
- ▼ FAR Part 43:
 - ▼ Government contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract.
 - ▼ A bilateral modification is a contract modification that is signed by the contractor and the contracting officer that is used to make negotiated equitable adjustments....
- ▼ Two types – formal and constructive

Government Official Authority to Change the Contract is Limited

- ▼ The contracting officer, acting within scope of authority, is the only person with actual authority to change the contract.
 - ▼ Executes formal change
 - ▼ Acts in a manner to cause the contractor to believe a change has occurred
 - ▼ Directs contractor to perform work that should be a change
- ▼ **APPARENT AUTHORITY NOT VALID IN GOVERNMENT CONTRACTS**
 - ▼ You may not get paid to do work that has not been approved by the KO.
 - ▼ Exceptions – implied authority, ratification, equitable estoppel

Formal Changes

- ▼ Change executed in writing
- ▼ Can be unilateral or bilateral
 - ▼ Changes clause allows KO to make some changes without contractor approval
- ▼ Need to look to correct contract clause to determine contractor rights
- ▼ It is the contractor's responsibility to determine whether a change has occurred and to take proper action

Which Changes Clause Applies?

- ▼ 52.243-1: Fixed Price contracts for supplies
- ▼ 52.243-1 Alternate 1: Fixed Price contracts for services
- ▼ 52.243-2: Cost Reimbursement contracts for supplies
- ▼ 52.243-2 Alternate 1: Cost Reimbursement contracts for services
- ▼ 52.243-3: T&M contracts
- ▼ 52.243-4: Construction contracts
- ▼ 52.243-6: R&D contracts
- ▼ 52.212-4: Commercial Items contracts
- ▼ All of these contain subtle, but important, differences

The Government can mandate Changes...

- ▼ **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 in any one or more of the following:**
 - ▼ Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
 - ▼ Method of shipment or packing.
 - ▼ Place of delivery.

...But Equitable Adjustments are Required...

- ▼ **52.243-1(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.

...In Some Cases, Contractor Must Provide Notice...

- ▼ 52.243-1(c): The Contractor must assert its right to an adjustment under this clause *within 30 days* from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

...And the Contractor Cannot Stop Working.

- ▼ 52.243-1(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.

Other Price Adjustment Clauses

- ▼ 52.204-2 Security Requirements
- ▼ 52.222-30 to 32 Construction Wage Rate Requirements—Price Adjustment
- ▼ 52.222-41 Service Contract Labor Standards
- ▼ 52-236-2 Differing Site Conditions
- ▼ 52.242-14 Suspension of Work
- ▼ 52.242-15 Stop-Work Order
- ▼ Know your rights under the relevant clause

Notice

- ▼ **Changes clauses generally require that a contractor provide notice to the government that a change has occurred**
 - ▼ **Timely**
 - ▼ **In writing**
 - ▼ **Sent to KO**
 - ▼ **State nature of the claim**

Notice

▼ Exceptions to Strict Notice Requirements

- ▼ **The Government knew about the basis of the claim**
 - ▼ Actual knowledge can be shown from Government records
 - ▼ Presence of Government personnel on jobsite
 - ▼ Acts of Government in working with contractor to address issue
 - ▼ Meetings
- ▼ **The Government considers the claim on the merits without complaining about lack of notice**
- ▼ **The Government was not prejudiced by the lack of notice**
 - ▼ Government has burden of proving it was prejudiced
 - ▼ If Government cannot mitigate expense or elect any one of available options
 - ▼ Government commonly argues that it would not have incurred expense if it knew

Elements of Constructive Changes

- ▼ A change occurred as a result of government action or inaction
- ▼ The contractor did not perform voluntarily
- ▼ The change resulted in an increase (or decrease) in the cost or time required for performance

Types of Constructive Changes

- ▼ Contract interpretation
- ▼ Defective specifications
- ▼ Governmental interference or failure to cooperate
- ▼ Failure to disclose vital information
- ▼ Constructive acceleration

Constructive Changes 1

▼ Contract interpretation

- ▼ Ambiguous specifications not apparent on the face of the contract
- ▼ Contractor's interpretation is reasonable
- ▼ Government requires performance in accordance with different interpretation
- ▼ Contractor incurs additional costs

Constructive Changes 2

▼ Defective specifications

- ▼ Design specification in contract
 - ▼ Contractor bears risk for performance specifications
- ▼ Government warrants adequacy of specifications
- ▼ Specification contains errors, omissions, or inconsistencies
- ▼ Contractor incurs additional costs

Constructive Changes 3

▼ Governmental interference or failure to cooperate

- ▼ Any of the following
 - ▼ Government overzealous inspection
 - ▼ Improper or incompetent rejection
 - ▼ Change in testing method or frequency
 - ▼ Disruptive criminal investigations
 - ▼ Failure to prevent interference caused by another contractor
 - ▼ Failure to provide access to work site
- ▼ Contractor incurs additional costs

Constructive Changes 4

▼ Failure to disclose vital information

- ▼ Government had vital information
- ▼ Government knew the contractor did not possess the information
- ▼ The contract did not impose a duty to investigate
- ▼ The government withheld the data

▼ Warranty of reasonable accuracy

▼ Negligent estimate

Constructive Changes 5

▼ Constructive Acceleration

- ▼ One or more excusable delays
- ▼ Notice of the delay by contractor and request for time extension
- ▼ Failure or refusal by the government to grant request
- ▼ Express or implied order to accelerate
- ▼ Contractor incurs additional costs

▼ General rule – subcontractor delay is not excusable

Notice for Constructive Changes

- ▼ Not required for standard supply and service contracts
- ▼ Within 30 days for construction contracts
- ▼ Must state nature of the claim

Contractor Duty to Proceed

▼ Duty to Proceed

- ▼ Contractor required to perform (unless it believes change is a breach)

▼ Contractor can request equitable adjustment

Scope of the Change

- ▼ Modifications must be within the scope of the contract
- ▼ Changes that exceed the scope of the original contract (aka “cardinal changes”)
 - ▼ Fairly and reasonably within the contemplation of the parties when the contract was entered into?
- ▼ Result
 - ▼ Contractor not required to perform/proceed
 - ▼ Contractor may be entitled to breach damages

Effect of Final Payment

- ▼ Requests for equitable adjustments raised for the first time after final payment are untimely

Quantum 1

▼ Actual, reasonable cost incurred due to change

- ▼ Direct cost of added work
- ▼ Indirect cost affected by the change

▼ Reasonable profit

▼ Does this effectively turn all contracts into cost-type contracts? Not exactly

- ▼ Contractors are not required to have an approved accounting system, but they are required to demonstrate the accuracy and reasonableness of their costs

Quantum 2

▼ Important to capture all costs

- ▼ Field overhead is either percentage added to direct costs or time-related extended costs
- ▼ Unabsorbed overhead resulting from delay
 - ▼ Must hit the requirements, including virtually complete standby; strongest if contractor work was stopped or suspended
- ▼ Direct impact of other costs

▼ Unallowable costs are not allowable under a change

Quantum 3

▼ Four approaches

- ▼ Reasonable cost
- ▼ Jury verdict
- ▼ Total cost
- ▼ Reasonable value

▼ Reasonable cost is most favored, but there is no presumption that incurred costs were reasonable

- ▼ Contractor has the burden of demonstrating reasonableness by showing that the costs do not exceed those that a prudent person would have incurred under the circumstances

▼ Total cost is the difference between the original contract price and the actual cost of performing the contract

- ▼ Disfavored method because it assumes reasonableness and that all additional costs are the result of the change

Quantum 4 - Does TINA Apply?

- ▼ Need to go back through the cost or pricing data exceptions
- ▼ To determine whether the TINA threshold is met, *add* the total value of the *related* increases and decreases together

Quantum 5

- ▼ **Practical tips from Hobie – whatever he wants to include here, e.g., make sure you start tracking time immediately, create a new tracking code for both direct and indirect employees**

Submitting a Claim

- ▼ If the Government rejects a request for equitable adjustment, the contractor has the right to submit a certified claim under the Contract Disputes Act (“CDA”)
- ▼ Defined: a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract. FAR 2.101, FAR 52.233-1

Elements of a Claim

- ▼ In writing
- ▼ Seeks payment of a sum certain, adjustment/interpretation of contract terms, or other relief arising or relating to the contract
- ▼ Submitted to contracting officer for decision
- ▼ If claim exceeds \$100,000, certification set forth in FAR 33.207/41 USC 7103(b) by person authorized to bind the contractor

Who Can File a Claim

- ▼ Prime contractors (with valid corporate status, if applicable)
- ▼ Subcontractors *only if* sponsored by the prime contractor
- ▼ Sureties? Nope

CDA Interest

- ▼ **Simple interest starts to accrue from the date the contracting officer receives a claim**
- ▼ **At a rate established by the Secretary of the Treasury**
 - ▼ **Changes every six months**
 - ▼ **Published on www.treasurydirect.com**

KO Final Decision

▼ Written final decision required

▼ Time limits

- ▼ \$100,000 or less – final decision within 60 days
- ▼ Exceeds \$100,000 – within 60 days KO must either:
 - ▼ Issue final decision or
 - ▼ Notify contractor of firm date by which KO will issue final decision
 - ▼ Failure results in appealable “deemed denial” of certified claim
- ▼ KO has no duty to act if claim is uncertified or defectively certified

▼ Appeal rights advisement (set forth in FAR 33.211(a)(4)(v))

Appeal of Final Decision

- ▼ 90 days to Board of Contract Appeals
- ▼ 12 months to Court of Federal Claims
- ▼ Currently, two BCAs: Armed Services (ASBCA) and Civilian BCA (CBCA)
 - ▼ Dispose of approximately 800 appeals per year
- ▼ Approximately 15% of Court of Federal Claims docket concerns claims