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Practice Notes

An Overview of the Deductive Changes Process and Areas of Potential Challenge

By Ms. Valerie Mullaley

Government contracts typically contain a changes clause that permits the contracting officer to make unilateral changes to certain aspects of the contract, provided those changes are within the "general scope" of the contract.[1] When such changes decrease the cost or time to perform part of the work under the contract, the contracting officer must make an equitable adjustment to the contract price and/or performance period to reflect the reduction.[2] These "deductive changes" have proven more difficult to classify and quantify than their additive changes counterpart, requiring careful analysis by contracting officers and their legal advisors.[3]

As with changes that add work, disputes may arise when contracting officers initiate unilateral changes that decrease work. The performing contractor may challenge the contracting officer's classification of the reduced work as a deductive change rather than a partial termination for convenience, challenge the Government's entitlement to a price reduction, or challenge the contracting officer's determination of the amount of the price reduction. Potential offerors may challenge the deductive change as a material contract change that requires competition. If challenged, the Government bears the burden of proof.[4] To ensure a defensible determination, contracting officers must understand the process and areas of

potential challenge when using the changes clause to unilaterally decrease work under the contract.

1. The Deductive Change Must Be Within the General Scope of the Contract

Before proceeding with any change under the changes clause, additive or deductive, the contracting officer must establish that the change falls within the "general scope" of the contract.[5] There are two potential challenges here: (i) the performing contractor may allege that the deductive change is a cardinal change outside the purview of the changes clause, or (ii) the contractor's competitor may protest the modification as outside the scope of the original competition.[6]

Although the performing contractor generally would not challenge a deductive change as outside the general scope of the contract,[7] contracting officers must be cognizant of the possibility. Cardinal changes occur "'when the Government effects an alteration in the [contract] work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for' by the parties."[8] A cardinal change constitutes a breach of contract[9] and opens a host of separate issues for consideration.

An allegedly improper deductive change may also give rise to a protest by the performing contractor's competitor for falling outside the general scope of the contract. In *Poly-Pacific Technologies, Inc.,* the Government Accountability Office (GAO) sustained a protest that alleged a modification reducing the scope of work was improper where it affected the field of competition.[10] The GAO found that the U.S. Air Force improperly relaxed a requirement by suspending the contractor's obligation to recycle acrylic plastic media once it became unusable.[11] Although the protester did not compete under the original solicitation, it asserted that the deductive change materially altered the contract such that it constituted an improper sole-source award for which the protester was currently able to perform.[12]

The GAO agreed, finding that the solicitation required offerors to provide technical solutions and pricing for leasing the plastic media and disposing and recycling the spent blast material and that the agency had materially changed the contract by relaxing the recycling requirement.[13] The GAO looked at 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" to determine whether there was "a material difference" between the original contract and the modified contract.[14] The GAO further considered whether relaxing the recycling requirement was reasonably anticipated under the solicitation and whether a modification that removed the recycling requirement "materially changed the field of competition."[15] Ultimately, the GAO determined that removing the recycling requirement created an improper sole-source award where another contractor could now perform the reduced work.[16] Even though the agency still required the plastic media and removal of spent blast media, that did not give the agency "unlimited latitude to modify the way in which it contracts to meet those requirements" where the change resulted in work materially different than that anticipated in the solicitation.[17]

Although the decision has garnered some criticism, with some contending that deductive changes are not proper protest issues,[18] the case remains GAO precedent.[19] Contracting officers must consider how the deductive change affects competition before relying on the changes clause as a mechanism to decrease work and reduce associated costs.

2. The Deductive Change Must Fall Within a "Designated Area" of a Changes Clause

After determining that the deductive change falls within the general scope of the contract, the contracting officer must ensure the change fits within a "designated area" permitted under the applicable changes clause incorporated into the contract.[20] The various changes clauses identify the types of changes authorized for certain contract types and procurements. For example, in a fixed-price, supply contract, the contracting officer may only invoke the changes clause to make changes to: "(1) 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."[21] The contracting officer could not, then, use the changes clause in a fixed-price, supply contract to unilaterally decrease the quantity of supplies.[22]

Where a change causes a decrease that falls outside the authorized "designated areas"[23] of the applicable changes clause in the contract, the contracting officer cannot rely on the changes clause as authority to unilaterally deduct work from the contract and must instead consider other authority, such as a partial termination for convenience, or enter into a bilateral modification. Because contracting officers are generally well versed on the limitations of the changes clause and only use this authority when the change falls within a permissive designated area, this issue holds little risk of challenge.

3. The Deductive Change Must Be Either a Specification Change or a Minor Change

To rely on the changes clause as authority for a unilateral decrease to the contract, the Government must show, in addition to proving the deductive change is within the general scope of the contract and fits within a designated area of the applicable changes clause, that the decrease is either a specification change or a minor change to the contract. This determination influences whether the decreased work should be classified as a partial termination for convenience instead of a deductive change.

No hardline rule governs whether to classify the work reduction as a partial termination for convenience or as a deductive change,[24] as each determination is fact-specific.[25] The determination of the proper clause "does not depend on which clause provides the greatest benefit to the Contractor;" instead, "the choice of clause is determined by the extent of the work being deleted."[26] The Corps of Engineers Board of Contract Appeals identified two objective tests to determine the appropriate classification of these work decreases.[27] The first test examines the identifiability of removed work.[28] With regard to supplies, when the Government reduces the number of units to be delivered or eliminates particular line

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items or "other identifiable, segregable items of work," the contracting officer should rely on the termination for convenience clause.[29] Specifications changes, however, usually fall within the authority of the changes clause.[30]

The second test examines whether the decreased work is a major or minor change in relation to the entirety of the contract.[31] Decreases of 20 percent or more of the work have generally been treated as a major change, for which a partial termination for convenience in lieu of a deductive change order is appropriate.[32] Decreases of less than 10 percent usually constitute a minor change for which a deductive change is appropriate.[33] Contracting officers should be wary, however, of relying on percentages in making these determinations and consider the totality of the circumstances in deciding whether to classify the change as major or minor.[34]

If the contracting officer cannot demonstrate that the decreased work is a specification change or a minor change relative to the entire scope of the contract, the reviewing board or court may determine that the change should have instead been treated as a partial termination for convenience.[35] Although the reviewing body will give deference to the contracting officer's classification,[36] the performing contractor may challenge the contracting officer's classification as a deductive change rather than a partial termination for convenience when its contract is not profitable.[37] On a loss contract, a partial termination for convenience benefits the contractor because "the contractor is entitled to reasonable profit on the work performed even if that rate of profit is lower than that actually earned or bid on the project."[38] Contracting officers should expect challenges under these circumstances and should, therefore, walk through the analysis and prepare contemporaneous documentation to support the classification.

4. The Contractor Must Have Recognized Cost Savings from a Deductive Change for the Government to Reduce the Contract Price

Once the contracting officer has determined that the deductive change fits within the general scope of the contract, fits within a designated area of the applicable changes clause, and constitutes a specification change or a minor change, the contracting officer must next determine whether the contractor recognized a cost savings. If the contractor did not realize some cost savings, the contracting officer cannot pursue a downward equitable adjustment.

Because the "purpose of an equitable adjustment is to . . . make [the contractor] whole, whether the change is an additive or deductive one," [39] price adjustments are typically measured by the "cost impact of the contractor."[40] Thus, the contracting officer should review downward adjustments from the contractor's perspective. Contractors may challenge the contracting officer's determination, arguing that it did not realize any cost savings and that the Government, therefore, cannot reduce the contract price.[41] If the contractor does not realize some cost savings from the change, the Government is not entitled to a price reduction under the changes clause.[42]

5. The Contracting Officer Must Select the Proper Calculation Method

Once properly categorized as a deductive change for which the contractor recognized some cost savings, the contracting officer faces an additional hurdle with quantifying the reduction. This determination is ripe for challenges based on the competing interests of the Government recouping costs associated with unperformed work and the contractor retaining the contract price.

Ultimately, the adjustment must be equitable, making the contractor whole.[43] The price reduction "should not increase the plaintiffs' loss nor decrease it at the expense of the Government."[44] The Defense Acquisition University Pricing Guide iterates this point, stating the "contractor should not be left in a better or worse cost or profit position on the unchanged work after the change than it was before the change."[45]

To calculate the equitable downward adjustment in contract price, the contracting officer should ordinarily rely on the "would have cost" method.[46] This method utilizes the contractor's *current* estimate rather than the price provided in the contractor's original proposal.[47] The contract price is reduced by "the reasonable cost of performing the deleted work" based on that current estimate.[48] Determining reasonable costs involves "both an objective element in terms of what it would have cost a prudent businessman in a similar overall competitive situation and a subjective element as to what it would have cost the particular contractor involved."[49]

Although the "would have cost" method generally applies to deductive changes, one exception to this method occurs when the Government completely deletes severable work.[50] In these situations, the entire price of the severable work in the contract, rather than the estimate of what it would have cost the contractor to perform the work, should be used to determine the downward adjustment.[51]

Conclusion

Deductive changes can quickly turn into complex contract actions. To ensure an equitable and defensible determination, contracting officers should carefully consider the various issues posed by characterizing a decrease in work as a deductive change. As a threshold issue, the contracting officer should make an affirmative determination that the change fits within the general scope of the contract and within a designated area of the applicable changes clause in the contract. Then, the contracting officer can address the more complicated

issues of characterizing proper decreased work and determining the quantum of the price reduction—always with an eye on making the contractor whole as a result of the Government-directed, unilateral deductive change. **TAL**

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Notes

1. FAR 43.201(a) (2024). FAR Subpart 43.205 requires contracting officers to insert a specific changes clause based on contract type (e.g., fixed-price, cost-reimbursement, or time-and-materials or labor-hours) and what the Government is actually procuring (e.g., supplies, services, dismantling/demolition/improvement removal, or construction). FAR 43.205 (2024).

2. *See, e.g.*, FAR 52.243-1(b), 52.243-2(b), 52.243-3(b), 52.243-4(d), 52.243-5(c) (2024).

3. John C. Person, *Deductive Changes,* Briefing Papers, July 2001, at 1, 1 (examining characterization and quantification of deductive changes).

4. If the awardee appeals, the Government bears the burden of proving both entitlement and quantum by a preponderance of the evidence. *See* J.S. Alberici Constr. Co., Inc., GSBCA No. 11024, 91-3 BCA ¶ 24,205 ("In claiming a downward equitable adjustment . . . the Government has the burden of proof.") (citing Nager Elec. Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971)). If a potential offeror protests the deductive change as requiring competition, the Government must prove that the "modification does not materially change the requirements of the contract or result in a fundamental change to the nature of the work." *See* Poly-Pacific Techs., Inc., B-296029, 2005 CPD ¶ 105 (Comp. Gen. June 1, 2005).

5. FAR 43.201(a) (2024).

6. *See* Navistar Def., LLC v. United States, 146 Fed. Cl. 499, 510 (Fed. Cl. 2019) (discussing the two tests to determine whether a material departure from the scope of the original procurement occurred). The boards and courts often conflate these separate tests, but distinguishing the two will assist contracting officers in assessing whether the changes clause is appropriate authority to reduce work under the contract. For a detailed discussion on these determinations, see John Cibinic, Jr. et al., Administration of Government Contracts 347-54 (5th ed. 2016).

7. Ralph C. Nash, Jr. & Steven W. Feldman, Government Contract Changes § 4.3 (2022) (defining "general scope").

8. Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 (finding no cardinal change in a challenge to assessed liquidated damages where construction of an addition was "essentially the same work the parties bargained for" at award); *see* Bell/Heery v. United States, 739 F.3d 1324, 1335 (Fed. Cir. 2014) (stating that a cardinal change occurs when the work is "materially different from that specified in the contract").

9. *Bell/Heery*, 739 F.3d at 1335.

10. Poly-Pacific Techs., Inc., B-296029, 2005 CPD ¶ 105 (Comp. Gen. June 1, 2005).

11. *Id.* at 3.

12. *Id.* at 4; *see also* AT&T Comm'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) ("A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause.") (citations omitted).

13. *Poly-Pacific Techs., Inc.*, 2005 CPD ¶ 105, at 5.

14. *Id.* at 4.

15. *Id.*

16. *Id.* at 6.

17. *Id.* at 5.

18. *See, e.g.,* Vernon J. Edwards, *Postscript: Deductive Changes Outside the Scope of the Contract,* Nash & Cibinic Rep., Oct. 2005, ¶ 48 ("Deletions and partial terminations are . . . beyond the scope of the Comptroller General's protest authority.").

19. *See, e.g.,* Zodiac of N. Am., Inc., B-414260, 2017 CPD ¶ 107 (Comp. Gen. Mar. 28, 2017) (relying on *Poly-Pacific Technologies, Inc.* to demonstrate the GAO's jurisdiction to review protester's allegation that the agency improperly relaxed requirement following awardee's two failed first article tests on inflatable combat raiding craft and assault craft and ultimately denying protest because specification change was minor and within general scope of contract) (citing Poly-Pacific Techs., Inc., B-296029, 2005 CPD ¶ 105 at 3-4).

20. FAR 43.201(a) (2024).

21. FAR 52.243-1(a) (2024).

22. Mark J. Garrette, Jr., *Post-Award Deletions of Work: Partial Termination for Convenience or Deductive Change?* Contract Mgmt., Sept. 2014, at 46, 51 (citing Celesco Indus. Inc., ASBCA No. 22251, 79-1 BCA ¶ 13,604); Ideker, Inc., ENG BCA Nos. 4602, et. al., 87-3 BCA ¶ 20,145 ("Particularly in the supply contract context, reduction of the number of units of supplies to be delivered, elimination of line items or other identifiable, segregable items of work is generally accomplished under the [termination for convenience] clause, whereas specification changes are normally made pursuant to the 'Changes' clause.") (citations omitted).

23. FAR 43.201(a) (2024).

24. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974 (finding termination for convenience clause appropriate authority where the discontinued work satisfied both the identifiable, segregable test and the major test because there was no change to the specifications and the deleted work amounted to approximately 20 percent of the overall work).

25. Kinetic Eng'g & Constr., Inc., ASBCA No. 30726, 89-1 BCA ¶ 21,397 ("Whether work should be deleted under the Changes clause or the Termination for Convenience clause is best left to the circumstances of each case.") (citing American Constr. & Energy, Inc., ASBCA No. 34934, 88-1 BCA ¶ 20,361; Celesco Indust., Inc., ASBCA No. 22251, 79-1 BCA ¶ 13,604).

26. Jimenez, Inc., VABCA Nos. 6351, et al., 02-2 BCA ¶ 32,019 ("When major portions of contract work are deleted, the Termination for Convenience clause must be used.") (citations omitted).

27. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.

28. *Id.*

29. *Id.*

30. *Id.* This is further supported by the plain language of FAR 52.243-1(a) (2024), which includes specification changes as a designated area of change permitted under the changes clause.

31. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.

32. *See id.;* Person, *supra* note 3, at 3.

33. Person, *supra* note 3, at 3.

34. *See id.*

35. *See id.* (noting that a major change is usually classified as a partial termination for convenience).

36. *Ideker, Inc.*, 87-3 BCA ¶ 20,145, at 101,974.

37. Person, *supra* note 3, at 4.

38. *See id.* (finding, as a "general rule, on a profitable contract, deletion of work through a deductive change is better for the contractor, while on a loss contract, a partial termination for convenience is better").

39. Historical Servs., DOT BCA Nos. 72-8, et al., 72-2 BCA ¶ 9,582, at 44,789.

40. Temsco Helicopters, Inc., IBCA Nos. 2594-A, et al., 89-2 BCA ¶ 21,796, at 109,661 ("A contract modification resulting in a deductive change to a fixed-price contract must be priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government."); *accord* Cibinic et al., *supra* note 6, at 594.

41. *See, e.g., Temsco Helicopters Inc.*, 72-2 BCA ¶ 9,582, at 109,661.

42. *See* Cibinic et al., *supra* note 6, at 603 (citing Temsco Helicopters, Inc., IBCA Nos. 2594-A, et. al., 89-2 BCA ¶ 21,796).

43. *Historical Servs.*, 72-2 BCA ¶ 9,582, at 44,789.

44. Nager Elec. Co. v. United States, 442 F.2d 936, 946 (Ct. Cl. 1971) (citations omitted).

45. 4 Def. Acquisition Univ., Contract Pricing Reference Guide: Advanced Issues 173 (2021).

46. *See* EJB Facilities Servs., ASBCA No. 57547, 13-1 BCA ¶ 35,399, at 173,676.

47. *Id.* (citing as examples, "Osborne Constr. Co., ASBCA No. 55030, 09-1 BCA ¶ 134,083 at 168,513 (bid amount irrelevant to pricing deductive change); Olympiareinigung, 04-1 BCA ¶ 32,458 at 160,563 (amount allocated in bid for deleted work irrelevant to pricing a deduction); Fordel Films, 79-2 BCA ¶ 13,913 at 68,298 (contractor not bound by costs estimated in proposals in pricing a downward adjustment); Celesco, 79-1 BCA ¶ 13,604 at 66,683 (deduction should be based on the contractor's current estimate or 'would have' cost for performing the deleted work); S.N. Nielsen Co. v. United States, 141 Ct. Cl. 793, 797 (Ct. Cl. 1958) (proper way to price deleted work is to ascertain what the work would have cost, not what it was estimated to cost when the contract was formed)").

48. *Historical Servs.*, 72-2 BCA ¶ 9,582, at 44,789.

49. *Id.* (citations omitted).

50. Cibinic et al., *supra* note 6, at 606 (citing Gregory & Reilly Assocs., Inc., FAACAP 65-30, 65-2 BCA ¶ 4,918); *see EJB Facilities Servs.*, 13-1 BCA ¶ 35,399, at 173,676 (finding contract was not severable and therefore "would have cost" rule was proper method to determine price reduction).

51. Cibinic et al., *supra* note 6, at 606.