

PCI Infrastructure Series - 2023

Common Claim Issues in Construction Contracting Part 1: Changes & Defective Specifications

Meet the Presenter



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CHANGES

Recognizing Issues - “Changes”

- The Changes Clause Governs All Changes
 - Most Federal contracts will explicitly include the Changes Clause (limited exceptions: OTAs, etc.)
 - ... and even if they don't, the changes clause is generally read into every Federal government contract (due to Christian Doctrine)

Recognizing Issues - “Changes”

The Federal Acquisition Regulation (“FAR”) includes several versions of the Changes Clause

- 52.243-1 Changes - Fixed-Price.
- 52.243-2 Changes - Cost-Reimbursement.
- 52.243-3 Changes - Time-and-Materials or Labor-Hours.
- 52.243-4 Changes.
- 52.243-5 Changes and Changed Conditions.
- 52.243-6 Change Order Accounting.
- 43.205 Contract clauses

What is a “Change?”

A “Change” occurs any time the contracting officer requires a contractor to perform work beyond the contract requirements

- Two kinds of “Changes”
 - An express change is one requested by the Contracting Officer, often through a Request For Proposal (“RFP”)

But also...

- (Depending on version of Changes Clause) A constructive change occurs when the Contracting Officer impliedly orders a change to the contract, whether by direction or by interpretation of the contract terms

Express Changes

FAR § 52.243-4(a) states:

- The Contracting Officer may, at any time, without notice to the sureties, if any, **by written order designated or indicated to be a change order**, make changes in the work within the general scope of the contract, including changes —
- In the specifications (including drawings and designs)
- In the method or manner of performance of the work
- In the Government-furnished property or services
- Directing acceleration in the performance of the work

Constructive Changes

FAR § 52.243-4(b) states:

- **Any other written or oral order** (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change **shall be treated as a change order** under this clause ..

Many contractors fail to appreciate when this type of change is being made

Constructive Changes – Remote Access Example

- Contract allowed contractor to perform software updates to government computer system remotely
- New personnel took control of the Government network after contract award
- New personnel refused to grant the contractor remote access
- Contractor had to employ a subcontractor to perform the work locally
- A **change** to means and methods

Constructive Changes – Outlet Example

- Contract required a certain number of electrical outlets per square meter of office “space”
- Contractor interpreted this to require so many outlets per square meter of office space across the entire building
- Government personnel interpreted this to require so many outlets per square meter of space per office, rounded up, which resulted in the installation of many more outlets
- Contractor provided notice that it believed this interpretation to be incorrect and a change to the contract requirements
- Contracting Officer confirmed the government’s interpretation, thereby directing the contractor to install the additional outlets

Why Does it Matter When A “Change” Occurs, and What Type of Change It Is?

Likely, a contractor wants the right to claim for time/costs incurred as a result of the change →

- FAR § 52.243-4(d) - If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work . . . the Contracting Officer **shall make an equitable adjustment** and modify the contract in writing...

Why Does it Matter When A “Change” Occurs, and What Type of Change It Is?

Likely, a contractor wants the right to claim for time/costs incurred as a result of the change →

- Preservation of rights requires fulfillment of notice requirements
- Notice requirements differ depending on factual circumstances/type of change

Notice Regarding Changes

Notice is required for Constructive Changes

FAR § 52.243-4(b):

- Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; **provided, that the Contractor gives the Contracting Officer written notice** stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order

Notice Regarding Changes

A General Cost Proposal is Also Required (a or b)

- FAR §52.243-4(e): The Contractor must assert its right to an adjustment under this clause within 30 days after:
 - (1) receipt of a written change order under paragraph (a) of this clause or
 - (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

Notice Regarding Changes

Let's Return to Our Remote Access Example...

- Contract planned to perform software updates to government computer system remotely
- New personnel took control of the Government network after contract award and refused to grant the contractor remote access
- Contractor had to employ a subcontractor to perform the work locally
- **What if the contractor never informed the government that it considered this a change, and just went forward with hiring the sub; claimed damages after performance was over...**

Cost Proposal

What Kinds of Costs/Damages?

- Direct costs to perform the changed work.
 - Labor Costs
 - Material Costs
 - Equipment Costs
 - Subcontractor Costs and Markup
- Impacts on Unchanged Work
- Profit
- Overhead

(No?) Constructive Changes

- 52.212-4 Contract Terms and Conditions—Commercial Products and Commercial Services
 - (c) Changes in the terms and conditions of this contract may be made only **by written agreement** of the parties.

Questions and Common Mistakes – Notice

- When the Government issues an RFP or modification are you required to provide notice of the change?
- When the Contracting Officer changes the means or methods of work, do you need to provide notice that it is a change? Do you need to provide notice when you believe that the Contracting Officer's interpretation of the Contract will require you to perform additional work/constitutes a change?

Questions and Common Mistakes – Express Changes' Impact on Performance

- When the Government issues an RFP does that mean you can proceed with the work in the RFP?
- When the Government issues an RFP does that mean that you can stop performance of the work that is (potentially) going to be changed?

Questions and Common Mistakes – A Note About Prosecution of the Work

- The Disputes Clause, FAR § 52.233-1(i), states: “The Contractor **shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer**”
- Unlike a private construction contract, government contractors **are legally obligated to proceed with disputed work even if they have not received payment.** If the contracting officer directs you to proceed, you cannot refuse to do so (** Pro Subcontracting Tip...**)

Questions and Common Mistakes – A Note About Prosecution of the Work

- Consequences of refusing to perform as directed:
 - Uncompensated Delay
 - Cure Notices
 - Termination for Default
 - To convert a termination for default to a termination for convenience, contractor would have to prove that the Government was in material breach of the contract.

Questions and Common Mistakes – A Note About Prosecution of Work

- When the Contracting Officer interprets the contract, is that a direction to proceed with the work that you must obey?
- When the Contracting officer directs additional work, or interprets the contract in such a way that will require additional work, should you proceed with the work? Can you refuse to proceed without payment?
- What is your remedy?
- What do you need to do to protect your rights?

Questions and Common Mistakes – A Note About Authority

Let's make this a little harder...

- When the **COR/COTR** directs additional work, or interprets the contract in such a way that will require additional work, can you proceed with the work?

Questions and Common Mistakes – A Note About Authority

Only a **Contracting Officer** has Authority to Change the Contract

- FAR § 43.102 states:
 - (a) Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government. Other Government personnel shall not—
 - (1) Execute contract modifications;
 - (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
 - (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification

Questions and Common Mistakes – A Note About Authority

COR

- May not be delegated responsibility to perform functions that have been delegated to a contract administration office [to the ACO], but may be assigned some duties by the contracting officer
- **Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions**

Questions and Common Mistakes – A Note About Authority - Example

Let's return to our outlet example...

- Contract required a certain number of electrical outlets per square meter of office “space”
- Contractor interpreted this to require so many outlets per square meter of office space across the entire building while Government personnel interpreted this to require so many outlets per square meter of space per office, rounded up, which resulted in the installation of many more outlets
- What if the “Government personnel” referenced above was a COR/COTR? Should the contractor proceed?
- What should the contractor do?

Questions and Common Mistakes – A Note About Authority - Example

- Two Government design reviewers on a design-build project requested additional features be included in the design, which significantly increased construction costs.
- Contractor notified the contracting officer of one of the design reviewers comments, and the contracting officer authorized the change.
- However, the contractor failed to notify the contracting officer of the other design reviewer's comments and proceeded with the work without contracting officer approval.
- The contractor was able to recover for the work which the contracting officer had authorized, but not the work which was performed absent the contracting officer's approval.

Questions and Common Mistakes – A Note About Authority

Exceptions

- Implied Authority - Authority to bind the government may be implied when it is an integral part of the duties assigned to the particular government employee. There cannot be implied authority if the contract specifically states that only the contracting officer has authority to change the contract.
- Ratification - When an unauthorized government representative enters into an agreement, the agreement may still be valid if ratified by a person with express or implied actual authority to bind the government. The ratifying officer must have actual or constructive knowledge of the material facts involved.

You do not want to have to rely on these. Plan for the general rule.

It's All About How You Look At It... Notice/ Communication is Key to Avoiding Conflict

- Honest and courteous communication about a potential change as soon as it comes up is the best way to avoid conflict over that change
- The contract governs what is and what is not a change — the parties can often avoid a dispute altogether by simply consulting the contract together
- Many times the government may not realize that it is directing work that (the contractor believes) is not required by the contract

Changes Clause – Broader Implications

- Other Common Claim Bases Under Changes “Umbrella”
 - Defective Specifications
 - (Some) Delays

DEFECTIVE SPECIFICATIONS

Defective Specifications

- Faulty design and mistakes in specifications causing extra work have been held to provide a basis for price adjustment under the 'Changes' clause, even though the change constituted a relaxation of the specifications to achieve an attainable result. Where, as here, the change is necessitated by defective specifications and drawings, the equitable adjustment to which a contractor is entitled must, if it is to be equitable, i.e., fair and just, include the costs which it incurred in attempting to perform in accordance with the defective specifications and drawing.
 - *Appeal of Johnson & Son Erectors*, ASBCA No. 24564, 81-1 B.C.A. (CCH) ¶ 15082 (Mar. 31, 1981)

Defective Specifications

- The Changes clause, FAR 52.243-4(d) states:
 - . . . In the case of defective specifications for which the Government is responsible, the equitable adjustment **shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.**

Defective Specifications

- Design specifications v. Performance specifications
- Patent v. Latent Defects

Defective Specifications

- The law is clear that the government warrants **design** specifications, and if such specifications are deficient, the government bears the risk.
- In general, in order for a contractor to recover an equitable adjustment it must demonstrate that the specification is a **design** specification, not a performance specification, and that such design specification is defective or impossible to perform.

Defective Specifications

- **Design specifications** set forth in detail the materials to be employed and the manner in which the work is to be performed, and the contractor is required to follow them as one would a road map.
- **Performance specifications** simply set forth an objective or end result to be achieved, and the contractor may select the means of accomplishing the task.

Defective Specifications - Example

- Contract specified two different methods to provide required curved steel beams: rolling or welding.
- Contractor expended funds attempting to roll the curved shapes as specified, but was unable to produce the specified shape.
- Government argued that contractor could have welded instead.
- Board of contract appeals held that contractor was entitled to rely on both specified methods to produce satisfactory results.

Patent v. Latent Defect

- Where a contractor-claimant seeks to recover an equitable adjustment for additional work performed on account of a defective specification, the contractor-claimant must show that it was misled by the defect.
- To demonstrate that it was misled, the contractor-claimant must show both that it relied on the defect and that the defect was not an obvious omission, inconsistency or discrepancy of significance—in other words, a **patent defect**—that would have made such reliance unreasonable.

Defective Specifications - Example

- Contract called for a specific type/class of pipe to be used at a specific depth
- The specified pipe was not appropriate for use at that depth based on industry standards
- Pipe bowed, bent, broke, and needed to be reinstalled
- Contractor incurred damages
- Contractor was able to recover ... because they had raised the issue at the bidding stage

Defective Specifications

Contractors are NOT Required to Reverse Engineer Specifications to Find Defects

- In E.L. Hamm, a landscaping contractor based its bid on government calculations of acreage, based on data that was provided in the contract.
- Calculations were incorrect, but government argued that the contractor had an obligation to double check the government's math before bidding.
- The court disagreed, holding that absent some reason to reverse engineer the government's calculations, contractor was entitled to recover its costs incurred as a result of the erroneous calculations.

Defective Specifications

- Damages:
 - Costs incurred to repair or replace defective work resulting from a defective specification
 - Costs incurred in attempting to comply with defective specifications
 - Costs incurred as a result of additional work required as a result of a correction to a defective specification
 - Costs incurred as a result of delays caused by a defective specification

Defective Specifications - Summary Rules

- If contractor discovers a defect in the specifications before it submits its proposal, what should it do?
 - Contractor is obligated to inform the Government about the defect before submitting its proposal.
- If contractor discovers a defect in the specifications during performance, is notice to the contracting officer required?
 - Yes. Always.
- Is contractor obligated to proceed with the work that is not affected by the defective specification?
 - Yes. Always.

Differing Site Conditions v Defective Spec

What is the difference between a differing site condition and a defective specification?

- A differing site condition occurs when the physical conditions on the project site are different from what was indicated in the plans and specs.
- A defective specification occurs when the plans and specs direct the contractor to perform the work in a way that will not render a satisfactory result, often as a result of failure to take into account the existing conditions on the ground.

Differing Site Conditions v Defective Spec

What is the difference between a differing site condition and a defective specification?

- So a set of plans that indicates a particular route for utility lines which is blocked by other, unknown, utility lines will result in a differing site condition claim.
- But a set of plans that tells the contractor to install the wrong size pipe for the depth of the line is a defective specification claim.

Differing Site Conditions v Defective Spec

- A Differing Site Condition might also be a Defective Specification
- But not all Defective Specifications are DSC

BEWARE THE CLOSING STATEMENT!

Modifications – Accord & Satisfaction/ Waiver/Release

- The Government will always want to include release language on a modification
- Sometimes this release language is limited to releasing only those further claims related to the specific subject of the modification (even this can trip you up)
- However, sometimes the release language may be much broader than that, releasing the Government from all claims up through that point in the project

Modifications

D. CLOSING STATEMENT

It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects all credits due the Government and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

Modifications

- **Beware** the Release Language!
- In the federal Boards and Courts, broad releases are generally enforceable.

Modifications

- What can you do to rebut a Release/Waiver/Accord and Satisfaction Defense?

Modifications

- Reserve Your Rights!
 - Refuse to sign the bilateral modification and ask that the Agency issue it unilaterally (or direct you to do the work)
 - See if you can agree on a modification of the release language
 - Cross out the release
 - Attach a letter specifically reserving your claims or write the reservation directly onto the modification form

QUESTIONS?

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