



# When Contract Issues Arise - Contract Administration

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# Overview of Presentation

- ▶ Construction & Architect-Engineer Contracts
  - ❖ Changes
  - ❖ Delays
  - ❖ Disputes



# Changes

User changes

Changes in standards or codes

Differing site conditions

Value engineering proposals

Defective specifications or drawings





# Applicable Changes Clauses

- ▶ FAR 52.243-4 Changes -for FFP Construction Contracts over the Simplified Acquisition Threshold
  - VAAR 852.236–88 Contract Changes Supplement
    - Requires detailed itemized breakdown of costs for changes
    - Provides caps for the overhead, profit and fees that be charged on changes under \$500,000
  
- ▶ FAR 52.243-1 Changes – Fixed Price Alternate III -for Architect Engineer contracts

Under these clauses, if the change causes an increase in the cost, or in the time required to perform, the Contractor is entitled to an equitable adjustment or time extension.



# Changes

- **Directed changes** - made through written modifications to the contract
  - Change orders
  - Supplemental Agreements
  - Settlements by Determination (unilateral modifications)
  
- **Constructive changes** – changes that are informally ordered or caused by the Government
  - CO's misinterpretation of the contract
  - Defective Specifications
  - Acceleration
  - Hindrance or failure to cooperate



# Constructive Changes

- To prove a Constructive Change a Contractor must show:
  - Work was changed
  - The CO ordered the change through word or deed
- Notice Requirement in Construction Contracts - the Contractor must promptly give the CO written notice of Constructive Changes.
  - Date, circumstances and source of ordered change
  - Statement that Contractor considers the order a change order
  - No adjustment is allowed for costs incurred more than 20 days before the written notice was received
    - Except- notice is not required for Constructive Changes based on defective specifications



# Changes- Issues Unique to Architect Engineer Contracts

- FAR 52.236-22 Design within Funding Limitations
  - Design services must be accomplished to permit award within the specified funding limitation.
  - If all offers received are above the specified funding limitation, the AE must, at no additional cost, perform redesign services necessary to permit award within the funding limitation
- When putting together change order proposals, consider whether the change requires that the funding limitation also be changed.
- Notify the CO if the funding limitation becomes unrealistic. Changes in the scope, the materials, or in the funding limitation may be appropriate.



## Conclusion - Changes

- Make sure you read the changes clauses in the contract. Know what is required of you and know your rights.
- Submit proposals for changes promptly (VA requires proposals be submitted as expeditiously as possible, but at most within 30 days).
- For AE Contracts, make sure you are mindful of how any changes affect your obligation to “Design within Funding Limitations.”



## Conclusion - Changes

- In Change Order proposals, provide an itemized breakdown that includes materials, quantities, unit prices, labor costs, and equipment. Ensure all costs are accounted for.
- Read and make sure that you understand any release language in the Supplemental Agreements.
- Identify any Constructive Changes promptly and provide the Contracting Officer with notice.



# Delays

- Excusable
  - Compensable
    - Suspension of work
    - Changes clause
  - Non-Compensable
- Non Excusable





# Non Excusable Delays

- Delays that the Contractor causes or that are in the Contractor's control.
- The Contractor bears its own costs due to the delay, and the Government has contractual remedies
  - actual damages due to the delay
  - liquidated damages
  - possibly default termination
  - or paying for excess costs for re-procurement and/or completion by another contractor.
- The Contractor is usually responsible for Subcontractor caused delays.



# Excusable delay

- Delay is excusable when it is beyond the control and without the fault or negligence of the contractor.
  - The Contractor is entitled to a time extension for excusable delays
  - Contractor should give the CO prompt written notice of the excusable delay (within 10 days)
  
- Examples of Excusable Delay may include:
  - Acts of God
  - Fires
  - Acts of the public enemy
  - Floods
  - Unusually severe weather
  - Strikes
  - Epidemics
  - Freight embargos
  - Acts of the Gov't
  - Acts of another Contractor



# Relief for Excusable Delay

- To establish entitlement to relief for excusable delay, the burden is on the Contractor to show:
  - The overall completion of the job/work was delayed
    - Neither time nor money will be granted for delays to individual activities that do not extend the time needed for overall completion
  - The actual time the overall completion was delayed
  - What caused the delay
  - The cause was excusable
  - The cost impact of the delay (if delay is compensable)



# Relief for Excusable Delay

## ➤ The Schedule is KEY

- ❖ Know what the contract says about schedule submission and updates and about delay.
  - ❖ Know and understand the Notice requirements for delays
  - ❖ Know and understand the mitigation requirements for delays
- ❖ Get the baseline schedule approved early.
- ❖ Timely, accurate, contemporaneous monthly updates are extremely important.



# Types of Excusable Delay

- **Non-compensable Excusable delay** - Contractor may be entitled to additional time for such delays, but must bear the cost impact of such delays.
- **Compensable Excusable delay** – Under standard FAR clauses, the Contractor may be entitled to both time and costs for delays that are solely caused by the government
  - Concurrent non-excusable delay -the Contractor is not entitled to additional time or money
  - Concurrent non-compensable excusable delay - the Contractor may be entitled to additional time but not additional money.



# Compensable Delay - FAR 52.242-14 Suspension of Work (AE & Construction)

- If the CO suspends delays or interrupts the contractor for an unreasonable period of time, an adjustment shall be made for the increased cost of performance (excluding profit) caused by the unreasonable delay.
- A compensable delay can result from the CO issuing a formal written suspension order (a directed suspension) or from the CO's act or failure to act (a constructive suspension).
  - However, a claim for constructive suspension cannot be allowed
    - ❖ for costs incurred more than 20 days before the contractor provided the CO with written notice of the act or failure to act; and
    - ❖ Unless a written claim is asserted as soon as practicable after the delay and not later than final payment.



# Compensable Delay - FAR Changes Clauses

- Delays preceding a change are not recoverable under the standard FAR changes clauses.
- However an equitable adjustment under a changes clause could include impact and delay costs that result from the change after its issuance.
- Under the equitable adjustment provision in changes clauses you are entitled to reasonable costs and profit.

Note: the VAAR Changes clause imposes caps on overhead costs, fees, and profit for changes under \$500,000. The cap on overhead costs includes unabsorbed home office overhead, a major expense in delays.



# Compensable Delay – common types of allowable costs

- Unabsorbed Overhead – home office overhead
  - Only allowed where the contractor is on standby
    - ❖ The Contractor is on standby when it is required to immediately resume work at the government's notice
    - ❖ Standby is difficult to prove when non-critical work is ongoing
  - Eichleay Formula used
- Idle Labor and Equipment
- Escalation of Labor Rates and Material Prices
- Loss of Efficiency

NOTE: Contractor must make reasonable efforts to mitigate damages



# Delay Issues Unique to AE Contracts

- Delays in awarding the Construction Contracts can impact the AE Contract
  - Construction Period Services
  - Design within funding limitations
  - Changes in codes and standards



## Tips with regard to delays

- Know and understand your contract's clauses on Schedules, Changes, Differing Site Conditions, Designing within Funding, and Suspensions of Work.
- Maintain accurate monthly schedule updates. Discuss all possible delay issues with the Government early.
- The Contractor must take reasonable steps to mitigate delays and delay damages
- Keep detailed records. The burden to prove costs is on the Contractor. The Government often audits delay claims.



# Disputes



Requests for Equitable Adjustments

Filing Claims with the Contracting Officer

Alternate Dispute Resolution

Board of Contract Appeals

U.S. Court of Federal Claims



# Resolving disputes without filing a formal claim

- ▶ Resolving disputes early is less costly for both Contractors and the Government.
- ▶ Submit a detailed fully supported Request for Equitable Adjustment (REA) before filing a claim.
  - Explain in detail the relevant facts. If compensable delay is claimed, include your time impact analysis based upon contemporary schedules.
  - Explain the contract provisions and/or other legal authority you are relying upon.
  - Provide detailed cost breakdowns with the supporting evidence on the actual costs.



# Filing a claim

- ▶ A Claim is basically a written demand to the Contracting Officer seeking the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising out of the contract.
- ▶ Monetary Claims exceeding \$100,000 should be certified.
- ▶ Use the certification language found in FAR clause 52.233-1(d)(2)(iii).



# Claims

- ▶ In the claim, clearly request a Contracting Officer's Final Decision (COFD) on the matter.
- ▶ Reference and/or attach all relevant information that supports your demand, including the detailed REAs previously submitted.
- ▶ When you get the COFD, read it carefully and note the appeal and litigation rights.
  - Boards of Contract Appeals- within 90 days
  - United States Court of Federal Claims – within 12 months
- ▶ I strongly urge you to consider using Alternate Dispute Resolution or Mediation to try and resolve disputes.



Questions

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