

## **CHANGES CLAUSE CAN'T BE USED TO CHANGE TERMS AND CONDITIONS, INCLUDING PAYMENT TERMS**

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The Federal Acquisition Regulation (“FAR”) defines “change order” to mean “a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor’s consent.” FAR 2.101. The question is, what types of changes are authorized by the Changes clause? The answer is found in the Changes clause and the caselaw. The simple answer is: only limited types of changes, and generally, the terms and conditions in the contract cannot be changed by a change order. And in particular, payment methods or amounts cannot be changed, as demonstrated in a recent case. *CH2M-WG Idaho, LLC, CBCA 3876*, Sept. 7, 2017.

FAR 52.243-1, Changes—Fixed-Price (AUG 1987), states

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:

- (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 52.243-2, Changes-Cost Reimbursement contains similar language, while FAR 52.243-3, Changes-Time and Materials permits changes in the same three items plus: (1) Description of services to be performed; (2) Time of performance (*i.e.*, hours of the day, days of the week, etc.); (3) Place of performance of the services; and (4) Amount of government-furnished property. FAR 52.243-4, Changes for fixed price construction contracts, permits changes in (1) In the specifications (including drawings and designs);(2) the method or manner of performance of the work; (3) the Government-furnished property or services; or (4) Directing acceleration in the performance of the work; and (5) Amount of Government-furnished property.

As you can see from the short rundown of the key words in the various Changes clauses, a contracting officer is constrained, and may not order changes in such things as payment terms, warranties, or other terms and conditions not set forth in the Changes clause. (Of course, any change within the scope of the contract, including one in payment terms or other terms and conditions, may be made by using a bilateral change order, which is agreed to by the contractor.)

In *CH2M-WG Idaho, LLC, CBCA 3876*, Sept. 7, 2017, the Board considered a Contracting Officer’s Change Order that adjusted payments between the target and non-target work contained in the contract. This change order adjusted the contractor’s final fee in a cost reimbursement contract. The Board held that the agency contracting officer had no right to unilaterally change the contract to revise this payment method. There were several reasons and cases cited:

- This type of change did not involve a change in general scope of the contract and services performed, time of performance or place of performance. This unilateral change

impacted the contract's payment provisions, which are *not* part of the general scope of work under the contract. (This change was “beyond the general scope and cannot be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.”)

- Longstanding case law establishes that an agency is not entitled to unilaterally change the terms and conditions of a contract, including the payment terms. *BF Carvin Const. Co*, VABCA 3224, 92-1 BCA ¶24481; *Welbilt Const. Inc.*, GSBCA 2530, 68-1 BCA ¶ 7031. (Government has no basis to withhold payment of the full price of a contract, and cannot unilaterally modify payment provisions using the Changes clause)
- A Contracting officer administering a cost plus fixed fee contract may not unilaterally decrease funding to a level below total incurred costs after performance has concluded, thereby creating a cost overrun. *TEM Assoc, Inc.*, DOTBCA 2556, 93-2 BCA ¶25759.
- The ASBCA has made it clear that although the government may unilaterally order changes in certain contract provisions, when the particular term of the contract that the Government wishes to change is omitted from the list in the Changes clause, the Government has no right to change the term unilaterally and any change must be bilateral. *Coastal States Petr. Co*, ASBCA 31059, 88-1 BCA ¶ 20468 (Changes clause does not authorize a change in the warranty).

**The Takeaway:** A contracting officer may issue a unilateral change order, *but only for things set forth in the Changes clause in the contract*. If the government wishes to change other things (e.g. payments, payment methods, warranties), the contractor may refuse to perform that change and notify the contracting officer that the change order violates the FAR and the relevant case law. Alternatively, a contracting officer may change anything within the scope of the contract using a *bilateral* change order agreed to by the contractor, provided the requirements of the Competition in Contracting Act (“CICA”) are complied with.