

ARE YOU ENTITLED TO AN EQUITABLE ADJUSTMENT?

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It is not possible to delineate all situations where a contractor is entitled to an equitable adjustment in price and/or time to perform the contract. However, under the Federal Acquisition Regulation (“FAR”), contractors are eligible for numerous different equitable adjustments arising out of the performance of their contracts and the actions of the government. Typically, a contractor can receive an equitable adjustment for a constructive change, delay or other government caused increase in its costs. It is generally advisable to assert your right to the various equitable adjustments permitted by the FAR. You must comply strictly with the equitable adjustment requirements in the FAR and in your contract.

What is an equitable adjustment: Although the FAR defines a claim (see below), it does not define equitable adjustment, but uses the term throughout the regulation. The courts and boards generally define equitable adjustment as “an appropriate modification of the amount due under a contract, or the time required for its performance, because of the issuance of a change order, which is just, fair, and right in consideration of the facts and circumstances of the individual case.” *Norair Eng'g Corp.*, GSBCA No. 1178, 66-1 B.C.A. ¶ 5312. The U. S. Supreme Court has stated that the term ‘equitable adjustment,’ as used in a ‘Changes’ clause of the FAR (FAR 52.243-1, 2 & 3) includes not only the cost of the work but the addition of a reasonable and customary allowance for profit. See *U. S. v. Callahan Walker Construction Company*, 317 U.S. 56, 61 (1942).

The purpose of an equitable adjustment is to keep a contractor whole through reimbursement of increased costs and payment of a fair profit. See *New York Shipbuilding Co., Div. of Merritt-Chapman & Scott Corp.*, ASBCA No. 16164, 83-1 B.C.A.¶ 16534, citing *Bruce Construction Corp. v. United States*, 163 Ct. Cl. 97, (1963); *United States v. Callahan Walker Construction Co.,id.* In general, the idea is that an equitable adjustment will be negotiated between the contractor and the government, and the contractor will be made whole. Equitable adjustments are not designed to be adversarial proceedings.

What is a claim: A claim is defined in FAR 2.101 as “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. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U.S.C. chapter 71, Contract Disputes, until certified as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Difference between request for equitable adjustment (“REA”) and claim: While an REA is supposed to be non-adversarial, a claim is a demand which may result in litigation. As noted in the definition of claim, there must be a specific certification in order to qualify as a claim if the

amount is over \$100,000. Finally, FAR 31.205-47(f) declares that the cost of preparing and prosecuting a claim against the government is unallowable. However, REAs are considered to be matters of contract administration, not litigation, and not subject to FAR 31.205-47(f). Therefore, the costs of preparing and negotiating an REA are allowable. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995); FAR 31.205-33. Finally, it should be remembered that a properly prepared REA can be converted to a claim if there is an impasse in negotiation with the government. It can be certified and resubmitted to the contracting officer.

Specific examples of prescribed equitable adjustments: The following are some specific examples of clear-cut situations in the FAR where an equitable adjustment is specifically prescribed:

- (1) Change orders. Contract modifications that result from either unilateral or bilateral changes are eligible for equitable adjustments. FAR 43.103. Contracting officers are required to negotiate equitable adjustments resulting from change orders in the shortest practicable time. FAR. 43.204. See the clauses at FAR 52.243-1 to 3.
- (2) Failure to provide timely disposition instructions for disposal of inventory may entitle the contractor to an equitable adjustment. FAR 45.602-1
- (3) Under the termination clause, after partial termination, a contractor may request an equitable adjustment in the price or prices of the continued portion of a fixed-price contract. FAR 49.208.
- (4) If the security classification or security requirements of a contract are changed by the Government, the contractor is entitled to an equitable adjustment. FAR. 52.204-2
- (5) If the quantity of a unit-priced item in a construction contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, the contractor is entitled to an equitable adjustment FAR 52.211-18.
- (6) If the contractor is requested by the contracting officer to revise technical data to reflect engineering design changes made during the performance of a contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract, the contractor is entitled to an equitable adjustment. FAR 52.227-21.
- (7) If the contract cost is affected by a change which the contractor is required to make to the contractor's established cost accounting practices, the contractor is entitled to an equitable adjustment. FAR 52.230-2.
- (8) If a protest of an award is filed after award, and the contracting officer issues a stop work order to an awardee, the awardee is entitled to an equitable adjustment. FAR 52.233-3.
- (9) If the contractor encounters materially different site conditions that cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, the contractor is entitled to an equitable adjustment . FAR 52.236-2.

- (10) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), the contractor is entitled to an equitable adjustment. FAR 52.242-14.
- (11) If a stop-work order issued under this clause is issued and then canceled, the contractor is entitled to an equitable adjustment in schedule or price. FAR 52.242-15.
- (12) If a change ordered by the contracting officer or a constructive change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under a contract, whether or not changed by the order, the Contracting Officer must make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract. FAR 52.243-1 (fixed price changes, and other change order clauses at -2, -3).
- (13) If Government furnished property is not delivered to the Contractor by the dates stated in the contract, or the property is delivered in a condition not suitable for its intended use, the contractor is entitled to an equitable adjustment. FAR 52.245-1.
- (14) If the Department of Homeland Security denies a contractor's application or designation or certification of an item under the Support Anti-Terrorism by Fostering Technologies Act of 2002 ("SAFETY Act"), the contractor may request an equitable adjustment in price based on lack of SAFETY Act designation or certification.

There are numerous bases for equitable adjustments in the regulations. Contractors should normally use these regulations and seek an REA when the situations arise. If a contractor cannot successfully make itself "whole" through an REA, the REA should be converted to a claim and submitted to the Contracting Officer for a formal ruling, and possible litigation if required.