

REQUEST FOR PROPOSAL GIVEN TO CONTRACTOR ON AN EXISTING CONTRACT IS NOT A CONSTRUCTIVE CHANGE

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When a contracting officer (“CO”) asks an existing contractor for a proposal for additional work and then withdraws that request, the request for proposal (“RFP”) is not a constructive change on the contract. *Walsh Turner Joint Venture II*, ASBCA No. 63665, May 8, 2025. The Armed Services Board of Contract Appeals dismissed Walsh Turner’s claim because it failed to state a claim.

Walsh Turner was awarded a firm-fixed-price contract by the Corps of Engineers for construction of a new Veterans Affairs Medical Center in Louisville, KY. The contract included the standard Federal Acquisition Regulation (“FAR”) 52.254-4, Changes clause. During the COVID-19 pandemic, the President issued Executive Order (“EO”) 14042 establishing a task force to establish guidance that required contractors to be completely vaccinated for COVID-19. The Army Corps issued an RFP advising Walsh Turner that the government was considering adding a COVID safety clause, but noted that the letter requesting the proposal “does not constitute a notice to proceed with the work involved. Submit your proposal by [date to facilitate negotiations].” The government rescinded the RFP one month after it was issued, stating the proposal for this effort is no longer required.

Approximately two months later, Walsh Turner submitted a document explaining the impact of the RFP on awarding its subcontract, and a delay on the cost of steel. Approximately 10 months later Walsh Turner submitted a certified claim for \$1.7 million for increased steel cost it alleged were a result of the heightened COVID-10 safety protocols required by Executive Order 14042. The Army Corps denied the claim, finding that the higher steel costs were part of the risk of performing a firm-fixed-price contract and that the issuance of the RFP was not a change under the contract.

Walsh Turner appealed, and after determining it had jurisdiction, the ASBCA addressed the issue of whether the RFP had been a constructive change. The ASBCA explained that an RFP is not considered to be a change to a contract because it is not a direction or order, but rather is a mechanism to solicit proposals from a contractor. FAR. 15.203(a). In order to be a constructive change the contractor must show that (1) it performed work beyond the contract requirements; and (2) the additional work was ordered, expressly or implied by the government.” Here the contractor did not actually perform work outside the requirements of the contract. Furthermore, Walsh Turner failed to show that the government ordered any work as part of the RFP, which was requested in a letter stating “this letter does not constitute a notice to proceed with the work. Submit your proposal for this change...to facilitate negotiations.” Because the RFP explicitly directs that it is not a notice to proceed, it cannot be a constructive change to the contract.

Takeaway: Never consider an RFP to be a direct or constructive change order unless it explicitly directs the contractor to proceed with the work embodied in the proposal.

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