



April 22nd, 2021

The FAR Changes Clause: What It Is, When IT Applies, and Why It Matters

Agenda

- Introductions
- About Fedmine
- Presentation by Maria Panichelli: The FAR Clause
- Q & A – *please use the Q+A button to ask questions*

**We will send out the recording and slides following today's presentation*

▶ About Fedmine

We are the largest aggregator of federal spending data

WHO

Fedmine

Our online platform analyzes and **simplifies** the increasingly complex federal business landscape in real-time, providing you the visibility you need into your addressable market of business opportunities.

Monitor federal spending by industry, geography or socioeconomic status

Conduct fast Super Searches, create custom keyword alerts, discover subcontractors at the task order level, with complete comprehension of what matters most

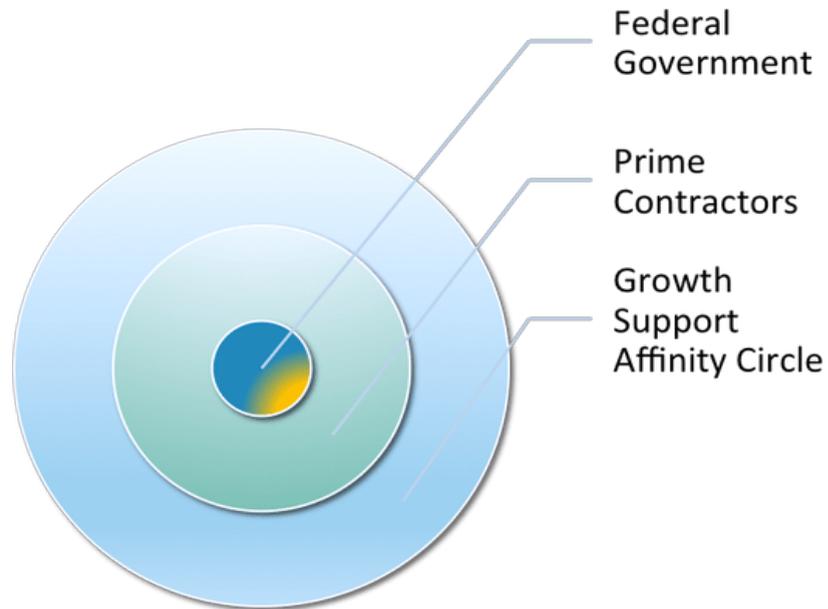
- Receive daily alerts based on awarded contracts within your addressable market
- Build a pipeline with re-compete and newly forecasted solicitations
- Dissect competition, quickly view agency profiles, drill down to key contacts and download information for marketing needs

Our Strength



Accessible content, easy to use functionality, aggregated data sets that unify views of information from disparate data sources in real-time

Clients include Prime Contractors, Growth Support organizations and the Federal Government itself – we call this the “Fed Circle”



Integrated Datasets are King

Curated, ready-to-use content is an asset many in government ascribe a premium value, especially if it is through SaaS delivery



Meet the Presenter

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Recognizing Issues - “Changes”

- The Changes Clause Governs All Changes
 - Most Federal contracts will explicitly include the Changes Clause (limited exceptions: OTAs, etc.)
 - ... and even if they don't, the changes clause is generally read into every Federal government contract (due to Christian Doctrine)
 - The Federal Acquisition Regulation (“FAR”) includes several versions of the Changes Clause

What is a “Change?”

- A “Change” occurs any time the contracting officer requires a contractor to perform work beyond the contract requirements
- Two kinds of “Changes”
 - An express change is one requested by the Contracting Officer, often through a Request For Proposal (“RFP”)But also...
 - A constructive change occurs when the Contracting Officer impliedly orders a change to the contract, whether by direction or by interpretation of the contract terms

Express Changes



FAR § 52.243-4(a) states:

- 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 —
- In the specifications (including drawings and designs)
- In the method or manner of performance of the work
- In the Government-furnished property or services
- Directing acceleration in the performance of the work

Express Changes – Example



- Contract called for the construction of a one-story building as part of a base construction project.
- During construction, the end-user pointed out that the building needed more office space and should be two stories.
- Just before the foundations were laid, the government issued a Request For Proposal to the contractor to change the building to a two-story structure.
- This resulted in a modification - an express change to the contract.

Constructive Changes



FAR § 52.243-4(b) states:

- 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 . .

Many contractors fail to appreciate when this type of change is being made

Constructive Changes – Remote Access Example



- Contract allowed contractor to perform software updates to government computer system remotely
- New personnel took control of the Government network after contract award
- New personnel refused to grant the contractor remote access
- Contractor had to employ a subcontractor to perform the work locally
- **A change** to means and methods

Constructive Changes – Outlet Example



- Contract required a certain number of electrical outlets per square meter of office “space”
- Contractor interpreted this to require so many outlets per square meter of office space across the entire building
- Government personnel interpreted this to require so many outlets per square meter of space per office, rounded up, which resulted in the installation of many more outlets
- Contractor provided notice that it believed this interpretation to be incorrect and a change to the contract requirements
- Contracting Officer confirmed the government’s interpretation, thereby directing the contractor to install the additional outlets

Why Does it Matter When A “Change” Occurs, and What Type of Change It Is?

- Likely, a contractor wants the right to claim for time/costs incurred as a result of the change
- Preservation of rights requires fulfillment of notice requirements
- Notice requirements differ depending on factual circumstances/type of change

Notice Regarding Changes

Notice is required under FAR § 52.243-4(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

Notice Regarding Changes

A General Cost Proposal is Also Required (a or b)

- FAR §52.243-4(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 proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

Notice Regarding Changes – Cost Proposal

What Kinds of Costs/Damages?

- Direct costs to perform the changed work.
 - Labor Costs
 - Material Costs
 - Equipment Costs
 - Subcontractor Costs and Markup
- Impacts on Unchanged Work
- Profit
- Overhead

Questions and Common Mistakes - Notice

- When the Government issues an RFP are you required to provide notice of the change? What about costs?
- When the Contracting Officer directs additional work, do you need to provide notice that it is a change?
- Do you need to provide notice when you believe that the Contracting Officer's interpretation of the Contract will require you to perform additional work/constitutes a change?

Questions and Common Mistakes – Express Changes' Impact on Performance

- When the Government issues an RFP does that mean you can proceed with the work in the RFP?
- When the Government issues an RFP does that mean that you can stop performance of the work that is (potentially) going to be changed?

Questions and Common Mistakes – Prosecution of Work

- When the Contracting Officer interprets the contract, is that a direction to proceed with the work that you must obey?
- When the Contracting officer directs additional work, or interprets the contract in such a way that will require additional work, should you proceed with the work? Can you refuse to proceed without payment?
- What do you need to do to protect your rights?

More About Prosecution of Work

- The Disputes Clause, FAR § 52.233-1(i), states: “The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”
- Unlike a private construction contract, government contractors are legally obligated to proceed with disputed work even if they have not received payment. If the contracting officer directs you to proceed, you cannot refuse to do so.

More About Prosecution of Work

- Consequences of refusing to perform as directed:
 - Uncompensated Delay
 - Cure Notices
 - Termination for Default
 - To convert a termination for default to a termination for convenience, contractor would have to prove that the Government was in material breach of the contract.

Communication is Key to Avoiding Conflict

- Honest and courteous communication about a potential change as soon as it comes up is the best way to avoid conflict over that change
- The contract governs what is and what is not a change — the parties can often avoid a dispute altogether by simply consulting the contract together
- Many times the government may not realize that it is directing work that (the contractor believes) is not required by the contract

Changes Clause – Broader Implications

- Other Common Claim Bases Under Changes “Umbrella”
 - Defective Specifications
 - (Some) Delays



A Note About Authority...

Contracting Officers

- **Only a Contracting Officer has Authority to Change the Contract**
- FAR § 43.102 states:
 - (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

COR

- May not be delegated responsibility to perform functions that have been delegated to a contract administration office [to the ACO], but may be assigned some duties by the contracting officer
- **Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions**

Lack of Authority – Example

- Two Government design reviewers on a design-build project requested additional features be included in the design, which significantly increased construction costs.
- Contractor notified the contracting officer of one of the design reviewers comments, and the contracting officer authorized the change.
- However, the contractor failed to notify the contracting officer of the other design reviewer's comments and proceeded with the work without contracting officer approval.
- The contractor was able to recover for the work which the contracting officer had authorized, but not the work which was performed absent the contracting officer's approval.

Exceptions

- **Implied Authority** - Authority to bind the government may be implied when it is an integral part of the duties assigned to the particular government employee. There cannot be implied authority if the contract specifically states that only the contracting officer has authority to change the contract.
- **Ratification** - When an unauthorized government representative enters into an agreement, the agreement may still be valid if ratified by a person with express or implied actual authority to bind the government. The ratifying officer must have actual or constructive knowledge of the material facts involved.
- You do not want to have to rely on these. Plan for the general rule.



Beware the Closing Statement!

Modifications – Accord & Satisfaction/Waiver / Release

- The Government will always want to include release language on a modification
- Sometimes this release language is limited to releasing only those further claims related to the specific subject of the modification (even this can trip you up)
- However, sometimes the release language may be much broader than that, releasing the Government from all claims up through that point in the project

Modifications



D. CLOSING STATEMENT

It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is increased as indicated above, which reflects all credits due the Government and all debits due the Contractor. It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its Subcontractors and Suppliers for all costs and markups directly or indirectly attributable for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

Modifications

- **Beware** the Release Language!
- In the federal Boards and Courts, broad releases are generally enforceable.

Modifications

- What can you do to rebut a Release/Waiver/Accord and Satisfaction Defense?

Modifications

- Reserve Your Rights!
 - Refuse to sign the bilateral modification and ask that the Agency issue it unilaterally (or direct you to do the work)
 - See if you can agree on a modification of the release language
 - Cross out the release
 - Attach a letter specifically reserving your claims or write the reservation directly onto the modification form

Questions and Common Mistakes – Modifications

- Are you required to sign a bilateral modification?
- What are your options?



Questions?

Contact Information



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