

Changes: Are You Losing Money on the Table?



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Government Perspective



Vendor Perspective



The Idea

Through “changes” clauses, the government establishes its right to make changes in the contract’s statement of work or period of performance.

In Exchange

The Contractor receives a right to equitable adjustments in contract cost and/or schedule.

OUTLINE

- I. Fundamentals
- II. Entitlement - Recognizing When Uncle Sam Has a Duty to “Cough It Up”
- III. Quantum - Tips on Maximizing
- IV. Being Savvy on Change Order Accounting

I. Fundamentals



Have you left something on the table?

Claim

“Claim” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

Formal Unilateral Changes Clauses

- ▶ § 52.243-1 Fixed Price
- ▶ § 52.243-2 Cost-Reimbursement
- ▶ § 52.243-3 Time & Materials or LH
- ▶ § 52.243-4 Construction
- ▶ § 52.212-4(c) Commercial

FAR § 52.243-1

“The Contracting Officer 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:

FAR § 52.243-1

- (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
- (2) Method of shipment or packing.
- (3) Place of delivery.

FAR § 52.243-1

(b) If any such change causes an increase or decrease in the cost of, or the time required ... the Contracting Officer shall make an **equitable adjustment.....”**

FAR § 52.243-1

(c) The Contractor must assert its right to an adjustment under this clause within **30 days** from the date of receipt of the written order.

Claim

“Claim” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

Claim – “Or Other Relief...”

- ▶ If contractor is unwilling to accept a change that is not within the scope of the Changes clause, consider declaratory judgment under “or other relief.”
- ▶ Example – *CliniComp International, Inc. v. United States*, U.S. Court of Federal Claims No. 17-1035C.

Constructive Changes

- ▶ “Constructive “Change” is where the govt changes the contract but won’t acknowledge it.
- ▶ Constructive changes not addressed in FAR.
- ▶ Best strategy is to observe early and put the C.O. on notice (as well as reserve right to an EA).

Constructive Changes

A “constructive change” is any conduct by a Contracting Officer or other Government representative empowered to order changes that are not a formal change order, but have the consequence of requiring the contractor to perform work beyond the original contract requirements.....

Nash & Feldman Government Contract Changes § 10:2

Constructive Change

Occurs not as a result of govt direction, but as a result of circumstances the contractor encounters in performing the tasks

Settled through equitable adjustment

If the parties can't agree, the Contracting Officer will issue a formal decision, and the contractor can take an appeal

Should present to C.O. as soon as possible, but certainly before final payment

Request For Equitable Adjustment (REA)

REA is the embryonic stage of a claim

- ▶ Generally not adversarial
- ▶ Often based on other clauses
- ▶ Cost of preparing a REA (experts, accountants, attorneys) generally are allowable costs

Request For Equitable Adjustment (REA)

REA is the embryonic stage of a claim

- ▶ Make as detailed as possible
- ▶ Try to submit with 30 days
- ▶ If subject to DFARS, must include certification in § 243.204-71 if > \$150,000

Requests for Equitable Adjustment (REA)

Clauses Allowing REAs

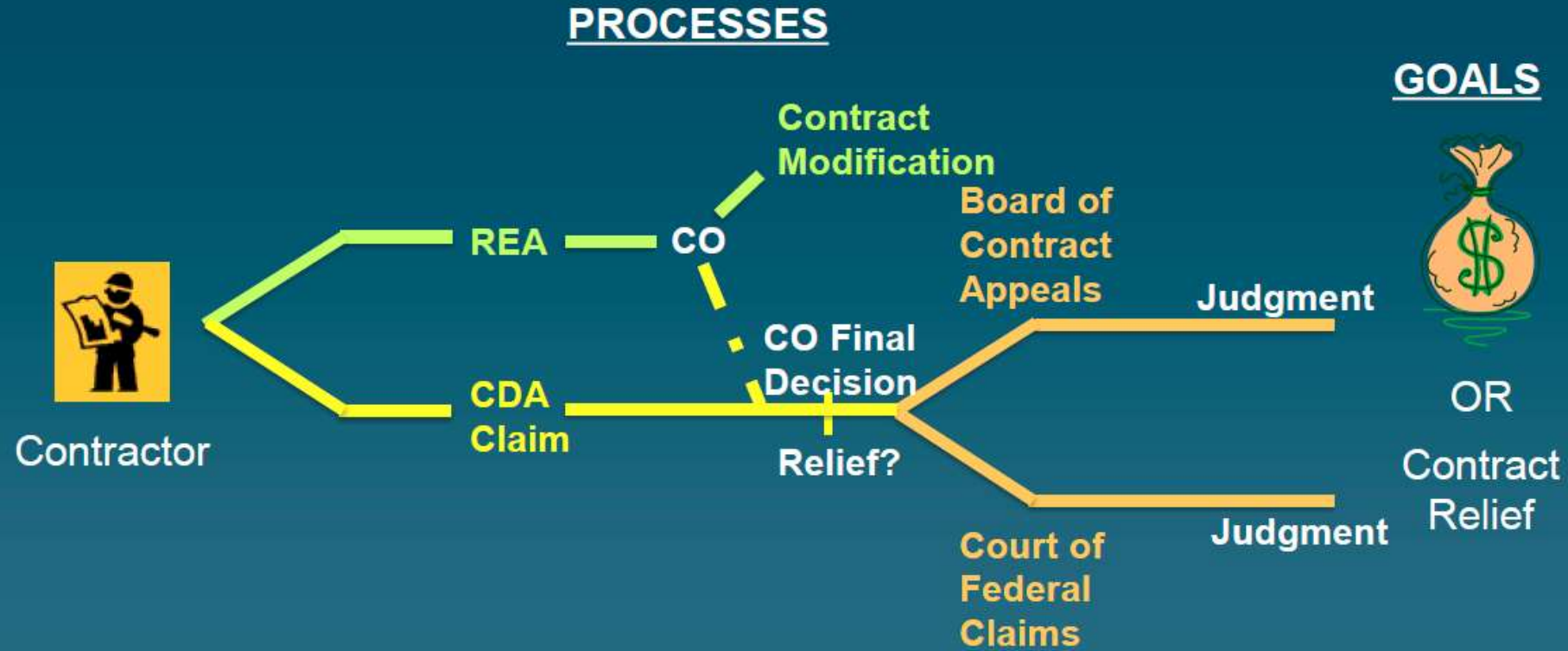
- ▶ FAR § 52.236-2 Differing Site Conditions
- ▶ FAR § 52.222-44 SCA - Price Adjustment
- ▶ FAR § 52.245-2, Government Property (Fixed Price)

Requests for Equitable Adjustment (REA)

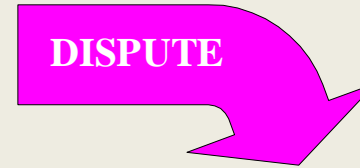
Clauses Allowing REAs *(cont.)*

- ▶ FAR § 52.242-14, Suspension of Work
- ▶ FAR § 52.242-15, Stop Work Order
- ▶ FAR § 52.242-17, Government Delay of Work

REA versus Claim under Disputes Clause



Also - ADR Option



**Required steps to
Federal Litigation**

Must Establish

ENTITLEMENT	QUANTUM
Has there been a change in the contractor's obligations under the contract?	How much is the contractor owed?

II. Entitlement - Recognizing When Uncle Sam Has a Duty to “Cough It Up”

Preparing Equitable Adjustments Claim Assessment Checklist

- Does the contract contain any of the FAR clauses that provide for an equitable adjustment?
- Did the government fail to issue a formal or express change order under the FAR Changes Clause?
- **Is the government demanding an unreasonable interpretation of the contract requirements?**

Disputes Over What Is Required

“The most frequently litigated issue in government contracting is probably the correct interpretation of contract language.”

4 *Nash & Cibinic Report* ¶ 25

Preparing Equitable Adjustments Claim Assessment Checklist

- **Are the contract specifications ambiguous?**
- Has the government included conflicting clauses in the contract?
- Has the government awarded a contract type that is inappropriate for the procurement (e.g., fixed-price development)?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Has the government increased the scope of the tasks under the contract?
- Has the government revised the tasks to be performed under the contract?
- Is the government's interpretation of the contract requirements more costly than that of the contractor?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Is the government imposing a higher standard of performance than is required by the express requirements of the contract?
- **Has the government rejected work that actually meets the requirements of the contract?**
- Has the government imposed inspection procedures that are in excess of those deemed reasonable?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Has the government greatly increased the amount of documentation required?
- Has the government induced the use of an entirely different inspection system than planned, which has increased the cost of contract performance?
- Are the government inspectors following inconsistent inspection procedures?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

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Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Has the government performed its inspections at a later time than required by the contract, increasing contractor costs?
- Has the government provided approvals or disapprovals of plans, drawing, reports, etc. outside of the time limits included in the contract?
- Do the specifications of the contract make it impractical or impossible for the contractor to perform?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Are the contract specifications unachievable due to some technical error?
- Do the contract specifications exceed what any contractor could possibly achieve given the technology available?
- Is the cost of achieving contract requirements prohibitive or wasteful?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Has the government failed to disclose superior knowledge vital to the successful performance of the contract?
- Was the undisclosed information known to the contracting agency or a meaningfully connected agency?
- Was the contractor unaware that the undisclosed information was available?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Did the government cause the contractor actual harm (e.g., increased cost of performance) by not disclosing the information?
- Did the government in any way require or imply that the contractor should accelerate contract performance?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Did the government refuse to adjust schedule or completion dates even though the contractor experienced excusable delay?
- Did the contractor, at the insistence of the contracting officer, attempt to accelerate contract performance and incur additional costs?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Did the government fail to provide government-furnished property or information in accordance with the contract requirements?
- Was the government-furnished property or information unsuitable for its intended use?
- Did the government fail to cooperate, through an action or inaction, during contract performance?

Preparing Equitable Adjustments Claim Assessment Checklist (Continued)

- Did the government exercise a contract option after the option's indicated expiration date?
- Did the government fail to satisfy all of its requirements as defined in the "requirements" contract?

Defective Specifications

*Axion v.
United
States,
COFC –
No. 03-
2644C &
04-297C*

*Axion v.
United
States, 68
Fed. Cl.
468 (2005)*

III. Quantum -- Tips on Maximizing

Concept of Quantum

The purpose of an equitable adjustment is to keep a contractor whole through reimbursement of increased costs and payment of a fair profit.

*New York Shipbuilding Co., Div. of Merritt-Chapman
& Scott Corp., ASBCA No. 16164, 83-1 B.C.A. ¶ 16534*

Quantum

“The ascertainment of damages is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision: It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation.”

Bluebonnet Savings Bank v. United States, 266 F.3d 1348 (Fed. Cir. 2001).

Means of Proving Quantum

- **Actual Costs** – *Best hope to recover*
- **Total Cost Method**
– Solid possibility
- **Jury Verdict** – *Not likely to recover*



Actual Costs – The “Safe”

“[The actual cost **Best** method] provides the court, or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor.”

Propellex Corp. v. United States, 342 F.3d 1335 (Fed. Cir. 2003)

Actual Costs – The “Safe”

Bet

“Usually contractors relying solely on the ‘jury verdict’ or ‘total cost’ methods of calculating damages walk away empty-handed. Prudent contractors should therefore strive to avoid the need for a ‘jury verdict’ or ‘total cost’ approach on quantum by tracking actual costs incurred as a result of Government change orders or constructive changes.”

Total Cost Method

Prerequisites

1. The nature of the loss made it impracticable to determine amount of the loss with a reasonable degree of accuracy.
2. Amount proposed was realistic.
3. Actual costs were reasonable.
4. Contractor was not responsible for the additional costs.

Interest on Claim

FAR § 33.208 Interest on Claims.

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that

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(1) The contracting officer receives the claim (certified if required by § 33.207)

Truth In Negotiations Act

FAR § 15.403-4(a)(1)(iii) requires certified cost or pricing data for the modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph if the price adjustment exceeds \$200,000.

Maximizing Recovery Tip

#1

If the contractor is in a position to make a substantial profit on the contract, it may be able to retain a greater portion of its anticipated profits in a deductive change situation. Under the Changes Clause only profit attributable to the deleted work is lost. In the partial termination for convenience situation the contractor receives a "reasonable" profit on the work actually performed.

Maximizing Recovery Tip

#2
Often the government deliberates for a prolonged amount of time deciding whether to proceed with the change. If the contractor has to stop work or otherwise suffer delay as the government deliberates, pursue the costs attributable to the delay. [For example, idle facilities and idle capacity.]

Maximizing Recovery Tip #2 (*continued*)

Days Of

Daily Site

Compensable x Overhead = Damages

Delay

Rate

Maximizing Recovery Tip #3

Under the FAR 31.205-10 “cost of money,” contractors are generally entitled to recover facilities capital cost of money. “Cost of money” is an imputed amount for the cost of capital for facilities devoted to contract performance.

Recovery of cost of money does not depend on whether the contractor used borrowed funds or equity capital for the committed facilities.

Maximizing Recovery Tip

#4

Contractors often do not claim general and administrative expense on increases in subcontractor costs.

Maximizing Recovery Tip

Costs arising from the negotiations #5 were recoverable, administrative costs, because they were part of the increased cost to Tip Top from the change order.

Tip Top Construction, Inc. v. Donahoe, Postmaster General, 95 F.3d 1276 (Fed. Cir. 2012)

Maximizing Recovery Tip

#6

Deductive changes – the burden of proof of quantum is on the government.

HCS, Inc., ASBCA No. 60533, 08-1 BCA ¶ 33,748
(2016)

Maximizing Recovery Tip

#7
When a contractor is required to perform extra work on a contract, it is not uncommon for it to use salaried employees to perform that work. In such cases, these employees may not be paid for the extra hours but the contractor has concrete proof of the hours that they worked.

GaN Corp., ASBCA 57834, 12-2 BCA ¶ 35103

IV. Being Savvy on Change Order Accounting

Change Order Accounting

Change order accounting refers to the accounting procedures that a contractor uses to segregate its costs to perform the work identified in a particular change order from the other costs it incurs to perform the contract.

Change Order Accounting

Change order accounting helps the parties determine the amount that the contract price should be adjusted (up or down) for changed work.

FAR § 52.243-6

Change Order Accounting

“The contracting officer may require change order accounting whenever the estimated cost of a change or series of related changes exceeds \$100,000. The contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred, segregable direct costs (less allocable credits) of work, both changed and not changed, allocable to the change.”

FAR § 52.243-6 Change Order Accounting *(continued)*

“The contractor shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by the contracting officer or the matter is conclusively disposed of in accordance with the Disputes clause.”

Change Order Accounting

- ▶ The FAR § 52.243-6 clause is not mandatory – cannot be inserted through *Christian* doctrine.
- ▶ If clause is in contract, Contracting Officer still must direct use of change order accounting.

Change Order Accounting

If a contractor has a DCAA approved accounting system, typically change order accounting can be achieved by opening a separate charge number.

Change Order Accounting

If C.O. does not direct use of change order accounting, a court is less likely to require a contractor with a fixed price contract to prove its claim using actual cost data.

Advanced Engineering & Planning Corporation, Inc., IBCA No. 2844, 96-1 BCA ¶28,128.

Concluding Thought

*“Contracting with the federal government is like **dancing with a gorilla**. With very few exceptions, you dance the way the gorilla wants to dance and if you don’t do what the gorilla wants, things can get ugly very quickly”*

James F. Nagle. Federal Government Construction Contracts at p. 6.



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