



Changing Course - Contract Mods, REAs, & Terminations

Mark R. "Hawk" Thomas, Reid Law PC

Speaker

Mark R. “Hawk” Thomas, Esq.

Managing Counsel / Colonel, USAF (Ret.)

Reid Law PC (www.FedBizLaw.com)



The Big Picture

“The Only Thing That Is Constant Is Change” — Heraclitus

There is no truer quip or wiser counsel in federal contracting than to “plan for change.” From the President to Agency structures, and from program directors to contracting specialists, the federal customer and their priorities, budgets, and methods seem constantly in flux. Not to mention a myopic and fickle Congress, and the never-ending deluge of statutes, regulations, and directives that flow from it. Then there are the everyday moving targets that complicate contract performance, from new technologies to emerging site conditions and other unforeseeable factors.

Even worse, planning for change is largely ignored by many federal contractors, particularly small businesses. Thus the quandary: Changes are inevitable, and those shifts can wreak havoc upon contractors, especially smaller entities operating on highly leveraged and razor-thin margins of time, personnel, and budgets. Whether contemplated and memorialized well in advance, suggested in real time by a bystander to the project, or a seismic policy shift truncating an otherwise successful program, “changing course” for a small contractor often seems more a burden than a blessing.



FAR Part 43 - Contract Modification (“Mod”)

- Limits – Not applicable to delivery orders or extraordinary contractual relief (national defense).
- Contracting Officers – Only KOs acting “within the scope of their authority” are empowered.
- Others – Shall not act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or direct or encourage the contractor to perform work that should be the subject of a contract modification.
- Timing – Shall be priced before execution if can be done without adversely affecting the interest of the Government. If significant cost increase could result from modification and time does not permit negotiation of a price, at least a ceiling price shall be negotiated unless impractical.
- Bilateral – “Supplemental Agreement” signed by the contractor and KO. Used to make negotiated equitable adjustments resulting from change orders, definitize letter contracts; and incorporation.
- Unilateral – Signed by KO. Used for admin changes, change orders, clause changes, terminations.
- Change Orders – USG contracts contain a changes clause that permits KO to make unilateral changes, in designated areas, within the general scope of the contract... including REAs



FAR Part 43 - Request for Equitable Adjustment (“REA”)

- Purpose – Corrective measure to keep contractor “whole” and avoid later contract disputes.
- Scenarios – Most common when constructive change occurs in contract execution:
 - Requirements interpretation / defective specifications
 - Additions / deletions / substitutions (authorized & other)
 - Acceleration / Stop Work Order / Suspension of Work
 - Differing site conditions (common in construction)
 - Late or unusable GFP/GFI
 - USG delays (Unreasonable & Compensable vs. Excusable)
- Amount – Delta between cost of performance without vs. with change. “Fair and reasonable.”
- Deadline – Requires notification of change within 30 days (FAR 52-243-7)
- Construction – Only costs incurred within 20 days prior notice are recoverable (FAR 52-243-4).
- Courts – Contractor may recover unless Agency harmed by failure to provide timely notice, or Agency would have taken different action than actually taken had timely notice been given.



FAR Part 49 - Termination for Convenience (“T4C”)

- Objective – Fairly reimburse contractor for work completed + prep for terminated portion.*
- P&L – Provide reasonable allowance for profit + adjustment for anticipated contract loss.
- Calculation – Equitable, not prescriptive, but cost accounting rules and data inform approach.
- Duties – Stop work; terminate open subcontracts; protect/preserve/dispose of USG property.
- Next Steps – Promptly submit termination settlement proposal (TSP); settle subcontract termination liabilities (generally tied to settlement of TSP or litigation of subsequent CDA claim).
- Timing – Must file within one year in TCO-specified format or accept unilateral determination.
- Settlement Basis –
 - Total Cost (Early T4C): Itemizes all costs incurred up to termination date + adjustment for profit – credits.
 - Percentage Complete (Rare): Establishes percentage of completion applied to total price – prior payments.
 - Detailed Build-Up Cost (Most Common): Contractor proposes all costs incurred – previous payments. Remaining costs incurred are negotiated with TCO.

**Termination may be partial or complete. KO has discretion to negotiate the terminated portion, although rare.*



FAR Part 49 – Termination for Default (“T4D”)

- Definition – Exercise of Agency’s right to terminate (complete or partial) because of contractor’s actual or anticipated failure to perform its contractual obligations.
- Conversion – If contractor can establish (or it is otherwise determined) that contractor was not in default or that the failure to perform is excusable, T4D will be considered a T4C.
- Rationale – If contractor fails to (a) make delivery of the supplies or perform the services within the time specified, (b) perform any other provision, or (c) make progress and that failure endangers performance of the contract.
- Liability – Agency must be protected from potential liability to laborers and material suppliers for outstanding lien rights after paying contractor (e.g., payment bonds, disclaimers).
- Show Cause Notice – Failure to timely respond may be taken as admission of no explanation.
- Notice – Agency to contractor, surety (if applicable), and SBA (if entity is small, not the contract).
- Alternative – When in USG interest, Agency may permit contractor/surety to continue performance (a) under revised delivery schedule OR (b) by means of subcontract/third party.
- Note – Agency shall report T4D in the FAPIIS module of CPARS within three (3) calendar days.



Practice Tips & Lessons Learned

- All – Contracting officer negotiates and makes final decision; claims appealed to BCA or COFC.
- Mods – How do I transform mission creep and capabilities push into a profitable partnership?
 - Superlative performance; active + passive engagement; stewardship vs. the cash cow...
- REAs – How do I mitigate risk of unauthorized performance and fully recover when it happens?
 - Educate everyone; memorialize everything (including verbal); clear it with KO before acting
- T4Cs – How do I leverage agency attitudes and capture dollars instead of fighting for survival?
 - Cooperating vs. fighting; push for partial vs. complete; excellent accounting; lawyer the TSP
- T4Ds – How do I stop the madness before becoming a casualty and unwind default into a win?
 - MBWA*; this is fish not wine; practice “it’s not the ones you fire...”; preserve the relationship
- Post-T4D – Fight for T4C conversion. Substantive and procedural bases for appeal. Time is of the essence (KO must report in three days). Attack on multiple fronts/courts (e.g., T4D, open REAs)
- All – Retain qualified legal counsel and keep them in the loop from outset (ounce of prevention)

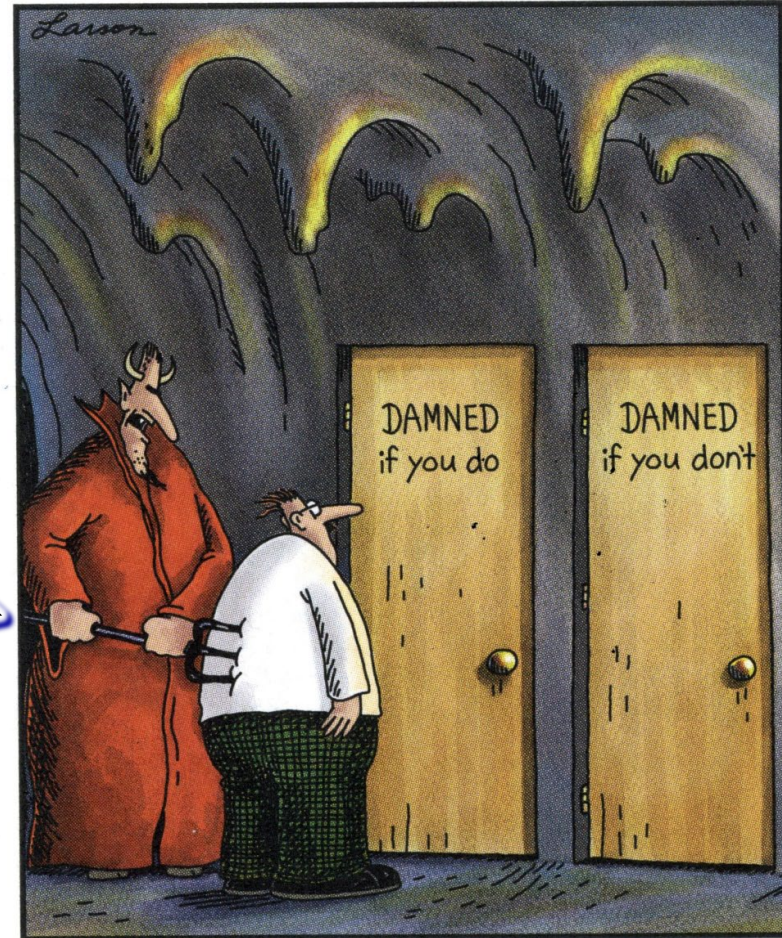


A Bit of Levity

How Many Small Businesses View Hiring Lawyers

YOU ARE HERE

BTW: Somebody smarter than you has already tried whatever angle you're contemplating... and wishes they hadn't.



“C’mon, c’mon—it’s either one or the other.”



Disclaimer

The information contained in this presentation is provided for informational purposes only, not for the purpose of providing legal advice or giving a legal opinion on any specific facts or circumstances. Every situation is unique, and the only way to ensure that any of the information contained herein is applicable to a given situation is for a prospective client to meet individually with a licensed attorney well versed in those areas of international, federal, state, and local law that apply to the client's situation. While we attempt to update the information in this presentation periodically, the law is always changing. Statutory, regulatory, and other developments may affect the validity of the materials contained herein. As a result, we give no guarantee that the information provided herein is correct, complete, or up to date. Reid Law PC expressly disclaims all liability in respect to actions taken or not taken based on any or all the contents of this presentation.





QUESTIONS?

Contact Information

Mark R. “Hawk” Thomas, Esq.
Reid Law PC

Washington DC
Denver CO

202.768.9434 Office
303.717.9398 Cellular
hawk@fedbizlaw.com

www.FedBizLaw.com

