



Government Changes Clause and Request for Equitable Adjustment

Wisconsin Procurement Institute
B2G Connect
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Facilitator: Daryl Zahn
Sr. Contract Administrator
DRS-Power & Control Technologies, Inc.

Changes Clause – what is it?

- **FAR 52.243 - The “Changes Clause”**
- Enables the Customer to make *unilateral* changes to the contract during performance:
 - (a) The Contracting Officer may at any time, by written order, and without notice, make changes within the general scope of the contract in any one or more of the following:
 - (1) Drawings, designs, or specifications
 - (2) Method of shipment or packing
 - (3) Place of delivery
- Virtually every contract contains provisions that address *what* can be changed, *how* it can be changed, and how the *Seller should respond* to such changes.

Changes Clause – what is it?

- **FAR 52.243**
 - FAR 52.243-1: Fixed Price
 - FAR 52.243-2: Cost Reimbursement
 - FAR 52.243-3: T&M/Labor Hour
- **NOT a mandatory Flowdown**
 - Prime can be in difficult situation if it does not flow the requirement to subs.

Changes Clause

- Advantages of the clause include:
 - Allows for technological refreshment
 - Used to implement Contractor suggestions (VECP)
 - Government can accelerate schedules
 - Interpreting specifications or scope
 - Contractor enjoys “sole source” opportunities
- Disadvantages
 - Disrupt schedules – loss of learning
 - Difficult for contractor to recover impacts to other work (incidental or consequential damages)
 - Sole source position may require cost disclosure
 - Contractor’s sole source position may drive up costs

Changes Clause - Impact

- The clause entitles the contractor to an "equitable adjustment" to the contract if the change results in a change in contract costs or time of performance.
 - “(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.”

Changes Clause – Impact

- Time is of the essence
 - “(c) The Contractor must assert its right to an adjustment under this clause within **10/20/30/?** 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.”
- Failure to assert within the prescribed time period is considered acquiescence – Required Change without equitable adjustment - i.e., you snooze, you lose

Unauthorized direction

- If Seller considers that the conduct, statement or direction of any of Buyer's employees constitutes a change hereunder or during the performance of the order, Seller shall notify Buyer's authorized representative and **take no action on the perceived change pending *written approval* of Buyer's authorized representative.** Only Buyer's authorized representative has authority to approve a change.
- Any change made by Seller without such written approval shall be deemed voluntary by Seller and not compensable in the cost of or time required for performance.

Equitable Adjustment

- Equitable adjustments can cut both ways
 - “(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.”
- The clause allows for **unilateral** changes – i.e., you can fight over the equitable adjustment but you **MUST** implement the change
 - “(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.

Changes Clause - Mechanics

- All changes under the clause must be:
 - Within the scope of the contract
 - Issued by the designated Contracting Officer(s)
 - Ordered in writing
- Contractor should acknowledge the change in writing without accepting any limitation imposed on remuneration
- Contractor must assert any cost &/or schedule impact within the prescribed time period (usually 30 days but read the contract)
 - Proposal on cost &/or schedule impact may be submitted any time prior to closeout/final payment

Changes Clause – Duty to Proceed

- Clause explicitly requires contractor performance on changes asserted under the clause
- Disputes on *value* of the change are subject to the Disputes clause and may result in a claim
- Failure to proceed with the change can result in a default termination
- Stating that you will not proceed until the price of the change is negotiated is viewed as *anticipatory breach* and can result in a default determination

Constructive Changes

- Defined as informal customer actions or inactions not initially identified or admitted to be changes -- but which require extra work
 - Government’s “re-interpretation” of specifications
 - Defective specifications
 - Contractor has a duty to seek clarification on patent ambiguities
 - Government’s interference or failure to cooperate
 - May include arbitrary disapprovals, overzealous inspections, inadequate access, late GFI/E, etc.
 - Failure to disclose *vital* information – superior knowledge
 - Acceleration
 - Typically involves holding schedule after excusable delay
 - Contractor **must** assert excusable delay and request an extension
 - Impossibility of performance
 - Act of over-inspection or unreasonable approval times
 - Failure to cooperate

Importance of managing contract changes.

- Erode **profitability** by accomplishing out of scope work without recovery of associated costs.
- **Cost growth** on the program: Design To Cost increasingly important. On many large problems, it is the critical decision-making variable due to budget constraints.
- **Product Improvements** may cause product to become non-competitive or less desired due to cost growth.
- Disagreements may arise with respect to the conformance of product that has deviated from specs ... as a result of direction from unauthorized sources (i.e. only in writing from buyer's designated representative).
- Best Value outcomes may be compromised by accomplishing uncontested constructive changes.
- Compliance with contract terms and conditions, government regulations, and public statutes require diligence.

Change Order and Constructive Changes

- The Changes Clause allows for an *equitable adjustment* in the price and delivery schedule
- The purpose of the equitable adjustment is to:
 - Keep a contractor whole when the Government modifies a contract, and
 - Preserve pricing on unaffected work
- Requests for equitable adjust (REA) are “sole source” proposals and typically cost-disclosed and subject to TINA
- Change and resultant adjustment should not affect the original contract formation

DFARS 252.243-7002 Requests for Equitable Adjustment.

- The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed.
- Any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold (\$100K) requires that at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

Equitable Adjustments

- Equitable adjustment pricing is based on a “will cost” vice “should cost” principle
 - Costs must be reasonable and reflect what a contractor’s actual costs will be – not necessarily original estimates
 - Burden of proof rests with the contractor
 - Adjustments for work deletions based on the same principles
- If “will cost” exceeds original estimate, use “will cost.” Example of deleted work:
 - If original estimate was \$100 and new estimate is \$50, deduct \$50
 - If original estimate was \$100 and new estimate is \$150, deduct \$150

Equitable Adjustments

- Wholesale deletion of CLINs is generally at the established CLIN price
- O/H rates used to price the adjustment should be actuals or current estimates
- Profit used in the adjustment does not have to reflect the original estimate/contract
 - Generally, a downward adjustment may exclude profit if the contractor can demonstrate that the entire contract is in a loss position
 - Profit is usually negotiated to reflect risk and complexity of the changed work

Contract Claims

- An REA is not a Claim. REA's are submitted under the *Changes clause* of the contract
- If the REA is denied, the next step would be a claim
- A formal Claim is a *written* specific demand for payment of money, adjustment of contract terms,... submitted under the *Disputes clause*
 - A formal claim must arise from a dispute
- A formal claim must
 - Be certified that the “claim is made in good faith” if over \$100K
 - Specify the relief required
 - Assert specific rights (i.e., supporting documentation)
 - Request a COFD
 - Clearly indicate the the amount of remuneration required

Request for Equitable Adjustment

- A good request for an equitable adjustment establishes four things:
 - (1) entitlement to an adjustment based on a Government act or failure to act,
 - (2) damages in the form of an increase in the cost or time of performance,
 - (3) a causal link between the act or failure to act and the damages, and
 - (4) proof of the amount of the damages.

Suggested REA Format

- Introduction
 - State that REA is to contract price, time of performance or both-State specific amount or time that you want.
- Statement of Facts
 - Describe what the Government did or failed to do that caused the change. i.e. Change Order or Constructive Change directive.
 - Explain how the act or failure to act caused the increase in cost or time by forcing you to do something that you otherwise would not have had to do or that you could have done at less expense or in less time. You must prove a cause-to-effect link. State that there was no other cause of the increase in cost or time.
 - Explain (a) how you estimated or measured the effect of the act or failure to act on cost or time and (b) how you determined the amount of additional profit to request. Attach supporting documentation.
 - Either (a) identify a contract clause that says you're entitled to money or time in the event of such a Government act or failure to act or (b) state that the Government's act or omission was a breach of contract and identify the contract term with which it was inconsistent.
- Conclusion
 - Reiterating your REA is for an adjustment to the contract price or time of performance.
 - If the request for an equitable adjustment exceeds \$100,000, insert the claim certification required by FAR Subpart 33.2. Make sure that the letter is signed by the appropriate company official.

Changes Clause - Take Aways

- Change Orders must be written and come from the contracting officer (s) or designated rep
- Changes Clause requires the contractor to proceed with the work
 - not acknowledging the change order puts you at risk for acquiescence
- Constructive changes must be acknowledged in writing
 - Includes scope changes and excusable delay
- You must assert your right for an adjustment within “x” days of a constructive change or formal change order
- Proposal on cost &/or schedule impact may be submitted any time prior to closeout/final payment
- REAs are sole source proposals subject to TINA

Know thy Contract

- The program execution team should have a solid understanding of the technical requirements reflected in the contract.
- More difficult than it sounds, particularly in the design and development phases. Post-award conferences very useful.
- Use spreadsheets (RTM) capturing applicable compliance documents: DoD standards & specs, Special Purchase Order Conditions (SPOCs), System Requirements Documents...

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Questions?