

Equitable Adjustment: The Changes Clause FAR 43.2 and 52.243

By Traeger Machetanz

1201 3rd Avenue, Suite 2200
Seattle, WA 98101

Phone: 206.622.3150
E-mail: traegermachetanz@dwt.com



Entitlement

1. Express Changes

- a) Someone in authority (C.O. or A.C.O. by designation)
- b) In writing
- c) Orders
- d) Changes in work

Someone in authority – COTR not good enough

In writing – oral orders not good enough

- a) Put it in writing to provide “input” authority
 - Unless we hear from you within _____ days, we will proceed with the work on the assumption that you are aware of the order given by your representative, _____, and concur that the contract should be changed in accordance with that order.

Changes work

- a) Specifications or drawing
- b) Method or manner of performance
- c) Government-furnished services, etc.

Ask yourself –

Is the owner requiring you to do something more than the contract requires of you?

Or is the owner restricting your means and methods in a way not required by the contract?

Notify owner you are entitled to additional compensation and/or time

- a) Explicitly set forth in 52.243
- b) Actual notice and lack of prejudice – avoid this exception, comply with notice provisions

2. Constructive changes recognized and require notice

What are constructive changes – same analysis only not by express direction

Entitlement - Continued

- a) Government failure to clearly and timely direct contractor when contractor encounters difficulties with specifications, informs government of difficulties and requests direction
- b) Government interference with work – must be unreasonable
 - 1. Now extended duty to cooperate

Entitlement - Continued

- c) Defective plans or specifications – implied warranty of accuracy
 - 1) Design v. performance specifications
 - 2) Duty to clarify “patent” errors
 - 3) Impossibility or impracticability of performance
- d) Government failure to disclose superior knowledge
 - 1) Information crucial to performance solely within control of government

3. Pricing the Equitable Adjustment

- a) Unit price if available unless materially different or character
- b) Bilateral – forward priced
 - 1) Substitute actual cost when available
- c) T&M
 - 1) Keep detailed records

Quantum – Continued

d) Unilateral – disputed

- 1) Keep detailed T&M records
- 2) Try to get daily sign off – “reasonable” costs
- 3) Ensure cost code set up for direct extra costs to avoid uncertainty
- 4) Contractor has obligation to proceed while change is being resolved

Quantum - Continued

e) Time Recovery

1) Schedule analysis

- i. Critical path analysis because that is basis for time
- ii. Extended home office and job site recovery

Quantum - Continued

2) Constructive acceleration

- i. Request for time
- ii. Request for legitimate
- iii. Request is denied – completion date changed
- iv. Notice of need to acceleration

Equitable Adjustment - tell me a story

- a) Tell me a story about a project
- b) What does the contract say about this problem?
 - 1) Who bears responsibility?
 - 2) How do you obtain relief, i.e., what provision?
- c) What has to be done under the provision to obtain relief?
 - 1) Notice
 - 2) Basis for entitlement
 - 3) Relief requested

REA Preparation - Continued

- d) Why is it compensable
 - 1) What does the contract say
 - 2) Is there any pertinent law you wish to include
- e) How much is due from the owner
 - 1) Isolate affected items in the job cost report
 - 2) Job cost reports demonstrate reduced production of affected items
 - Measured mile
 - 3) Impacted schedule shows time

- 4. If successful, be aware of broad form release**
- 5. If unsuccessful, file claim under Disputes clause**
 - a) Another story for another day

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