

# ROLLING WITH THE CHANGES

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This presentation is not intended to be legal advice. If you have specific questions, please contact a government contracts attorney.

# DISCUSSION SUMMARY

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## **Contract changes**

**What is a change?**

**How do changes become disputes?**



## **Contract disputes**

**Options for handling dispute?**

**Appeals**



## **Best Practices**

**“A CHANGE IS  
GONNA COME”**

# WHAT'S A "CHANGE?"

- Essentially, a modification of some aspect of the contract
  - Specifications
  - Method/manner of performance
  - Government's obligations
  - Schedule
- May be additive or deductive
  - Could be asserted by the contractor or the government
- Changes must fall within contract's original scope
  - Changes outside the scope of the contract should be made through a new contract

# UNDERSTANDING CHANGES

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**Changes refer to revised contract terms or requirements**

- Often arise during performance
- Address realities during contract performance

**Common reasons for changes include:**

- Scope creep
- Differing site conditions
- Excusable delays (e.g., Acts of God, pandemics, etc.)

# CHANGES UNDER THE FAR

- Changes clause allows government flexibility to address in performance
  - Also allows contractor the ability to suggest changes to the contract
- The FAR anticipates that changes will be necessary and provides procedures for addressing these circumstances
  - FAR 52.243-1 Changes Fixed-Price
  - FAR 52.243-2 Changes Cost-Reimbursement
  - FAR 52.243-3 Changes Time-and-Materials or Labor Hours
  - **FAR 52.243-4 Changes**
  - FAR 52.243-5 Changes and Changed Conditions



# FAR 52.243-4 CHANGES

(a) The Contracting Officer 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-

- (1) In the specifications (including drawings and designs);
- (2) In the method or manner of performance of the work;
- (3) In the Government-furnished property or services; or
- (4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating-

- (1) The date, circumstances, and source of the order; and
- (2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.



# FAR 52.243-4 CHANGES

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

# CHANGES OUTSIDE THE FAR

- *Constructive changes* are *informal* changes made through an agency's conduct
  - Scope creep
  - Defective specifications or withheld government knowledge
  - Contract interpretation
  - Failure to cooperate with contractor
- Government must cause the extra work to be performed
  - Must be directed by someone with authority to bind government
    - Contracting Officer
    - Contracting Officer's Representative . . . if approved/ratified

# WHAT TO DO AFTER A CHANGE

## Notify

**Notify the contracting officer**

- Contractor must provide notice to the government within 30 days of identifying a change

## Track

**Track Costs Separately**

- FAR 52.243-6 may require the contractor to independently track costs associated with the change until an equitable adjustment is negotiated.

## Continue

**Continue Performance**

- A change does not excuse performance of the contract while it negotiates with the government.

# **“GIMME THREE STEPS”**

# WORKING THROUGH CHANGES

- Changes are a frequent source of friction between contractors and the government.
  - Often results increased costs to the contractor (and, hopefully, to the government)
  - May also cause schedule delays
- Not all changes lead to disputes, for example:
  - Change does not impact cost or schedule
  - Government offers cost and schedule adjustments with change
  - The government and contractor negotiate cost and schedule modifications
- These outcomes avoid escalating changes into disputes
  - Preserves the relationship
  - Reduces negotiating and litigation costs

# CHANGES TO DISPUTES

- Sometimes there is no avoiding a dispute associated with a change—the government and the contractor have different interests that cannot be reconciled

Contractor Interests	Government Interests
<ul style="list-style-type: none"><li>▪ Preserving profitability of the job</li><li>▪ Covering increased material costs</li><li>▪ Meeting expressed contractual obligations</li></ul>	<ul style="list-style-type: none"><li>▪ Maximizing value from the contract</li><li>▪ Accomplishing the objects of procurement</li><li>▪ Staying within budget</li></ul>

- The government may argue there is no change because:
  - The work is within the scope of the original contract
  - The Contractor is responsible for causing alleged changes

**“I FOUGHT  
THE LAW”**





## WORKING THROUGH DISPUTES

- If contractor and government cannot agree on changes, that's a dispute
- How to resolve?
  - Negotiation
  - Request for Equitable Adjustment
  - Claim

# NEGOTIATION

## Generally

Negotiation offers a flexible opportunity for the contractor and the government to work through a dispute to find a solution that suits the needs of both parties quickly and with less expense.

## Procedures

- A contractor may request negotiation of a dispute under FAR 33.214 Alternative Dispute Resolution, but participation by the government is voluntary
- Negotiation is flexible and use many structures, including:
  - Negotiation
  - Mediation
  - Arbitration

# EQUITABLE ADJUSTMENT

## Generally

An equitable adjustment modifies the contract to accommodate cost and schedule alterations that result from a change.

## Procedures

Contracting officer *should* make an adjustment any time a change impacts cost or schedule

## SPOILER ALERT!

This doesn't always happen

If a contracting officer does not make an equitable adjustment voluntarily, a contractor may request such an adjustment.

# REQUEST FOR EQUITABLE ADJUSTMENT

## The Request

A request for equitable adjustment is a formal request from a contractor to the government for a modification that addresses costs and schedule alternations resulting from a change

## Form

- There is no specific form that a request for equitable adjustment must take, **but** the request must be certified
  - Made in good faith
  - Supporting data are accurate
- Successful requests typically include the following:
  - Discussion of the factual circumstances of the change
  - Identify reason for the change (e.g., differing site conditions)
  - Cite specific contract provisions impacted by change
  - Provide supporting documentation of change and associated costs

## Timing

A request for equitable adjustment must be filed within 30 days of

- Receiving a change order from the government, or
- Notifying the government that a change has occurred.

Request for equitable adjustment not available after final contract payment



### Generally

"[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 this contract."

### Form

- No specific form that a claim must take, **but** must be certified (if requests over \$100k)
  - "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor."
- Successful claims typically include the following:
  - Discussion of the factual circumstances of the change
  - Identify legal basis for the change (e.g., differing site conditions)
  - Cite specific contract provisions impacted by change
  - Provide supporting documentation of change and associated costs

### Timing

A claim must be filed within 6 years of the claim arising

# REA OR CLAIM?

Despite looking similar, REAs and claims differ in key areas

	REA	Claim
Timing	Within 30 days of change & before final payment	Within 6 years of the change issue first arising
Certification	General with 2 required statements	Specific language
Appealable	No (but can file a claim)	Yes

The key distinction: only a claim meets the requirements of the Contract Disputes Act, which is required for appeal options

# APPROACHES AT A GLANCE

	Negotiation	Equitable Adjustment	Claim
Advantages	<ul style="list-style-type: none"><li>• Flexible</li><li>• May be fast</li><li>• Less expensive</li></ul>	<ul style="list-style-type: none"><li>• Descriptive</li><li>• In writing</li><li>• More “amicable” than a claim</li></ul>	<ul style="list-style-type: none"><li>• Concrete &amp; Descriptive</li><li>• In writing</li><li>• Triggers CDA</li></ul>
Disadvantages	<ul style="list-style-type: none"><li>• Agency participation optional</li><li>• Recovery is negotiated</li></ul>	<ul style="list-style-type: none"><li>• Does not trigger CDA</li><li>• More involved</li></ul>	<ul style="list-style-type: none"><li>• Most involved</li></ul>



**“WHY CAN’T WE  
BE FRIENDS?”**

# CHANGES AND SUBCONTRACTORS

- Subcontractor work is likely to be impacted by any changes
- Notice requirements still apply
  - Subcontractors should promptly notify prime of changes and impacts
    - Subcontract should incorporate a notice provision
- Liability issues
  - Subcontracts are governed under state law
  - Consider releases/waivers of claims
- No privity between subcontractor and government
  - Prime contractor must “pass through” subcontractor’s request to the government
  - Is prime *required* to pass through a claim?

**“DON’T WORRY,  
BE HAPPY”**

# BEST PRACTICES

- Understand work scope *before bidding*
- Communicate . . . in writing!
  - Contracting Officer  $\neq$  Contracting Officer's Representative
  - Communicate *as soon as* a potential change is identified; reserve rights for time or money
- Create a paper trail
  - Contemporaneous, detailed records
  - Present *reasonable* alternatives
  - Make mitigation efforts
- Track interests in work and costs
  - Keep records relating to employee costs, equipment, facilities, etc.
    - Overhead and lost opportunities can be very tricky
  - Can you mitigate?
- Watch for releases/waivers in contract documents

# Questions?

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