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.
• 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?
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
Learning and Development

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 let 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?
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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