

**WHEN GOVERNMENT ACTIONS CHANGE THE CONTRACT****REQUESTS FOR EQUITABLE ADJUSTMENTS AND CLAIMS**

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A significant difference between contracting with the government and contracting with private industry is the government's right to make unilateral changes in work during contract performance. In return for this right, the government provides the contractor a tool to access an equitable adjustment to the contract price and/or schedule whenever a change is made that will increase or decrease the cost of contract performance or impact contract deliveries or completion. If the Contracting Officer refuses to make a decision on an equitable adjustment, the Contractor simply converts it into a Claim, which requires a certification if the Claim exceeds \$150,000.

The purpose of the equitable adjustment is to fairly compensate a Contractor for the Government's actions or modification of a contract. The request for an equitable adjustment should establish four things: (1) the Contractor's entitlement to an adjustment based on a Government act or failure to act, (2) the Contractor's damages in the form of an increase in the cost or time of performance, (3) a causal link between the Government's act or failure to act and the Contractor's damages, and (4) proof of the amount of the Contractor damages. There are several different Changes Clauses. The following addresses Fixed-Price Contracts.

As prescribed in 43.205(e), insert the following clause:  
52.243-1 Changes - Fixed-Price (AUG 1987)

- (a) 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:
- (2) 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.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) 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.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.



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(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

The equitable adjustment is the difference between the reasonable cost of contract performance without the change or changes and the reasonable cost, actual or estimated, of contract performance with the change or changes.

The Contractor must establish, and provide proof of, four things: (1) the Contractor's entitlement to an adjustment based on a Government act or failure to act, (2) the Contractor's damages in the form of an increase in the cost or time of performance, (3) a causal link between the Government's act or failure to act and the Contractor's damages, and (4) proof of the amount of the Contractor damages.

1. Describe what the CO did or failed to do that caused the increase or decrease in the Contractor's cost or time of performance. State that the act or failure to act increased the cost or time of performance. The contractor will need to be specific -- who did what, when did they do it, where did they do it and how did they do it.
2. Explain how the act or failure to act caused the increase in cost or time by forcing the Contractor to do something that they otherwise would not have had to do or that could have been done at less expense or in less time. The Contractor must prove a cause-to-effect link, and is required to state that there was no other cause of the increase in cost or time, or the government can either cut down or avoid the claim.
3. Explain (a) how the Contractor estimated or measured the effect of the act or failure to act on cost or time and (b) how the Contractor determined the amount of additional profit to request.
4. Either (a) identify a contract clause that states the Contractor is entitled to money or time in the event of such a GC act or failure to act or (b) state that the CO's act or omission was a breach of contract and identify the contract term with which it was inconsistent. Don't forget that there are implied duties of good faith and fair dealing that may apply.

It is critical that the Contractor understand and abide by the contract and FAR notice periods; and under no circumstance may an equitable adjustment be requested after final payment. The primary FAR clauses dealing with equitable adjustments are located at FAR part 36, 42, and 43. All contractors have the responsibility to recognize and promptly report changes in contract performance. Deviations from what are contractually required and events that make performance more costly, take longer, and be less efficient must be immediately recognized and the appropriate actions taken to: (1) justify an increase in contract price or change in scheduled performance; and (2) provide a defense against a claim for damages for untimely performance.

It is critical that Contractors perform Federal contracts according to the terms and conditions of the Contract and Federal law. The Government requires Contractors to comply with Federal law, including the creation and maintenance of accurate records for equitable adjustments and Claims. It is



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also mere common sense as the burden of proof is on the Contractor; the Contractor must protect their own interest in the amount of money the Agency owes them, and this amount is in dispute unless the Contractor has significant documentation. The Contractor must remember it is not the Government's job to teach and oversee the Contractor to ensure proper contract administration in keeping good records, but the Government will require the Contractor substantiate their Claims.

As always in Federal Contracting, it is essential that Contractors be vigilant in their contract administration to recognize Government actions and/or changes that require the Contractor to file a request for equitable adjustment or a Claim. For additional information, please contact Jim Krause at (904) 353-5533 or [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net).



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