

UNDERSTANDING GOVERNMENT CONTRACT CHANGE CLAUSES AND EQUITABLE ADJUSTMENTS

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KEY DISCUSSION TOPICS

Panel will discuss unique aspects of contracting with the U.S. Federal Government.

- Unilateral Authority to Change vs. Bilateral Change
- Cardinal Changes
- Constructive Changes
- In and Out of Scope Changes
- Equitable Adjustments

PURPOSES OF CHANGE CLAUSES

- Provides operational and functional flexibility
 - World conditions
 - National emergencies
 - Budget Constraints
 - Technologies
- Provides contractor a means to propose changes to the work
- Provides CO with ability to order additional work (if within scope), without creating a new procurement
- Provide legal means by which contractor may process claims through the administrative disputes process.

CHANGE CLAUSES

- 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
- **52.212-4 Contract Terms and Conditions-Commercial Items**
- **52.243-6 Change Order Accounting**
- **52.243-7 Notification of Changes**

COMMON CHARACTERISTICS OF CLAUSES

- ❑ Written by the Contracting Officer...with actual authority, within the general scope...without notice to sureties
- ❑ Unilateral right to change contract
- ❑ Contractor has a “**duty to proceed**”
- ❑ Equitable adjustment if increase / decrease in cost of performance, schedule, or both; and other affected terms of the contract
- ❑ Contractor must assert its right to an adjustment within **30 days**
- ❑ Decisions subject to **Contract Dispute Act** (CDA)

EXAMPLES OF UNILATERAL CHANGES

- Drawings, designs, or specifications
- Method of shipment or packing
- Time of performance (i.e. hours of the day, days of the week, etc.)
- Place of performance of services
- Location of inspection, delivery, or acceptance
- Amount of Government Furnished property

CASE STUDY - 1

Makro Janitorial Services, Inc.

- Changes & Equitable Adjustments
- What did the Government assert in defense of its actions?
- Who was responsible?
- Was its position viable? Why or why not?
- What was the basis of the protest?
- What was the outcome?

CARDINAL CHANGES

What qualifies as a cardinal change?

- Material difference in the contract requirement
- Material difference in what the offeror thought was the requirement at the time of proposal

CARDINAL CHANGES

What conditions may indicate a cardinal change has occurred?

- Value of the change in comparison to overall requirement
- Significant changes in quantities
- Material changes in type of work
- Material changes in other terms of the contract, **e.g. delivery, schedule, warranty, etc.** factors that go to the essential business arrangement
- Large number of changes

CASE STUDY - 2

Neil R. Gross & Co.

- What was the claim by the protestor?
- What were some of the factors that were primary to the GAO analysis and led to its decision?
- Was the protest sustained or denied?

CONSTRUCTIVE CHANGES

THREE KEY ELEMENTS:

1. Gov't action or inaction causes a change to the terms and conditions of performance - (“change component”)
2. Contractor did not perform voluntarily - (“fault component”)
3. Change causes an increase or decrease in cost and/or time of performance

CONSTRUCTIVE CHANGES

- Scope Creep
- Defective specifications
- Governmental interference
- Superior knowledge
- Constructive acceleration
- Contract interpretation



EQUITABLE ADJUSTMENTS

KEY ELEMENTS OF REA:

1. Facts and law showing entitlement
2. Quantum
 - a. Calculation of increased costs directly attributable to any work added by the change
 - b. Deduction of costs directly attributable to any work eliminated by change
 - c. Application of overhead and profit to the net costs directly attributable to the change

EQUITABLE ADJUSTMENT

Entitlement:

- Does the Gov't employee have “actual authority”?
- When did it occur?
- When did the Gov't have notice?
- Was notice timely?
- Was the Gov't prejudiced?
- What effect on cost and performance time?

Clauses Allowing
for Equitable
Adjustments

52.245-1 Gov't
Property

52.242-14
Suspension of
Work

52.242-15
Stop-Work-Order

52.242-17 Gov't
Delay of Work

CASE STUDY - 3

Magnus Pacific Corp.

- What was the claim by the contractor?
- What did the court find regarding the “odd circumstances” of the case?
- Was the constructive change claim granted or denied?

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