GOVERNMENT CONTRACT

CHANGES

Protecting Your Bottom Line

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Overview

• What are “changes” to government contracts?

• How do lawyers think about changes?

• How does this affect me?
Overview

Administration of Changes

Basic Changes

Constructive Changes

Documentation of Changes
Administration of Changes

• The “Changes” Clause

• Formal Modifications
  – Mutual Agreement / “Bilateral”
  – Unilateral changes by the Government

• “Continue to Work” Provision
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Administration of Changes

Basic Changes

Constructive Changes

Documentation of Changes
Basic Changes

• Changes clause allows changes “within the general scope” of the contract

• Does not allow a “cardinal change”
Basic Changes

• Change a truck to a car?
Basic Changes

• Change the truck’s diesel engine to a gasoline engine?

• *American Air Filter Co.* (GAO)
Basic Changes

• Change from round headlights to square?
Basic Changes

• Understand that you do not have to accept changes beyond the “general scope” of the contract

• Advise your contract administrator / legal department where changes are substantial
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Administration of Changes

Basic Changes

Constructive Changes

Documentation of Changes
Constructive Changes

• Where the government changes the contract but won’t admit it

• You must learn to spot these changes
Constructive Changes

• To protect the company’s interests it is critical to:
  – Identify the Change Promptly
  – Put the Government on notice
  – Demand money and time
Constructive Changes

• Four Basic Types:
  – Changes to Express Contract Terms
  – Defective Specifications
  – Interference
  – Failure to Cooperate
Changes to Express Contract Terms

• Government says contract requires Box A and Box B connection

• You say it doesn’t
Changes to Express Contract Terms

• Is the Contract Clear?

• Remember:
  • Specifications
  • Drawings
  • Industry Standards
  • MIL-SPECS
  • Other referenced documents
Changes to Express Contract Terms

• Duty to inquire if there is an ambiguity
  – Be thorough when reviewing the bid package

• Don’t just rely on the “order of precedence” clause in the contract
Defective Specifications

• Government specs tell exactly how to build the product ("Design Specs")

• Government design does not work
Defective Specifications

- **Gov’t Spec:** connect Box A to B and it will give 10kw of power

- **Reality:** gives only 5kw
Defective Specifications

• Government bears the risk that its specifications are defective, not the Contractor

• Note: Contractor can’t have known this was a problem before bidding
Defective Specifications

• What about your own improvements to government design specifications?
Government Specification:
Your Improvement:
Defective Specifications

• Before making changes to government specs (even improvements):
  – Notify the government
  – Get permission

• Potential for sharing the savings under a Value Engineering clause
Interference

• Where the government’s actions interfere with your ability to perform the contract

• May occur where there are design specs or where there are performance specs
Your plan / the “better” way:
COTR’s Demand:
Interference

• When the government oversteps its authority and demands something you are not required do:

  – Do not just quietly follow the COTR instruction

  – Tell the government its demand is a change to your plan

  – Tell the government you will incur extra cost
Reverse the situation–You plan the “worse” option:
• COTR Suggestion – the “better” way:
Interference

Some Considerations:

• Does your design conform to the contract requirement as written?

• Will the change cost you money?
Interference

Remember:

- You are obligated to comply with the contract specifications.

- You are NOT obligated to make every possible improvement to the product.
Interference

Other common types of interference:

– Overinspection
– Disruption of work
– Failure to reasonably respond
Failure to Cooperate

Some common examples:

- Not disclosing relevant information
- Not providing promised facilities
- Hindrance by other contractors
- GFP / GFE / GFM
Constructive Acceleration

• Where you deserve more time to complete performance, but the government won’t allow it

• Generally occurs in conjunction with other changes
COTR’s Demand:
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A. Administration of Changes
B. Basic Changes
C. Constructive Changes
D. Documentation of Changes
Documentation of Changes

• When you first identify a change to the contract – focus on both external and internal documentation
Documentation of Changes

First Steps: External Documentation

– Timely notify CO of the company’s position regarding the change

– “Notification of Changes” clauses

– Critical to keep your Contract Administrator involved and up to date

– Make it clear you are not volunteering to do the extra work
Documentation of Changes

First Steps: Internal Documentation

• Can be just as important as the external communications

• Your communications may be part of the record in court
Documentation of Changes

Internal Documentation

• Avoid backstabbing communications

• Record government actions

• Inform the contract administrator promptly
  – timely notice to government
  – advantages to filing a claim early (even if all
    the costs of the change are not yet incurred)
Documentation of Changes

Documentation Generally

– The more timely and complete, the more likely the company will recover

– Protecting your right to recover is not always easy, but it is important
Documentation of Changes

Preparing for a Claim

– The Contract Requirements
– Government Actions / Omissions
– Additional Work
– Increased Costs

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Documentation of Changes

Government Actions / Omissions

• Many ways to do this
  – Internal memos, email, daily logs, etc.

• Contemporaneous records

• Records of timely notice to government
Documentation of Changes

Types of Increased Work / Costs

– Direct Effects

– Indirect Effects
Example: “Connect box A and box B electrically.”
Documentation of Changes

Direct Effects

– Labor / Overhead
– Material
– Subcontractor Costs
– Rework
– Other Costs
Documentation of Changes

Indirect Effects

– Delays
– Constructive Acceleration
– Disruption
Documentation of Changes

Direct Effects
and
Indirect Effects
Documentation of Changes

Tracking the Added Work

• For added work, you must take steps to identify and track:
  – Nature
  – Timing
  – Extent

• Creating internal records through memos, email, logs, diaries, etc.
Documentation of Changes

Tracking the Costs

– Change Order Accounting Clauses
  • apply to formal changes

– Constructive Changes are harder to track
  • often late recognition
  • consider charge numbers once identified
  • estimates may be needed

– KEY = Early identification and coordination
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• **DO** check and compare all documents included or incorporated by reference in the solicitation.

• **DON’T** assume the “order of precedence” clause means you don’t have to worry about lower-precedence documents.
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• **DO** ask the government to clarify any ambiguity or conflict in the solicitation documents.

• **DON’T** assume you will get paid for any work you didn’t price in your bid.
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• **DO** be on the lookout for changes outside the “general scope.”

• **DON’T** confuse “outside the scope,” or extra work, with “outside the general scope.”
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• **DO** communicate with your contract administrator during performance, early and often.

• **DON’T** assume the contract administrator can clean it up later if it becomes a problem.
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• **DO** give notice of government action or inaction that causes extra work or delay.

• **DON’T** assume the government will agree with you if you decide to bring it up later.
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• **DO** be responsive to government requests and direction.

• **DON’T** volunteer to do it for free or assume it will be a “no cost” exercise.
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• **DO** communicate your position to the government.

• **DON’T** assume the government doesn’t like to get something for nothing.
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• **DO** make a record of government responsibility for extra costs or delay.

• **DON’T** write memos blaming others in the company.
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• **DO** ask the government if it wants a product improvement.

• **DON’T** include the improvement without telling the government and then expect the government to pay for it.
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• **DO** understand that changes impact the company’s profitability.

• **DON’T** assume that any given change is insignificant or inconsequential.
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• **DO** promptly document the nature, timing, and extent of changed work.

• **DON’T** delay or assume that someone else will prepare this documentation for you.
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• **DO** identify all additional work required to implement the change.

• **DON’T** overlook the indirect effects.
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• **DO** check with your contract administrator regarding any contractual change order accounting requirements.

• **DON’T** assume the company’s accounting system will automatically identify and track the cost of changed work.
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