

Identifying and Negotiating Changes and Equitable Adjustments

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Agenda

- Overview and history
- The Changes clause(s) and formal changes
- Constructive changes
 - Comparison with breach of contract
- Subcontract wrinkles
- Change recognition
- REA vs. claim
- Takeaways

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

Brief History

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

Sample Clause – FFP/Supplies

- FAR 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.

Sample Clause – FFP/Supplies

- FAR 52.243-1, Changes—Fixed-Price (Aug 1987) (*cont.*)
 - (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

- 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

Types of Constructive Changes

- Delay and disruption
- Acceleration
- Overzealous inspection
- Demanding work beyond the statement of work (S.O.W.)
- Defective specifications
- Superior knowledge
- Contract interpretation

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

Equitable Adjustments Available for Changes

- Increased costs of performance
- Delay and stand-by costs
- Impact on other work (ripple effect)
- Unrecovered overhead
- Profit
- Interest
- Extension of time
- Adjustment of other affected provisions of the contract

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

Change Recognition

- The Loss Approach (Reactive)
 - Contractor realizes the problem after the fact
 - Money has already been lost
 - Contractor may not have the means to mount the fight necessary to maximize recovery
 - Evidence and witnesses are sometimes lacking
 - Contractor is in great danger of filing an untimely claim or REA
 - Subcontracts are silent on how the parties will address Government changes

Change Recognition

- The Event-Oriented Approach (Proactive)
 - Contractor's personnel are trained to recognize a change
 - All costs are charged to a new job number
 - Claim or REA is timely filed
 - Minimizes the spending of contractor's money
 - Witnesses and evidence are generally available
 - The use of ADR is encouraged
 - Both primes and subs consider how they will address changes when drafting subcontract agreements

Investigating and Documenting the Existence and Effects of a Change

- Document Review
 - Collect and review all pertinent contract documents, including the solicitation as amended
 - Review all pertinent correspondence, particularly e-mail
 - Interview all involved personnel
 - Preserve the product of each interview (video, tape, statement)
- Obtaining Government Information
 - Consider a FOIA request
- Discuss recommended techniques for preserving the evidence

REA vs. Claim

- Both contain facts and legal argument on why the contractor is entitled to the requested contract adjustment, BUT . . .

REA	Claim
An REA is submitted in order to negotiate	A claim is asking for a final decision
C.O. can take his/her time responding to an REA	C.O. generally has 60 days to respond to a claim
Contractor may recover costs of preparing an REA	Contractor cannot recover costs of preparing a claim
An REA does not accrue interest	Once C.O. receives a claim, interest begins to accrue

- An REA may later be converted to a claim

Typical Contents of an REA

- Facts
 - Straightforward and unemotional (avoids inflammatory language)
 - Tells the story
 - MUST be able to back up each statement with evidence, even if not included
- Legal arguments
- Basis/calculation of the requested equitable adjustment and timing or pricing logic
- Certificate if...
 - Over the simplified acquisition threshold and
 - Submitted to Defense agency

Submission of the REA

- Submit the REA to the C.O.
 - Can copy others in Government
- What the C.O. will do with the REA (typically)
 - Ignore it
 - Consult with program team and advisors, including the legal team
- C.O. may request further documentation or information before making a decision

Next Steps if the REA is Denied or Ignored

- No immediate remedy
- May submit a claim on the matter
 - If claim is denied (or deemed denied), may appeal the denial to
 - the appropriate Board of Contract Appeals or
 - the U.S. Court of Federal Claims

Takeaways

- Read the contract
 - Know which Changes clause applies
- Educate your team on identifying changes
- Submit timely written notices to the C.O.
- Track information necessary to support an REA or claim when you recognize the issue

Questions?



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