

PCI's Executive Exchange: Changes

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March 15, 2023

Changes

- One of the most distinctive features of Government contracts
- Generally covers actual changes under the “Changes” clause
- Also covers constructive changes
- Not to be confused with claims for breach of contract



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Brief History

- First known “Changes” clause in a U.S. contract appeared in 1818
- Sample Clauses
 - Supplies/FFP: FAR 52.243-1
 - Construction: FAR 52.243-4
 - Cost-Reimbursement: FAR 52.243-2
 - Services: FAR 52.243-1
 - T&M: FAR 52.243-3
 - Commercial Items: FAR 52.212-4

52.243-1 Changes-Fixed-Price (Aug 1987)

(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:

- (1) 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.
- (2) Method of shipment or packing.
- (3) Place of delivery.

(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.

(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.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(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.

Purpose of the “Changes” Clause

- Provides flexibility for the Government
- Provides compensation to the contractor
- Facilitates the implementation of contractor-suggested changes
- Permits ordering additional work without re-competing the contract
- Provides a basis for contractor claims



Breaking Down the “Changes” Clause

- Only covers changes within the scope of the contract
- Does not cover “Cardinal” changes
- Must be submitted within 30 days
- Should be used to educate the C.O.
- Provides for an equitable adjustment in both money and time

Formal Changes

- Government and contractor discuss the need for a change
- Contractor submits a proposal
- Government reviews, perhaps does an audit, and then initiates negotiation
- Agreement is reached
- A modification is issued, often with release language per FAR 43.204(c)

What if the Two Sides Cannot Agree?



- The Government will issue a unilateral change order
- Contractor has a duty to proceed
- If the contractor does not like what it says, it needs to begin the disputes process

Commercial Items “Changes” Clause



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- FAR 52.212-4(c)
- Does not mimic the standard “Changes” clause
- Permits changes only when the terms and conditions of the contract are changed by the written agreement of the parties

Constructive Changes

- A product of “case law”
- Contractor spots a change, often well after the fact
- Contractor submits a claim or a request for an equitable adjustment (REA)
- Government responds in a variety of ways
 - Denies it on timeliness grounds
 - Denies it on the merits
 - Agrees to talk



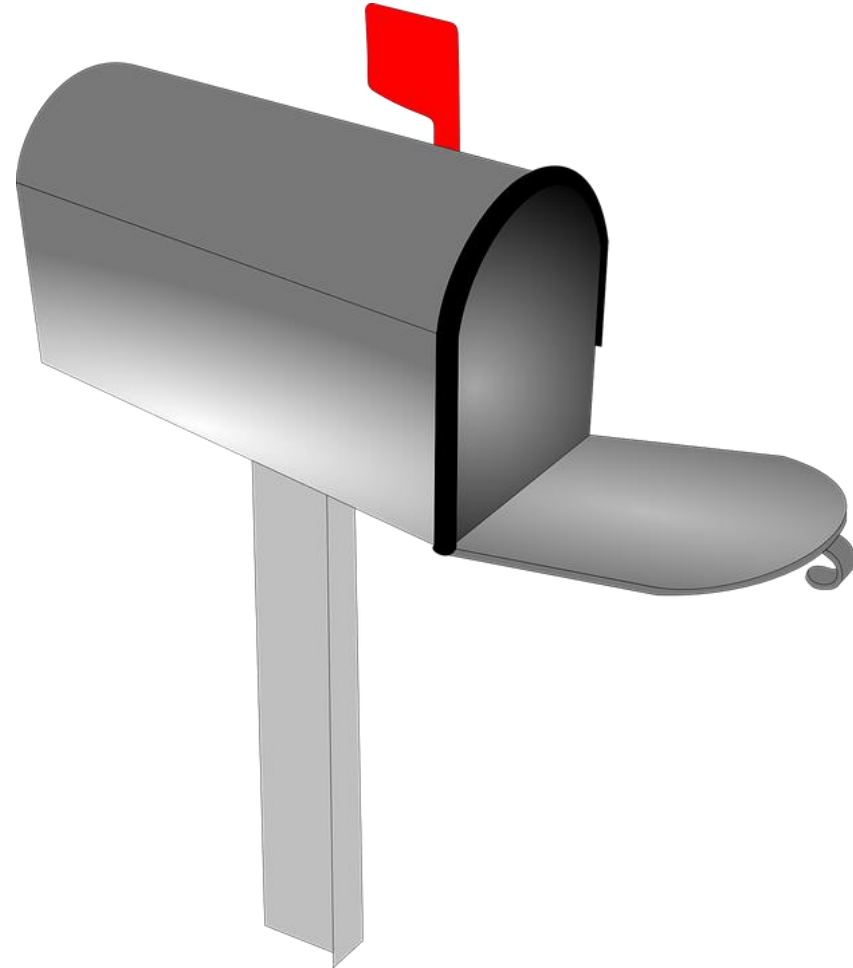
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Definitions

- Working definition: A constructive change is an occurrence during contract performance that requires a contractor to do more work that is not ordered as a change
- The “Notification of Changes” clause at FAR 52.243-7 contemplates constructive changes when it requires notice of “*any Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change*”

Requirements for Recovering for a Constructive Change

- Added work
- Government causation
- C.O. participation
- Notice



Types of Constructive Changes

- Delay and disruption
- Acceleration
- Overzealous inspection
- Demanding work beyond the statement of work (S.O.W.)
- Defective specifications
- Nondisclosure of vital information
- Contract interpretation disagreements

Breach of Contract

- Unlike the “Changes” clause, under breach a contractor is entitled to recover all damages that flow from the breach, including anticipatory profit
- Many of the situations that have been classified as “constructive changes” are really breaches of contract, but the Government prefers the constructive change approach because it limits the contractor’s recovery

Subcontract Wrinkles

- From the Prime's Perspective
 - The “Changes” clause is not a mandatory flow-down clause, but a smart prime should always include one in its subcontracts
 - The clause should provide the sub with less than 30 days to notify the prime of a potential change—giving the prime enough time to submit it to the Government
 - The subcontract should include indemnification and hold-harmless language

Subcontract Wrinkles

- From the Subcontractor's Perspective
 - A modified "Changes" clause should not be accepted without understanding it
 - If it has been modified, the sub should make sure it can live with the changes
 - If it has been modified, the sub should determine if the notice period is adequate

POLLING QUESTIONS

True or False

- (a). The Changes clause allows both parties to a Government contract the right to make changes within the general scope of the contract.
- (b). Commercial contracts generally do not contain a Changes clause.
- (c). If the Government and the prime contractor cannot reach agreement on the price or schedule impact of a change, the C.O. has the power to issue a unilateral change order which the contractor must abide by or risk termination.
- (d). Constructive changes can only occur under construction contracts.



Questions ?

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Tim Sullivan has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute and has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.

Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim is widely acclaimed for his lectures on contract negotiations.

Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.



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