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Small changes during contract performance can take a large bite out of the bottom line

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It is not unusual for agency personnel to request extracontractual changes during performance of a contract, many of which may seem fairly innocuous at first glance. From changing the type of screw used in a machine, to altering the background colors displayed on computer screens, extracontractual changes requested by agency personnel can seem minor or inconsequential, and contractors often readily agree without immediately recognizing the potential adverse consequences or taking the necessary steps to adequately protect themselves.

But even small extracontractual changes can create a large ripple effect that erodes the profitability of a contract and, in some cases, can even result in delays by the contractor in meeting performance deadlines. No matter how small, extracontractual changes to a design often require, at a minimum, revisions to design plans and a revised or new order for materials, which can increase costs and delay performance.

And if the terms of the contract are not followed to fully document extracontractual changes and their impacts, the contractor can be on the hook for increased costs and delay liability, despite the fact that the customer asked for the changes in the first place.

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Most government contracts contain a Changes Clause, which gives contracting officers authority to make changes to work within the general scope of the contract.[1] The Changes Clause requires these changes be documented in writing by the contracting officer. The Changes Clause also specifically contemplates the reality that written and oral orders can be issued to contractors during performance that result in changes to a contract.

But in order for those changes to be treated as a change order, the Changes Clause requires contractors to give notice to the contracting officer of (1) the date, circumstances, and source of the order; and (2) that the contractor regards the order as a change to the contract. While the Changes Clause contemplates that written and oral orders resulting in changes to the contract will come directly from the contracting officer, that does not always happen.

Contracting officers are not always involved in the day-to-day interactions between contractor and agency personnel during performance. And, on occasion, requests for changes are made by agency personnel without the knowledge or approval of the contracting officer. When that happens, it is up to the contractor to confirm with the contracting officer that extracontractual changes were requested and authorized by someone with authority to actually change the contract.

It also is incumbent on the contractor to alert the agency of the potential impacts that those changes will have on the performance schedule and total cost. A cursory discussion of the changes with the contracting officer usually is insufficient to comply with the Changes Clause and to fully protect the contractor's right to compensation.

Changes to a contract always should be documented in writing. Even when contracting officers participate in discussions regarding extracontractual work, it does not mean the agency ultimately will agree to pay for that work or otherwise accept responsibility for making the contractor whole if the change is not directed in the manner specified by the contract.

It is incumbent on the contractor to alert the agency of the potential impacts that those changes will have on the performance schedule and total cost.

Nor does it mean that a contracting officer will excuse performance-related delays arising from extracontractual changes, especially if the contractor does not make clear the impact that the changes will have on the project schedule.

While contracting officers may readily agree to a change during a call or meeting, they may not recognize that the change they agreed to will result in a change to the contract or an increased cost. Also, even when contracting officers agree to pay contractors for changes,

contract performance can take place over long periods of time, and a contracting officer may not recall an earlier discussion about the change at the time a claim ultimately is made.

Additionally, it is not uncommon for there to be a change in contracting officers during the course of the contract. And without written confirmation of a change, it is very unlikely that a new contracting officer will be willing to authorize payment for a prior undocumented change.

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It is thus critically important that contractors create and maintain strong records and ensure that all agency-directed changes are fully documented in writing. It also is important to document in writing the potential impact of those changes on the performance of the contract so any potential delays can be attributed to changes directed by the agency and not be blamed on perceived performance deficiencies by the contractor.

But what happens if extracontractual changes are made at the direction of agency personnel and were not directed by the contracting officer or later confirmed in writing? Can a claim be filed?

Though this situation certainly presents challenges, all is not lost. There remain legal arguments that can be made in support of a timely claim, but it is important to keep in mind that the likelihood of a full recovery is much lower than if the changes were documented in writing.

And the likelihood that a contractor will be forced through the formal claim and appeal process — which is an expensive and time-consuming process — also increases if you do not have contemporaneous documentation.

Notes

[1] *See, e.g.*, FAR 52.243-1, Changes — Fixed Price; 52.243-1, Changes — Cost Reimbursement; 52.243-4, Changes — Construction.

About the author

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