Contract Changes

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Overview

- Definitions
- Purposes
- Clauses
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- Constructive Changes
- Notice Requirements
Definitions

• CHANGE: “Any alteration to a contract permitted by the Changes clause of a contract.” (Gov’t Ks Reference Book, 3d Ed.)

• CHANGE ORDER: “means a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor’s consent.” (FAR 2.101)
Definitions

• CONSTRUCTIVE CHANGE: “An oral or written communication, act or omission by the contracting officer or other authorized government official that is construed as having the same effect as a written change order.” (Gov’t Ks Reference Book, 3d Ed.)

• CARDINAL CHANGE: “A change that is beyond the scope of the contract and, thus, cannot be ordered by the contracting officer under the contract’s Changes clause.” (Gov’t Ks Reference Book, 3d Ed.)
Four Main Purposes for Changes Clause:

(1) Operating Flexibility – Gov’t needs may change during course of K; technological advances may occur

(2) Provide Contractor Means of Proposing Changes – Contractors may be more in tune with tech and state of the art/marketplace

(3) Procurement Flexibility – If changes are within scope, then no need to have new competition (= >time)

(4) Legal Means for Contractor to Make Claims – prior to Contract Disputes Act (CDA, 41 USC § 601 et seq.), constructive changes claims were used to cover acts and communications by Gov’t that contractors claimed were changes; now all go under Changes clause
(a) The CO may at any time, by written order ... make changes within the general scope of this contract in any one or more of the following:

• (1) Drawings, designs, or specs when the SUPPLIES are to be specially manufactured for the Gov’t 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, the CO shall make an equitable adjustment in the K price, the delivery schedule, or both, and shall modify the K.
FAR 52.243-1: Alternate I

• If the requirement is for SERVICES, other than architect engineer or other professional services, and no supplies are to be furnished, substitute the following:

• (a) The CO 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:
  • Description of services to be performed.
  • Time of performance (i.e., hours of the day, days of the week, etc.).
  • Place of performance of the services.
FAR 52.243-4: Changes

• CONSTRUCTION

• (a) The CO 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 specs (including drawings and designs);
  • In the method or manner of performance of the work;
  • In the Gov’t-furnished property or services; or
  • Directing acceleration in the performance of the work.
Coverage

- Changes Clause has two (2) basic limits on use:
  - (1) Changes must be within the general scope of the K
  - (2) Must also be described as the kind within the clause

- “Within the General Scope”
  - Nature of Work
    - If the work as changed is basically the same as contracted for, then it will generally be in scope

- Amount of Effort Contractor Req’d to Perform
  - Amount of Cost & Disruption to contractor
• “Within the General Scope”
  • Nature of Work – if work “should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into” (*Freund v. United States*, 260 U.S. 60 (1922))
  • If the work as changed is basically the same as contracted for, then it will generally be in scope
  • Example: Construction materials may change often, but if the layout and size of building are the same, the in scope
  • 3d Party Protests – Competitors protest Gov’t changes instead of holding new procurement for the work
    • Did the change alter the work enough to circumvent the statutory requirement for competition (CICA)
    • Is the change within the scope of the original competition
      • (pretty much the same test)
Coverage

• Amount of Effort
  • Degree of work disruption and increased costs
    • Not a winner for contractors, generally
  • Example: Added work so disruptive to contractor it added over 200% of cost of backfill work originally planned
  • \textit{BUT}, no cardinal change where Gov’t (1) improperly denied, suspended and delayed progress payments; (2) improperly interfered with contractor’s ability to obtain financing; (3) diverted gov’t-furnished material; (4) delayed delivery of gov’t-furnished material it was contractually obligated to deliver; (5) imposed improper inspections; and (6) imposed improper testing requirements (\textit{Rumsfeld v. Freedom N.Y., Inc.}, 329 F.3d 1320, \textit{reh’g denied}, 346 F.3d 1359 (Fed. Cir. 2003), \textit{cert. denied}, 541 U.S. 987 (2004)).
(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.

Some gov’t officials, in executing their duties as delegated by the CO, may direct contractor actions while still not improperly issuing contract changes.
Any contract change not made by the CO is unauthorized.

The contractor bears the responsibility of immediately notifying the contracting officer of the alleged change to confirm whether the government is officially ordering the change. (FAR 43.104)
Permitted Changes

• FAR 52.243-1 (Supplies) permits changes in:
  • Drawings, designs or specs when the supplies to be furnished are to be specifically manufactured for the Gov’t in accordance with the drawings, designs or specs
  • Method of shipping or packing
  • Place of delivery
• Alt I (Services):
  • Description of services to be performed
  • Time of Performance (i.e., hours of the day, days of the week, etc.)
  • Place of performance
• Alt II (combines supplies and services)
Permitted Changes

• FAR 52.243-4(a) (Construction), permits changes in the work within the general scope of the K, “including”
  • Specs (including drawings and designs)
  • Method or manner of performance
  • Gov’t-furnished facilities, equipment, materials, services or site
  • Directing acceleration in the performance
• “Including” means that in the construction clause, changes not specifically stated in the clause are permitted if they are of the kind and character of those stated
  • This language is not used in supplies/services
Gov’t-Proposed Changes

- Significant number of changes come from changed Gov’t requirements or identified problems
  - Contractor required to submit proposal as to how the new work will be done, but clause is silent as to preparation costs
    - Normally, if Gov’t doesn’t order the change, contractor not entitled to preparation costs
    - BUT, where significant technical expertise is req’d to prepare the proposal, they have been held to be compensable
- If the contractor accepts the work, then they can’t come back and claim it was outside the scope
  - Once accepted, however, Gov’t bound to pay if increased costs
Contractor-Proposed Changes

• Contractor-Proposed Changes
  • DFARS 243.204-71: Engineering changes can originate with either the contractor or the Government. In either case, the Government will need detailed information from the contractor for evaluation of the technical, cost, and schedule effects of implementing the change.
  • Often contractor asks for Gov’t to issue change based on its proposal and priced under Changes clause
    • Contractors should make it clear when equitable adjustment is expected
    • Also – no right to acceptance and must continue working
Unilateral v. Bi-lateral

- Although major clauses deal with unilateral changes, bilateral modifications are preferred (FAR 43.102).
- FAR 43.102(b) – K mods shall be priced before execution if possible; if significant cost increase will result from K mod and no time to negotiate price, a max price should be negotiated (if possible).
  - A lot of task orders (TOs) through LOGCAP K in Iraq were issued with only a maximum price established, and sometimes not even that – One TO that hit $6B was capped after the ceiling was almost hit.
- One problem may be if the Gov’t issues a unilateral change order with a maximum price stated – not negotiated with contractor, so do they accept the price limitation if they proceed with the work?
Unilateral v. Bi-lateral

• Other Clauses Authorizing Unilateral Changes:

  • Suspension of Work (FAR 52.242-14) – for convenience of the Gov’t; if too long, contractor may get adjustment of K price (add’l costs, but not profit)

  • Options Clauses (FAR 52.217-7 thru -9) – Extend K or order more supplies/services

  • Terminations (FAR 49.5) – for convenience (T4C) or default (T4C)
Commercial Items

• Bilateral Changes Only
• FAR 52.212-4 – Contract Terms and Conditions—Commercial Items (Feb 2012)
  • (c) Changes in the terms and conditions of this contract may be made only by written agreement of the parties.
• Prior to the CDA, boards and courts couldn’t find constructive changes under a bilateral clause
Procedures

- FAR 43.301 – Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shall be used (for the most part) for
  - Amendments to solicitations
  - Change orders issued under the Changes clause
  - Any other unilateral K mod issued
  - Admin changes (typos, changes in paying office, etc.)
  - Supplemental agreements (see FAR 43.103)
  - Removal, reinstatement, or addition of funds to a K
- If a price change is anticipated, it should be on the SF 30
- Optional Form 336 (OF 336) may be used as a continuation sheet
- BUT, if the form isn’t used, changes may still count
Procedures

• Downward adjustments
  • Sometimes work can be reduced
  • Contractors have little incentive to submit adjustment
    • If they don’t, CO can issue unilateral price reduction
    • CO can ask contractor to submit proposed reduction before issuing a unilateral reduction (probably good idea)
• BUT, doesn’t prevent contractor from getting equitable adjustment where CO orally issues change and states an equitable adjustment will be negotiated later
• ALSO, lack of a written change order doesn’t bar recovery (but it can … it all depends)
• Bilateral mods are req’d to be in writing, however
Constructive Changes

• Constructive changes occur when the K work is actually changed but the Changes clause procedures are not followed
• Changes can occur through the action/inaction of the parties, either intentionally or unintentionally
  • Contractor often requests increase in $ or time
• Even though CDA would allow for these disputes as breach claims, still handled as constructive changes with equitable adjustments instead of damages
• After notice of constructive change, CO may:
  • Adopt the change
  • Reject the change
  • Adopt the conduct, but deny it changes the K
Constructive Changes

- Five (5) General Types of Constructive Changes:
  - Misinterpretation by the Gov’t
    - Usually contractor proposes 1 way to do work, Gov’t proposes more expensive way
  - Defective Specs
    - Usually the work is not as described and requires more $ than anticipated
  - Gov’t Interference & Failure to Cooperate
    - Did the Gov’t act reasonably?
  - Superior Knowledge/Failure to Disclose
    - Evolved from Defective Specs – Gov’t knows something it should disclose to the contractor but doesn’t
  - Constructive Acceleration
    - Gov’t tells them to hurry up in order to complete work earlier (or on time where there is excusable delay)
Constructive Changes

• Misinterpretation by the Gov’t
  • Often, Gov’t says requirements call for a more expensive way to perform (without raising the price)
  • Therefore, Gov’t tells contractor to perform the way it sees the requirements
    • If contractor doesn’t proceed, risks T4D
    • When dispute settled, then requirements will be known
  • Boards: Where contractor req’d to perform more or different work, or to a high std, based on Gov’t misinterpretation of K req’s, then contractor entitled to equitable adjustment in $ a/o time
  • Court of Claims follows: (2) categories of disputes: (1) those clearly within the bounds of the Changes clause and (2) those that couldn’t normally be ordered under it
Constructive Changes

- **Defective Specs**
  - Design Specs
  - Performance Specs
  - Purchase Descriptions
  - Composite Specs
- **Implied Warranty of Specs**
  - Contractor reasonably relied on them (and followed them)
  - Defective designs created increased costs
    - Actual/constructive knowledge of defects bars claim
- **Impracticability/Impossibility**
  - Unforeseen/Unexpected problems/occurrences
  - Commercially impracticable/impossible
Constructive Changes

• Gov’t Interference & Failure to Cooperate
  • Gov’t has implied duty to cooperate with contractor and not be a pain during performance/administration

• Interference:
  • Nit-picking/too many inspections of work
  • Incompetence of Gov’t personnel
  • Gov’t failure to correct problem that affects contractor work

• Failure to Cooperate:
  • Failure to assist
  • Failure to prevent interference from other contractor
  • Failure to provide access to work site
  • Failure to approve changes fairly when K calls for CO approval
Constructive Changes

• Superior Knowledge/Failure to Disclose
  • Based on warranty of specs
  • Gov’t has duty to disclose info it has that would affect performance
  • Contractor must be unaware of info and rely on it
  • If costs/time increased, then contractor should recover

• Example: The Gov’t knows from a previous K that the current contractor’s method will not work but doesn’t say anything
Constructive Changes

• Constructive Acceleration
  • CO refuses to change K schedule when it should be
  • Requires:
    • Excusable Delay
    • Notice by contractor of delay & request for more time
    • Failure of Gov’t to grant request
    • Express/implied Gov’t order to accelerate
    • Actual acceleration resulting in increased costs
  • Excusable Delay – embargoes, fires, floods, strikes, sovereign acts, acts of God, etc.
    • Beyond control of contractor/sub
    • Was it foreseeable?
Notice Requirements

• All Changes clauses have notice requirements
  • Bds & Cts, however, fairly loose in enforcing K language
  • More prone to follow case law when fairness demands
  • Notice designed to expedite negotiation process

• Supply Clause – contractor must assert right w/in 30 days from receipt of written order
  • BUT, if CO decides its okay, can accept any b4 final payment of the K

• Construction – contractor must assert right w/in 30 days after receipt of written order by submitting to CO written statement describing general nature of proposal – unless time extended by Gov’t
Notice Requirements

• Meaningful notice should include cost estimate, but sometimes this can’t be done in 30 days

• Historically, notice requirement not major part of K administration – as long as the Gov’t is made aware of the claim
  • Unless prejudice can be shown
    • Some examples: 3 yr, 5 yr delays in submitting claims
    • Where Gov’t could have corrected defect if timely notice was given

• Claims asserted after final payment are specifically barred
  • Late assertions of claims prior to final payment will generally not be barred
Notice Requirements

• Gov’t claims for downward adjustments should also be timely, although not really addressed in the FAR
  • “within a reasonable time, so as to afford the contractor an opportunity to appeal from an unreasonable or arbitrary decision while the facts supporting the claim are readily available and before the contractor’s position is prejudiced by final settlement with his subcontractors, suppliers, and other creditors.” *Joseph H. Roberts v. United States*, 174 Ct. Cl. 940, 357 F.2d 938 (1966).

• Oral notice has been accepted where a contractor’s defense it was not put on notice was denied where the Gov’t informally told them during performance the work should be reduced
Notice Requirements

- **Constructive Change Claims**
  - Most Gov’t Ks don’t have notice req’s w/r/t constructive changes
  - While no notice req’t may be provided, most cts/bds will impose a req’t if the other party is prejudiced by lack of notice
    - Rare to find Gov’t has been prejudiced
    - PLUS, even if prejudiced, ct/ bd may just raise burden and not outright dismiss the claim
  - Under construction Ks (FAR 52.243-4) there are req’s
    - (b) Requires notice of constructive changes
    - (d) Limits recovery to costs incurred w/in 20 days prior to the notice (but excludes defective specs)
    - If there aren’t extenuating circ’s, cts/bds will enforce
    - BUT, if Gov’t has knowledge, then not really enforced
Notice Requirements

• Notification of Changes clause (FAR 52.243-7)
  • Optional for use in major weapons systems/subsystems Ks
  • Uses a negotiated # of days for notification of contractor allegations of constructive changes
  • However, even though this is negotiated and, therefore, more apparent to the parties of intent, cts/bds enforce it more loosely, just like the 30 day notice req’t
Conclusion

QUESTIONS?
References

*Contract Changes*, Chapter 21 of the Army Contract Law Deskbook
