

5 Ways To Track Changes In Gov't Contracts

By **Matthew Haws** and **Carla Weiss** (August 17, 2020, 6:17 PM EDT)

They say the only constant in life is change. This is equally true in government contracts. Unlike most commercial contracts, the government gives itself the right to change the effort required from the other party in nearly all contracts. The good news is that the government has to deal fairly — equitably — with the contractor when it makes a change.

Theoretically, the government will identify the requested change to the contractor in advance, negotiate an equitable adjustment of the contract price and the time for performance, and modify the contract promptly.

Of course, the reality doesn't always work as smoothly. In many cases, the government does not expressly identify the changed work. All too often, after contractors find themselves over budget or behind schedule, they discover there were unexpected conditions, defective specifications, or changed requirements that made the work less profitable or more resource-intensive than expected.

If a contractor can identify these issues earlier, it can better manage its contracts, recover costs related to the changes and ensure more profitable performance. Specifically, the contractor can identify the change to the government and develop a request for equitable adjustment. Federal Acquisition Regulation 52.243-4, Changes (and related clauses), provides:

If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changes by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing.

When a change is promptly identified, the contractor can effectively and efficiently document the facts, segregate costs related to the changed work and track schedule impact. This will allow the contractor to develop its request for equitable adjustment expeditiously. Once submitted to the government, FAR 43.204 requires contracting officers to "negotiate equitable adjustments resulting from change orders in the shortest practicable time."

Thus, if a contractor can promptly identify contract changes and document their impact on the planned



Matthew Haws



Carla Weiss

work, it can effectively manage its performance and pursue equitable adjustment with the government. For truly effective change management, it is essential that the contractor creates a culture of awareness, making change control part of its contract formation and performance life cycle.

Here are five strategies we recommend for building a healthy change control culture:

1. Step back during contract formation to identify key assumptions and expectations.

In the intensity and time pressure of proposal preparation, important assumptions and expectations can get lost. Because they weren't identified early on, they are not addressed appropriately in pricing the contract, planning the work, or drafting the proposal. These key assumptions or risks then only fade further into the background as the official contract formation process gathers steam.

One way to counteract this tendency is to take a step back during the proposal process to create a more accessible, less formal list of all the assumptions, conditions and expectations the proposal team is making about contract performance or the terms of the proposal.

This allows the team to look at the project from a fresh angle and can help identify the key drivers of the proposed price, key performance risks and unspoken expectations about contract performance.

This informal list can then be reviewed to identify items that represent material issues, significant risks or other considerations worth addressing in more detail — including perhaps as part of your proposal and negotiations.

Of course, unless a key assumption is properly communicated to the government — always beware of unilateral statements in your proposal that object to material solicitation terms, as such statements can make your proposal unacceptable — or documented in the contract, it may not provide the basis for equitable adjustment. But taking the time to informally brainstorm key assumptions is the first step to bringing these issues out of the shadows.

2. Create a contract obligation matrix.

The post-award corollary to the key assumption exercise is the creation of a contract obligation chart or matrix. Just as unspoken assumptions can get lost in the rush of contract formation, key contract obligations can get lost in the familiarity of contract terms the team has seen hundreds of times before.

It is human nature to gloss over commonplace clauses or contract sections, but in doing so, the team can miss changes or aspects of the clause it didn't focus on during prior programs.

In order to bring key contract obligations into clear focus, we suggest creating an informal chart that captures key performance obligations, deadlines and clauses in simple, plain language.

Summarizing the obligation in plain language — and in chart format — can help clarify key contract requirements. Giving this task to a new member of the team or a different member of the organization can bring a fresh perspective to the exercise.

The program team can then use this matrix to ensure that each contract obligation has been assigned adequate resources — including a responsible individual — and appropriate deadlines.

3. Empower employees to speak up about changes to the planned work.

Ultimately, contract work is performed by individuals who start each day with an expectation about the work they will be doing that day. Empowering those individuals to raise their hands about unexpected events is key to identifying changes promptly and consistently.

Contractors typically do a good job on the first part of the equation: ensuring each team member understands their work for a particular day/week/month.

But team members should also understand their critical role in speaking up when the reality of the day's work differs from the expectation — when the material or site conditions are different than expected, or the work is harder or taking longer than anticipated.

Each individual should understand that the team wants to hear about these problems, and they shouldn't suffer in silence or assume they will be blamed for delays or additional costs. Building a speak-up culture is key to identifying changes in real time.

4. Make change control a topic at daily or weekly meetings.

In creating a culture that seeks to promptly and consistently identify changes, change control should be a topic at regular project meetings. The agenda for each meeting should include a discussion of change control, including such questions as: What work did we expect to perform this day/week? How did the work differ from our expectations? Why did that difference occur? What is the impact on our cost or schedule?

These questions will ensure changes in the past day's/week's work are promptly identified. The exploration of "why" will reveal whether equitable adjustment under the contract should be pursued. And even if the why is performance failures, these problems can be identified and corrected earlier.

5. Task one member of each project team to be the change control leader.

Finally, don't let the change-control discussion end with the daily or weekly meeting. Each potential change discussed should be identified in the meeting minutes, and a specific team member should be tasked with investigating the issue and reporting back to the team by the next meeting.

Developing contemporaneous records makes recovery for changes easier. Tasking a single member of the team to be the change-control leader can ensure accountability and focus. In larger organizations, a corporatwide change-control leader can ensure dedicated, consistent focus on change control throughout the organization.

The change-control leader should be empowered to obtain the resources necessary to review potential changes, and should meet regularly with the legal department to discuss potential contract changes. Contract changes should be evaluated, and adequately documented and presented in a request for equitable adjustment or contract claim.

Contractors that commit to making change management integral to company culture will reap benefits. Following these tips will allow for better contract management and more profitable performance through earlier identification of performance issues.

Where the cause of the issue can be traced to a government change, following these tips will ensure timely recovery of additional costs. Even where the cause is a contractor performance issue, following these tips will help avoid costly project overruns, bad performance reviews, liquidated damages or government claims.

Matthew L. Haws is a partner and Carla J. Weiss is special counsel at Jenner & Block LLP.

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