CONTRACT ADMINISTRATION QUIRKS

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Chapter 8

Contract Administration Quirks

Because a government contract is a contract, many of the rules that apply to contracts in general—contracts that business people enter into all the time—apply to government contracts. However, because a government contract is with the government, carrying out a government contract is not always identical to carrying out the typical commercial contract. This chapter looks at several unique aspects of administering government contracts.

In this chapter, we will see that, with the government, a deal is a deal, as described in the contract:

1. Unless the government intentionally and unilaterally changes it using the Changes clause
2. Unless the government inadvertently changes it through a constructive change
3. Even though the deadlines in the contract are not really deadlines, just suggestions
4. Even though clauses left out are in there anyway
5. Even though the deal can be ended by the government prematurely without paying breach of contract damages

THE GOVERNMENT INTENTIONALLY AND UNILATERALLY CHANGES THE CONTRACT BY USING THE CHANGES CLAUSE

The Changes clause (FAR 52.243-1) found in many government contracts is unique in the business world. Normally, in the business world, a deal is a deal. If you want to change the deal, you can, but only if the other party agrees. Microsoft or Home Depot will not give you and me a Changes clause in any contract we have with those companies.

Government contracts are different. In government contracting for everything except commercial items, a deal is a deal unless it is changed under the Changes clause, with or without the contractor's consent.

The heart of the Changes clause is FAR 52.243-1, section (a):

> ***Changes—Fixed Price (August 1987)***
>
> *(a) The Contracting Officer may, at any time, 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 . . .;*
>
> *(2) Method of shipment or packing;*
>
> *(3) Place of delivery.*

The Changes clause is a very important clause. It allows the government to respond quickly to changing needs, such as modifications in congressional or agency priorities. And if the contractor doesn't want to make the change, the government can force the contractor to do it anyway. Everything has its limits, and that includes the Changes clause. A contracting officer may not use it to change *everything* in the contract. The Changes clause itself has two self-imposed limits: the change must be "within the scope of the contract," and only those parts of the contract listed in the clause (like the drawings, designs, or specifications) may be changed.

Within the Scope of the Contract

With such a handy clause from the government's perspective, there's always the possibility of its misuse. An example of this is a "cardinal change." The dictionary defines *cardinal* as "principal," "fundamental," and "chief." The Changes clause allows the government to make changes "within the scope" of the contract but not a change "beyond the scope" of the contract—a cardinal change.

The Courts and the Government Accountability Office (GAO) don't look upon cardinal changes very kindly. They see the Changes clause as a device that could be misused by allowing an agency to make an end run around federal law's policy of full and open competition. If an agency can add something significant to an existing contract, it procures something without using full and open competition.

The test of "beyond scope" really focuses on "competition" and the change's effect, if any, on it. The government may not modify a contract to where it is "materially different" from the original contract. In other words, does the original contract, as modified, require "essentially the same performance"? If so, the contract can be changed to obtain

what the agency needs from the incumbent contractor; the agency does not have to let vendors compete for it.

One court used this definition:

> *A cardinal change . . . occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for.*[1]

Here's how GAO describes its test:

> *In assessing whether the modified work is essentially the same as the effort for which the competition was held and for which the parties contracted, we consider factors such as the magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract.*[2]

The Peace Corps issued En Pointe a delivery order for Microsoft products for the agency's email system under its Federal Supply Schedule (FSS) contract. After the agency modified that order to add Microsoft products including Email-as-a-service (EAAS), Onix, a Google reseller, protested, arguing that the modification was beyond the scope of the agency's original purchase of software update services (along with technical support) for the Peace Corps' existing software products installed on the Peace Corps' IT enterprise system.

GAO agreed. Its "beyond scope" test is whether the modification is of a nature that potential offerors reasonably would have anticipated competing for the goods or services being acquired through issuance of the modification. Here, the original competition En Pointe delivery order was limited to authorized Microsoft resellers because the agency concluded that only Microsoft products would meet its requirements. Since the competition for the En Pointe delivery order was confined to firms capable of providing Microsoft products and services, it necessarily follows that firms—such as Onix—could not reasonably have anticipated that the agency would acquire an EAAS product using the originally-competed delivery order. In addition, the EAAS acquisition was also beyond the scope of the original order. Neither the original competition for the delivery order, nor the delivery order as issued, ever contemplated the acquisition of a cloud-based EAAS product or service.[3]

If the agency gives the existing contract has a broad scope of work to start with, the contract allows a broader change in that scope. But if an agency has given vendors the chance to bid on a contract that has a broad scope, the losing vendors can't fairly complain when the broad scope is used to get—through a modification to the contract via the Changes clause—something the losing offerors think should be a separate procurement.

For years, H.G. Properties (HGP) housed the National Park Service's Western Archeological and Conservation Center (WACC). WACC has about 5 million museum objects and gives advice on archeology to parks in the western United States. As the contract with HGP was about to end, the Park Service issued a solicitation for, in its terms, a "Cadillac" or state-of-the-art facility for WACC. When the awarded contract was modified, a competitor protested the change as beyond scope. The CAFC (Court of Appeals for the Federal Circuit) disagreed. The broad scope of the original solicitation let the Park Service make a broad modification. The original solicitation "encouraged bidders to submit suggested modifications to the solicitation so as to create a state of the art facility. Accordingly, the 'scope' of the contract would be understood to embrace changes or modifications to these requirements."[4]

Indicators of Beyond-Scope Work

Type of Work

As mentioned above, one indicator of a beyond-scope change is a change in the type of work. But, as one GAO decision shows, garbage collection is still garbage collection, even if it is changed to be done with a contractor's equipment and not the government's equipment.

Mark Dunning Industries (Dunning) had a contract to collect and dispose of garbage at Fort Rucker, Alabama. The contract was comprehensive, covering the waterfront of garbage collection. Dunning was to pick up residential, commercial, industrial, and community area garbage. One of the contract tasks let Dunning use front-loading government vehicles to collect the garbage. But the front-loading government vehicles weren't very reliable, so the Army changed the contract to have Dunning provide these trucks as part of the contract. The price of the contract was increased about 20 percent. GAO found the change to be within scope.

GAO emphasized that "[t]he Army's modification did not make any changes to the original nature and purpose of the contract. First, the front-loading refuse collection service is but one of the multiple refuse collection services [that were] to be performed under the contract, the bulk of which were to be performed using the contractor's trucks. Moreover, the contract specifically included as one of the multiple line items the requirement that the contractor would perform the very front loading refuse collection services that were the subject of this modification, albeit with government-furnished vehicles." In addition, GAO noted that the change was made because the government's equipment was broken. Therefore, "[s]ince the essence of the requirement was for the contractor to provide front loading refuse collection, the Army's modification, merely shifting the responsibility for the vehicles and the containers needed to carry out the services to the contractor, did not substantially change the contract, nor make it essentially different."[5]

Large Changes—Up or Down—in Contract Cost

Large cost increases are one factor to be considered, but costs, curiously, are not a surefire indicator of a beyond-scope change. In one case, increasing the contract amount by 80 percent was a beyond-scope change.

The government wanted to have a "flexible" contract for custodial services. The winning offeror would give the government an "Add/delete of Service Cost Sheet" right after winning the contract. The sheet would list the winning contractor's prices to be used in negotiating with the Air Force for adding services or deleting them after award. The government expected the additions or deletions to be minimal. Once the contract was awarded, however, the winning contractor's cost sheet itself was deleted, making service changes negotiable one-by-one and at much higher costs.

The court acknowledged that whether the contract is "materially different" could be measured by the difference in costs between the contract as awarded and as modified. But the amount of increase alone isn't the only factor. The change in costs must be put in context: the context of what the original bidders thought they were getting into if they won the contract. A 100 percent increase in funding, under the circumstances, was not considered a cardinal change in one precedent. In that case, the government had estimated the number of hours the eventual winner of a security services con-

tract would have to provide. Because the hours in the contract that all the bidders had fought for were simply an estimate, there had been no "beyond scope" change when the actual number of hours under that contract was increased to double the original amount due to an emergency. But here, there had been no such change in circumstances and the contract price had increased by 80 percent. The change therefore was beyond scope.[6]

Modifications of a contract that **reduce** the scope of the contract might be beyond scope and have to be competed.

A contract called for providing and recycling but **not** disposing of something. The government modified the contract to require providing and recycling **or** disposing of something. The "disposing" was not only a much cheaper task; "disposing" also had more competitors waiting in the wings to do the work if the agency would compete the work as modified. GAO held that the reduction was beyond the scope of the original contract, so the modification should have been competed. "Here, the RFP did not anticipate that the contractor could be relieved of the recycling requirement or that a disposal effort could be ordered in lieu of recycling. Furthermore, the costs of leasing plastic media with no recycling requirements is as much as 50 percent less. . . ." Also, there were at least four competitors who could do the work.[7]

THE GOVERNMENT INADVERTENTLY CHANGES THE DEAL: CONSTRUCTIVE CHANGES

The money a contractor gets under a government contract normally may be increased only if the government issues—with or without the contractor's consent in a noncommercial item contract—a modification of the contract, usually under the contract's Changes clause.

One classic exception to this rule is a constructive change. When there is a constructive change, judges in effect become contracting officers. As contracting officers, judges find that although the government did not expressly change the contract, something the government made the contractor do changed the contract, and therefore the contractor should get paid for the "change." Judges, of course, do not have contracting officer warrants, so a judge cannot order a formal change; however, judges can construe things any way they want. In these instances, what

the government did is construed by the judge as a change to the contract—hence the phrase constructive change.

There's a big advantage to the government in this constructive change theory. As we will see, what a judge considers a constructive change and then handles under the Changes clause could be considered a breach of contract. But because a contractor gets compensated for these "breaches" under the Changes clause, the government actually saves money by avoiding having to pay the typically higher damages for breach of contract.

Because constructive changes are so important and so common, we need a good definition: First, for there to be a constructive change, the contractor must truly be **required** by the government to perform work beyond the contract requirements—the contractor cannot recover compensation from the government if the contractor unilaterally determines that a particular course of performance is preferable. Second, for a constructive change to occur, the informal order or the other conduct that causes the contractor to exceed the scope of the contract must originate from someone who is authorized to bind the government.[8]

When a constructive change happens, the contracting officer typically does not think he is changing the contract. For example, when asked by a contractor to interpret words in a contract, the contracting officer attempts to correctly interpret the contract; the contracting officer thinks they are simply interpreting the contract. But if a contractor disagrees, files a claim, and convinces the judge that the contractor's interpretation is the correct one, the contracting officer will learn—years after making the interpretation—that their interpretation was wrong and that they had "changed" the contract. No contracting officer knowingly issues a constructive change; only a judge can "issue" a constructive change. There should be no stigma attached to a contracting officer who learns they have made a constructive change to a contract. The contracting officer was administering the contract as they believed to be fair, but when a judge disagrees, the judge had the last word.

Types of Constructive Changes

A constructive change can sneak up on a contracting officer and can appear in all sorts of disguises. The most common types involve (1) disputes over contract interpretation during performance, such as whether the work involves "extras" or whether the work was directed by someone other than the contracting officer, and (2) defective specifications.

Extras

Generally, extras are candidates for a constructive change. Judges do not like the government getting something for nothing. When a contracting officer makes the contractor do more expensive work but then refuses to pay for it, a judge can bring out the constructive change theory to force the government to pay for the extras.

The U.S. Postal Service issued a solicitation calling for trucks to carry mail long distances. But the solicitation seemed to conflict with federal regulations by saying that drivers could work 12 straight hours even though federal regulations said that drivers could work only 10 straight hours. One company, L.P. Fleming, Jr., Inc., noticed the difference but thought nothing of it since all USPS solicitations it had seen had that same language in them. Moreover, when the head of the company described how he intended to do the work—using only one driver—to a USPS contract specialist, the contract specialist never voiced any opposition to Fleming's plan and in fact recommended that Fleming get the contract.

During the contract, federal regulations changed. As applied to Fleming's work, they clearly made him use two drivers. After ignoring the earlier federal regulations, the USPS now enforced the changed regulations on Fleming, making him spend money for two drivers. When the USPS refused to increase Fleming's contract to pay for two drivers, Fleming went to the Postal Service Board of Contract Appeals. The board got Fleming paid for the extra driver. The board found that Fleming's interpretation of the contract—that one driver was okay—was reasonable and in fact "was shared by the government at the time of award and thereafter. Under these circumstances, that interpretation of the contract language governs. Therefore, when the contracting officer directed Fleming to perform the contract in accordance with the revised federal regulations, that direction had the effect of changing the contract provisions governing the allowable driving time. . . ." It concluded by making the USPS pay for the extra work.

The board came to this conclusion after addressing two important points in contract interpretation—reasonableness and reliance. Fleming's contract interpretation was reasonable ("Its drivers were regularly able to complete the trips" under the solicitation's time limits).

And Fleming's interpretation was also the one he had relied on in bidding the contract.[9]

Please note: Although the focus in a constructive change is on the contracting officer's making the contractor do more work, it's important to realize that not only a contracting officer can make a constructive change but other government employees can also, as we will discuss later.

A contractor believing it has been made to provide "extras" without getting paid for them must give the government notice as soon as possible or risk having to pay for the extras itself. (We will review this shortly.)

Defective Specifications

Sometimes the extra work comes not from a wrong interpretation of a contract but from a defective specification in the contract.

Lamb Engineering and Construction won a contract to modify ammunition storage buildings at Camp Navajo in Arizona. The specification in the contract let Lamb use dirt from one part of the camp (a borrow area) to fill holes in the ground caused by the project. During the bidding stage the government had told bidders, including Lamb, that the winning contractor could use this dirt "as is." The dirt was in such good condition that none of it had to be broken up, none of it was rock, and none of it was hard material. But in fact Lamb had to pay for "screening" some of the material and for breaking up other parts of the material. When Lamb did not get the additional cost of this extra work, it went to the Armed Services Board of Contract Appeals (ASBCA). The board found a constructive change. "To the extent that the contract indicated that the existing arch cover and the borrow stockpile would be suitable, Lamb attempted to perform in reliance on the government's detailed design specifications . . . and incurred increased costs in screening clay clods or clumps and other deleterious items. . . . The specifications were defective and extra work resulted from the ensuing constructive change."[10]

A Constructive Change by Other Government Employees

No discussion of a constructive change is complete without stressing that government employees other than the contracting officer can end up making a constructive change to a contract. This is true even if

the contract's Changes clause demands the approval of the contracting officer. Other contract clauses may delegate contracting officer approval authority to other government personnel, such as an inspector. So an inspector can be responsible for making a constructive change to a contract.

But, first, let's discuss perhaps one of the most important changes in government contract law in the twenty-first century: if a contractor wants to get paid for extras, the contractor should first get the approval of the contracting officer. A contractor should no longer rely on earlier decisions that "reflect a willingness to relax the formal writing requirement in the then-existing changes clause."[11]

Since the early 2000s, a CAFC decision has made it harder for contractors to use the constructive change theory to get paid if the contracting officer has not approved the change. The decision involved a U.S. Navy construction contract that contained not only the FAR Changes clause but also two Navy clauses stating that only the contracting officer could bind the government to a change order. When the contractor tried to get paid for changes approved by technical people and not by the contracting officer, the contracting officer refused to pay. The CAFC concluded that the contracting officer was correct. Contract modifications could only be made by a government employee with actual authority. "Where a party contracts with the government, apparent authority of the government agent to modify the contract is not sufficient; the agent must have actual authority to bind the government. Although the contracting officer clearly could delegate authority to others, in this case only a limited delegation of authority occurred. None of the Navy on-site technical people had authority to change the contract. All they can do is monitor performance and be contacted about technical questions or problems. Moreover, DoD regulations prohibit the technical people from modifying the contract. Regardless of what was said on-site, the contract language prevailed."[12]

Later Court of Federal Claims (COFC) decisions, however, showed that the constructive change theory still had some life in it. The Navy had a contract with Information Systems and Networks Corp. to provide support. One of the contractor's tasks was performing site surveys to determine the specific equipment needed. Purchases of new equipment or software had to be processed as a formal modification to the contract. The contract had numerous references to the fact that the contracting officer had to be involved in any contract modification. After the work fell behind schedule, the government asked the contractor to provide an engineering change proposal (ECP) for getting the contract back on

schedule. The contractor submitted the ECP, but the contracting officer never signed it. After the contract ended, the contractor tried to get paid for the ECP but the contracting officer refused on the basis that the contracting officer had not signed it.

When the contractor appealed to the COFC, the court had no trouble agreeing with the contracting officer's refusal to pay for a very obvious reason: the contractor could not adequately prove it "performed additional work, that whatever work it performed was left uncompensated, that any such work was performed pursuant to an informal order or other faulty conduct, or that any supposed direction came from someone authorized to bind the United States."

However, the significance of the decision is in two points the judge made. First, the court discussed the constructive change theory and how it is alive and well in five situations that the CAFC did not deal with in its *Winter* decision: "(i) disputes over contract interpretation during performance; (ii) government interference or failure to cooperate; (iii) defective specifications; (iv) misrepresentation or nondisclosure of superior knowledge; (v) an acceleration." Second, the judge pointed out that some versions of the current "Changes" clause expressly allow oral orders from the contracting officer; FAR 52.243-4 is one such example.[13]

Authority and Other Contract Clauses

It is important, however, that both the contractor and the contracting officer read **all** of the contract provisions. Although the Changes clause may require a contracting officer's approval, other contract provisions may delegate that authority to another government employee.

A government inspector looked at a newly installed roof that would let ponding water evaporate in 48 hours, the industry standard. But that was not good enough for him. He made the contractor change the roof to make water evaporate in 24 hours. The ASBCA made the government pay for the contractor's extra work. "Inspectors with authority to accept or reject work have been held to bind the government when they improperly reject the work. An extremely rigid, unreasonable, and arbitrary course of conduct by a government quality assurance representative constitutes an improper disruption of a contractor's performance that can work a constructive change entitling the contractor to an equitable adjustment under the changes clause." The contract contemplated that there would be some ponding. "Where there are no contract provisions establishing acceptance

criteria, the standard used to pass on contract work is a standard customary within the industry. The rejection of the contractor's work . . . was unjustified."[14]

In this case, the inspector cost the government money even though the contract clauses seemed to prohibit it. The contract said that "no understanding or agreement between the contractor and any Government employee other than the contracting officer would be effective or binding upon the Government." The board fit its decision into the terms of the standard clause. The inspector "was acting with the authority of the contracting officer in performing his inspection duties to obtain compliance with his interpretation of contract requirements."

Implied Authority

In addition to authority being in contract clauses, it may also be found in the job description of the contracting officer's supervisor. A supervisor, therefore, can make a constructive change to a contract.

Actual authority can be express (like that of the contracting officer with a warrant) or implied (like that of the U.S. President, who certainly can bind the government).

DOD issued contracts with transportation service providers (TSP) for transporting household goods of service members and their families. The government used a computerized billing and payment system administered by a U.S. bank for a fee of 1 percent. After the TSPs paid the 1 percent, the government reimbursed them. While the government and the vendors were in the process of preparing for the follow-on contract, senior government employees in charge of the program promised the vendors that the 1-percent reimbursement would continue. These employees, however, were not warranted contracting officers. The government later refused to reimburse the contractors for the billing and payment fee, leading the contractors to file a claim.

The COFC concluded that these senior government officials had "implied authority" to bind the government based on their job descriptions. For example, the chief of the personal property division had the authority to "manage, allocated distribute funds" and was "responsible for effective management" of the transportation contracts. His duties included development of "personal property systems, policies

and regulations[.]" Another official was the DOD traffic management specialist responsible for the competitive procurement of moving services. He had "primary responsibility for the conduct of professional, technical, and administrative work in management and procurement of worldwide household goods moving services affecting military/DoD civilian personnel and commercial industry [and is] responsible for incorporating electronic billing/payment processes in the current/future [program.]" These job descriptions proved that the employee had implied authority to bind the government.[15]

CONTRACTOR BOUND BY APPARENT AUTHORITY

Although the government can be bound only if a government agent has actual authority and not apparent authority as discussed in chapter 5, a contractor can be bound by "apparent authority." Apparent authority only seems like actual authority because the person claiming to have actual authority in reality does not. Although apparent authority does not bind the government, the principle can be used to bind the contractor.

Seven Seas Shiphandlers, LLC submitted five claims to the government arguing that it had not been paid for work it had done in Afghanistan. The contracts were for a number of commercial items like generators, cables, phones, video adapters, and refrigerant line sets. All of the supplies were delivered and accepted by the U.S. government.

During contract performance, Seven Seas subcontracted to a local Afghan company to provide vehicle maintenance for some vehicles. One of the subcontractor's employees, Mr. Qahir, worked periodically with Seven Seas personnel. Mr. Qahir received authorization from Seven Seas to deliver invoices to the contracting office for unrelated contracts. While he was not authorized to receive payments on behalf of Seven Seas, on several occasions, Mr. Qahir was given cash payments that he delivered to Seven Seas. However, he was not one of the three people to which the contractor expressly authorized the government to give cash.

Seven Seas and the government disagreed on "when, whether, or how [S]even [S]eas told the government not to make any more payments in Afghan currency." In early June 2009, the parties exchanged communications showing that they intended to return to EFT payments. Nevertheless, in early June 2009, the government finance office paid Mr. Qahir

AFA12 million, valued at over US$240,000, as full payment for the five Seven Seas contracts. He disappeared directly thereafter.

Because Mr. Qahir apparently did not give Seven Seas these payments, Seven Seas submitted claims for full payment under these contracts that were denied by the contracting officer. After Seven Seas appealed to the ASBCA, the government defended against the claim by arguing that it had already paid the contract invoices because it had given the money to Mr. Qahir who, according to the government, had apparent authority to receive the payments.

In a preliminary motion, Seven Seas asked the board to prohibit the government from making its apparent authority arguments but the board refused to do so at this early stage of the litigation because the facts were not at all clear yet.

In so ruling, the board described first what apparent authority is: "apparent authority, although not applicable to the government, can be applied to contractors. Apparent authority is determined by looking at the conduct of the principal to assess whether the principal created a reasonable belief that the actor was authorized by the principal in the manner relied on. . . . Apparent authority may be 'created by written or spoken words or other conduct of the principal which, if reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.' . . . For the government to prevail on its affirmative defense of payment, it must prove that Mr. Qahir had apparent authority to receive payments for Seven Seas under these contracts in Afghan currency."

Because two issues could not be conclusively resolved at this early stage of the case, the board could not throw out the government's apparent authority argument. First, the facts about what the government might have believed were in doubt.

Second, Seven Seas' legal argument was weak. At the heart of its legal argument was the "conduct of the principal." Seven Seas argued that there was no conduct by the principal that could reasonably be viewed as showing that Mr. Qahir was authorized to act for the company. "In particular, Seven Seas argue that silence as to lack of authority does not constitute 'written or spoken words or conduct.' . . . However, this is not necessarily the case. Treatises and courts have noted that acts not disavowed by the principal can lead to a conclusion of apparent authority. . . . A principal's inaction creates apparent authority when it provides a basis for a third party reasonably to believe the principal intentionally acquiesces in the agent's representations or actions. . . . Ap-

parent authority may also be derived from a course of dealing or from . . . the fact that other acts . . . similar to the one in question were . . . not disavowed by the principal. . . . Silence—i.e., not disavowing the supposed agent's past conduct—could, depending on the circumstances, contribute to a reasonable belief by a third party that the actor was authorized by the principal to continue acting in that capacity." The board denied Seven Seas' motion and let the government continue to make its apparent authority argument, although it allowed Seven Seas to renew its argument later as more facts were established.[16]

In a later decision, the board concluded that, although a valid theory in general, the government failed to prove apparent authority in this case.[17]

DEADLINES THAT ARE NOT REALLY DEADLINES, JUST SUGGESTIONS: NOTICE REQUIREMENTS

Rule 1: Read the contract. Rule 2: Don't believe everything you read in the contract. These rules pretty well sum up the way courts and boards see deadlines in FAR clauses. They see deadlines as merely suggestions.

For example, several clauses, including the heavily used Changes clause, say that a contractor "must" do something in 30 days. For example, the Changes clause for fixed-price contracts, FAR 52.243-1, has a thirty-day "deadline":

> *The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.*

The Changes clause at FAR 52.243-4 has two deadlines: a twenty-day and a thirty-day deadline:

> *(d) . . . no [equitable] adjustment . . . shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required.*
>
> *(e) The Contractor must assert its right to an adjustment under this clause within 30 days.*

But the deadlines in these clauses are not faithfully and literally applied by courts and boards. There is logic to this "flexibility." These dead-

lines are not like a statute of limitations designed to end a contractor's right to do something. They are more like a warning, forcing the contractor to tell the government something; for example, that the contractor thinks the government has made a constructive change to its contract. If a contractor intends to get an equitable adjustment for the constructive change, the government has to know why the contractor thinks the government made a constructive change. So, a deadline in a FAR clause helps to force the contractor to give the government notice.

But if the government already knows about it, why demand that the deadline in the clause be slavishly observed? If the clause is designed to make sure the government knows something, and the government in fact already knows it (even without the contractor's giving the government notice), why allow lack of formal notice to defeat any right the contractor might have to an equitable adjustment?

In the classic decision that used this relaxed approach, the court gave this "wholesome" explanation:

> *To adopt [a] severe and narrow application of the notice requirements . . . would be out of tune with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the government is quite aware of the operative facts.*[18]

What, then, are the rules on deadlines?

First, the rules shift the focus from "strictly following the deadlines" to "what harm has the government suffered because the contractor did not follow the deadlines"? In legalese, the issue is "prejudice." It's a "so what?" It's a contractor saying, in effect, "I was late, but so what? What was the harm to the government because I was late?"

Second, if the government wants to make a deadline a requirement and not a suggestion, it must tell the contractor what happens if the deadline is **not** met. By warning a contractor of the consequences of not following a deadline, it makes the time limit a real deadline.

Notice under the Changes Clause

Here are examples from two cases that have considered deadlines. In the first case, the government was prejudiced by the failure to give written notice; in the second, it was not prejudiced because the government

knew what was happening even without the contractor giving written notice.

Waiting almost two years after the project to give the government notice is too late. K-Con Building Systems, Inc. had a contract with the United States Coast Guard to design and build a prefabricated metal building in Port Huron, Michigan. As the project progressed and the Coast Guard made changes to the project, K-Con responded to the change requests with brief and affirmative statements like "will comply" and "correction will be made." Two years after contract completion, as part of K-Con's claim to the contracting officer, K-Con finally gave the contracting officer the notice required by the Changes clause.

The CAFC said the notice was too late and well beyond the 20 day time period in the FAR clause. "The notice provision serves an important purpose in a contract in which some government requests are plainly contemplated under the contract. Timely written notice differentiates requests the contractor views as outside the contract from those it deems contemplated by the contract. And it gives the government timely notice of what amounts it might be on the hook for, so that it will not be surprised by money claims later, as well as an opportunity to address demands for more money when it might yet avoid them."[19]

Significantly, the CAFC in this decision continued the less-rigid "suggestion" notice theory in precedent: "Sometimes, extenuating circumstances have weighed against strict enforcement of the time limit" referring expressly to the "wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally" quoted above. "But there are no such extenuating circumstances here. K-Con has proffered no evidence suggesting that the Coast Guard knew or should have known that K-Con considered the work requests to be contract changes until, at the earliest, K-Con submitted its first letter to the contracting officer."

This "extenuating circumstances" exception was used in a later COFC decision involving a Navy construction contract.

Five months after giving final approval to plans for constructing a pier, the Navy told the contractor the Navy had discovered serious problems with the contractor's plans. The contractor stopped work on the pier to study the Navy's concerns but did not give the 20 day notice stated in the Changes clause. However, the government apparently knew about the stopped work because the contractor discussed its reanalysis of the situation with the government and the Navy ultimately concluded that its concerns were unfounded. To get back on schedule, the contractor added personnel and overtime "of which the government was notified, of which the government observed, and of which the government approved" according to the contractor. Finding that the government had actual knowledge of the situation, the court refused to dismiss the contractor's case for lack of written notice within the 20 day period.[20]

No Prejudice

The government's failure to establish prejudice can be seen in a decision involving another clause requiring notice—the Differing Site Conditions clause, FAR 52.236-2. Although the board identified one potential type of harm—the cost of fixing something had increased while the contractor was delaying its notice to the government—that type of prejudice had not happened in this case. The decision also shows how it is not necessary that the contracting officer gets the notice; notice the government gets from reports or site visits of inspectors or contracting officer's technical representatives counts as notice to the contracting officer.

Parker Excavating had a contract to bury electrical cables at Fort Carson, Colorado. The contractor used a horizontal drill to prepare the dirt for the cables but unexpectedly ran into buried and abandoned foundations of demolished buildings on 19 different occasions. Trying to drill under these conditions increased the equipment costs to repair and replace parts of the drilling equipment. When Parker filed a claim for differing site condition, the government denied it for various reasons, including that the equipment operator was at fault and that the contracting officer had not received notice required by the differing site condition clause on all 19 occasions. The Armed Services Board of Contract Appeals concluded that Parker

had encountered a differing site condition and should be compensated for it.

The board did not let lack of formal notice get in the way. "The written notice requirements are not construed technically to deny legitimate contractor claims when the government was otherwise aware of the operative facts. Some of the daily contractor Quality Control Reports put the government on notice of the conditions encountered. . . . In addition, we have found that the government was aware of the conditions from meetings and site visits. The burden is on the government to establish that it was prejudiced by absence of the required notice. Here the government has made no showing of prejudice from the passage of time or an inability to minimize extra costs resulting from any delay in receiving prompt written notice."[21]

Making Deadlines Firm

If the government wants to make a deadline firm, it must say what the deadline is and what happens if the deadline is not met. In one case, the court required strict compliance with the termination for convenience settlement proposal deadline because the clause said that if the proposal was not submitted within one year from the effective date of termination, the contracting officer could unilaterally determine the amount due and the contractor would lose the right to appeal the determination.[22]

In addition, a General Services Administration (GSA) clause requires a government lessor to apply for reimbursement of a tax increase within sixty days after paying the tax. The clause warns lessors that if the sixty-day limit is not met, the lessor loses its right to reimbursement. The General Services Board of Contract Appeals has ruled that the sixty-day deadline must be strictly observed.[23]

CLAUSES LEFT OUT THAT ARE IN A GOVERNMENT CONTRACT ANYWAY: THE CHRISTIAN DOCTRINE

The *Christian* Doctrine, named after a 1963 decision of the Court of Claims, holds that a mandatory clause inadvertently omitted from a government contract is in the contract nonetheless. It's not a doctrine used by all courts. The U.S. Court of Appeals for the District of Columbia

Circuit has said, "Our court has never adopted the Federal Circuit's Christian doctrine."[24]

The issue usually becomes whether the omitted clause was so fundamental to government procurement that leaving it out was wrong.

The U.S. government had a contract for transporting Portuguese nationals from home to work in the Azores. It told the contractor that the contract was being terminated for convenience pursuant to the short-form termination for convenience clause. Unfortunately for the government, there was no termination for convenience clause in the contract, long- or short-form; also among the missing was a termination for default clause. The contractor argued that the government could not terminate the contract because there was no clause in the contract letting the government do so. The board concluded that there was no short-form termination for convenience clause in the contract because such a clause was discretionary with the contracting officer. A discretionary clause cannot be considered a mandatory clause. The board cited precedent holding that "the *Christian* case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion."[25]

The CAFC gave a nice summary of what the *Christian* Doctrine covers and what it does not.

> *[T]he Christian Doctrine applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy: a clause requiring plaintiff to exhaust administrative remedies before bringing suit for breach of lease; a clause promoting uniform treatment of "major issues" such as cost and pricing data when more than one military department is purchasing an item; a clause outlining proper pre-award negotiation procedures; and a clause implementing requirements of Buy American Act. . . . However, the Christian Doctrine has also been employed to incorporate less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation . . . [like] a missing "Mistake in Bids" clause required under [the regulations to] be incorporated into the contract as requested by the government because the clause was written for the protection of contract bidders.*[26]

Examples of clauses incorporated into a contract under the *Christian* Doctrine are

- The "Disputes Concerning Labor Standards" clause[27]
- The "Disputes" clause[28]
- The "Assignment of Claims" clause[29]
- The "Default" clause[30]
- The "Fair Labor Standards Act and Service Contract Act—Price Adjustment" clause[31]
- The "Changes" clause[32]
- A small business set-aside clause making the small business contractor do at least 50 percent of the work[33]
- The Service Contract Act provisions[34]
- The "Payments" clause[35]
- A "Government Furnished Property" clause[36]
- The "Protest after Award" clause[37]
- The Performance and Payment Bonds-Construction[38]

THE GOVERNMENT PREMATURELY ENDS THE AGREEMENT: TERMINATIONS FOR CONVENIENCE

A deal is a deal unless you are the government and have a termination for convenience clause as part of the deal. When you and I sign a contract, unless the contract has a clause requiring an early termination fee, we won't have the luxury of deciding, unilaterally and for free, that we don't want to carry out the contract any longer. If we want to get out of the deal, we generally become liable for breach of contract damages. These damages would include all the profit the other party would have made if we had stuck to our deal—so-called anticipatory profits.

The government is different. It has the clout to set new rules for the deal—rules more favorable to itself.

This is not unfair. If somebody wants to contract with the federal government, the contractor knows going into the deal that the government might end the contract before the contractor has had the chance to make all the profit the contractor expected. And it's not as if the government's termination for convenience will do any real harm to the contractor. The government will pay the contractor all costs to date and the profit on that work. In addition, the government will pay for the

lawyers and accountants of the contractor as they determine what those costs are. But, unlike you and me, the government will not have to pay anticipatory profits as damages.

The heart of the clause is section (a):

> ***FAR 52.249-2 Termination for Convenience of the Government (Fixed-Price) (April 2012)***
>
> *(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.*

The critical issue here is what is "the convenience of the government"? How far can the government push convenience? The answer is that the government can push convenience really far. An improper termination for convenience is rare.

This seems surprising. What is the convenience of the government? A word that vague invites overuse, but the government misuses it only on rare occasions. Although the courts and boards have been vigilant to guard against gross abuses,

> *[i]t is not the province of the courts to decide de novo whether termination was the best course. In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.*[39]

Let's look at these grounds—bad faith and abuse of discretion—that the government must have to terminate a contract for convenience improperly.

Bad Faith

Contractors trying to prove a bad faith termination for convenience have a really hard time doing so.

> *The contractor's burden to prove the Government acted in bad faith, however, is very weighty. . . . Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act conscientiously in the discharge of their*

> *duties. . . . Due to this heavy burden of proof, contractors have rarely succeeded in demonstrating the Government's bad faith.*[40]

It's a rare case that the government terminates a contract for convenience in bad faith. Here's an example.

> *Although wartime situations no longer limit use of the practice, the Government's authority to invoke a termination for convenience has, nonetheless, retained limits. A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source.*[41]

Abuse of Discretion

We've learned that a bad faith termination for convenience is hard to prove; it's equally hard to prove the government abused its discretion in terminating for convenience.

One possible abuse of discretion is when the contracting officer fails to make an independent decision to terminate a contract for convenience. Two cases suggest that, in the military, command influence on a contracting officer's decision can suggest that a contract's termination for convenience was an abuse of discretion.

TigerSwan competed for a contract and won. After that contract was terminated for convenience and re-bid, TigerSwan won again. After a competitor's protest was successfully defeated by the government, the government terminated TigerSwan's second contract and awarded the work to the competitor that had lost the protest. The contracting officer admitted that he had not made "an independent judgment and relied instead on facts presented by others who similarly did not perform investigations into the facts. . . . In a situation where the contracting officer is given the ultimate discretion to make the decision, the CO's failure to make an independent decision weighs in favor of finding an abuse of discretion."[42]

In another case, the government customer, not the contracting officer, ordered the termination of one contract for convenience and a second contract was stated as being terminated "due to command directive" of the customer. Although the termination was justified on

"national security" grounds, there was no evidence that an investigation into the alleged security incident was conducted.[43]

Decisions show two common situations that are not an abuse of discretion: a termination for convenience after discovery of a cardinal change and a termination for convenience to further full and open competition.

A Cardinal Change

A cardinal change is a significant change to the work under a contract. It's so significant that if the changed work were to be competitively bid, more or different bidders would compete to get the contract. If the government discovers after awarding the contract that the work is significantly different from what it expected—and thus a cardinal change—the government can terminate the contract for convenience and issue a revised solicitation that accurately reflects the government's new understanding of the work.

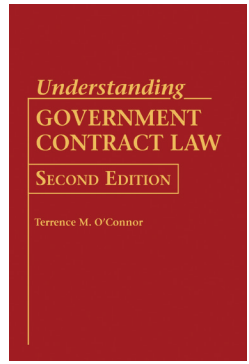
A government contract anticipated that approximately 10 percent of the work would be asbestos removal. It turned out, however, that the asbestos removal work would be about 50 percent of the contract. Believing that this large increase in work constituted a cardinal change, the contracting officer terminated the contract for convenience and resolicited the work. The terminated contractor argued that the termination for convenience was an abuse of discretion, but the court disagreed: under the circumstances, the contracting officer had ample justification for conducting a reprocurement competitively under CICA. "With this change in the scope of contract work, different bidders, like asbestos removal firms, may have entered the competition on the contract."[44]

Furthering Full and Open Competition

Clearly, a cardinal change defeats full and open competition. But a cardinal change isn't the only justification for a termination for convenience. Trying to further full and open competition, even without a cardinal change, is a proper exercise of the contracting officer's discretion to terminate a contract for convenience.

In estimating the work expected under a Navy contract for automotive and related vehicle parts and accessories for the United States Public Works Center on the island of Guam, the government greatly underestimated how many parts the government would need. After awarding the contract to T&M Distributors, Inc., the government learned that its estimate was wrong by 450 percent. Instead of having a value of about $1 million, the contract's value was over $5 million. The government terminated the contract for convenience, which the contractor opposed. The court held that the government was correct. The government did not have to prove a cardinal change to justify the termination for convenience. All the contracting officer had to demonstrate was that the statutory requirements for full and open competition had been affected. The court found this to have occurred: "It is not unreasonable for the contracting officer to find that a 450 percent error in the original solicitation could have affected the pool of bidders. That having been the case, we are not prepared to say he acted unreasonably or abused his discretion in concluding that the circumstances called for a new procurement with corrected requirements to satisfy CICA's requirements of full and open competition."[45]

We hope you enjoyed this excerpt from *Understanding Government Contract Law*, Second Edition by Terrence M. O'Connor



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