

6 FAH-2 H-530 CONTRACT MODIFICATIONS

(TL:CORH-2; 11-19-2003)
(Office of Origin: A/OPE)

6 FAH-2 H-531 GENERAL

(TL:CORH-2; 11-19-2003)

a. During the life of a contract, it may become necessary to alter the terms of the contract to incorporate new requirements or resolve problems that develop after contract award. When that is the case, the contracting officer must prepare and issue a formal contract modification.

b. Contract modifications are any written changes to a contract.

c. The only person authorized to modify a contract on behalf of the U.S. Government is the contracting officer. **The COR has no authority to execute any contract modifications.** The COR may not obligate in any way the payment of money by the U.S. Government or terminate for any cause the contractor's right to proceed.

d. Generally, there must be "consideration" whenever a contract is modified. "Consideration" is the benefit each party confers upon the other for the modification. The requirement for consideration, as set forth in decisions by the Comptroller General, is that no official of the U.S. Government may alter a contract to the prejudice of the U.S. Government unless the U.S. Government receives corresponding, tangible, contractual benefits. For instance, there is no such thing as a "no-cost" extension to the contract period of performance. If the U.S. Government allows additional time for delivery, the "cost" to the U.S. Government is its right to delivery by the date originally agreed upon. The law requires the contractor to provide consideration for the U.S. Government's giving up that right.

e. Modifications to a contract affect the interests, rights, and obligations of two independent parties, the U.S. Government and the contractor. The responsibility of the contracting officer is to preserve the integrity of the relationship between these two parties. The contracting officer reviews the action to determine whether it is consistent with the existing contract and to ensure that the equities of the existing relationship are preserved, and will be continued, when a modification is issued and negotiated.

6 FAH-2 H-532 TYPES OF CONTRACT MODIFICATIONS

(TL:CORH-2; 11-19-2003)

a. There are two general categories of modifications:

(1) **Unilateral modifications:** Those issued and signed by the contracting officer. Unilateral modifications are binding on the contractor; and

(2) **Bilateral modifications:** Those established by mutual agreement and signed by both the contractor and contracting officer.

b. **Unilateral modifications:**

(1) **Administrative change:** An administrative change alters only administrative details which do not affect the substantive requirements and provisions of the contract—for example, the name of the COR or the paying office, a telephone number or a funding code, a typographical mistake. It is U.S. Government policy that all changes to a contract, whether or not the rights and obligations of the parties are affected, be communicated in writing to the contractor through a modification issued by the contracting officer;

(2) **Change order:**

(a) A change order is a written order that directs the contractor to make changes to the contract as authorized by the Changes clause of the contract. This clause allows the U.S. Government to alter the work to be performed without the consent of the contractor as long as the change is **within the general scope of the contract**. It also obligates the contractor to perform the work of the contract as changed;

(b) When a change order is issued, the contractor must proceed with the work as changed. Such changes may result in an appropriate upward or downward adjustment in the contract price, delivery schedule, or time for performance. If there is an increase in the cost of the work or the time for performance, the contractor must submit a claim for an equitable adjustment within 30 days, and must do so prior to final payment. The contractor is neither to be disadvantaged nor given an unwarranted advantage as a result of the equitable adjustment. Equitable adjustments are reflected in a subsequent bilateral modification;

(c) Disagreements in the content of the change order and the equitable adjustment are subject to settlement under the Disputes clause, and nothing in that clause excuses the contractor from proceeding with the contract as changed. This power, unique to U.S. Government contracts,

allows the contracting officer to alter performance without unnecessary interruption and to subsequently determine the appropriate contract adjustments;

(3) Options:

(a) Some contracts contain a clause that enables the U.S. Government to exercise an option, i.e., a unilateral right in a contract by which, for a specified time, the U.S. Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. Exercise of the option requires acceptance of the provisions of the Option clause and necessary revisions in the contract schedule;

(b) Options may be exercised only when it is determined that:

(i) Sufficient funds are available;

(ii) The requirements covered by the option fulfill an existing need;

(iii) The exercise of the option is most advantageous to the U.S. Government with price and other factors considered; and

(iv) The option was synopsisized in accordance with FAR Part 5, unless exempted by the FAR;

(c) To exercise an option, the COR must initiate a procurement request in sufficient time to allow for processing of the action—generally within 60 days administrative lead time. The request should state the basis for determining that the requirement is still needed and any factors that justify exercise of the option (e.g., need for continuity of operation, cost of relocating U.S. Government-furnished property, etc.). The request must also include an approved funds cite to cover the estimated or actual cost of the option. A sample memo from the contracting officer and the requirements office certification format are available from A/OPE;

(4) Incremental funding: An incrementally funded contract is a contract in which the total work effort is performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance. This funding method allows the contracting officer to award contracts for periods in excess of one year, even though the total estimated amount of funds to be obligated for the contract is not available at the time of contract award. These contracts are awarded subject to the availability of funds.

c. Bilateral modifications:

(1) All bilateral modifications are called supplemental agreements. They constitute revisions which:

- (a) Add additional work; or
- (b) Revise the existing terms of the contract;
- (2) Supplemental agreements are used to:

- (a) Provide an equitable adjustment when a change order has been issued pursuant to the Changes clause, U.S. Government-Furnished Property clause, or other clauses or special provisions of the contract;

- (b) Change the contract price, delivery schedule, quantity, or other contract terms;

- (c) Modify a contract when the modification is for work that is an inseparable part of the original acquisition;

- (d) Finalize the settlement agreement when a contract has been terminated for convenience of the U.S. Government; or

- (e) Permit the contractor to complete a contract after a nonexcusable delay when the contractor assumes liability for actual damages.

6 FAH-2 H-533 MODIFICATIONS INVOLVING NEW ACQUISITION ACTIONS

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a. Before initiating a modification, the contracting officer must determine if the proposed effort is within the scope of the existing contract or is a "new acquisition" outside of the scope. A new requirement outside of the scope of the existing contract must be processed as a new acquisition. Contract scope means, in simple terms, that the contemplated change must be generally related to the work originally contracted for. If a contract was awarded for the design (and only the design) of an automated information system, it could not be later modified to have the contractor provide and install hardware.

b. Whether or not a contemplated change is within or beyond the scope of a contract is often not clear, so the COR should discuss all proposed changes with the contracting officer or legal counsel, if necessary, to obtain a determination.

c. When a new acquisition is contemplated, it should be subject to competition. The contracting officer must ensure that a proposed modification complies with the competition requirements of FAR Part 6 and DOSAR Part 606. It cannot be awarded to a contractor simply because that contractor has a current contract. If the new requirement is to be awarded noncompetitively, it must be justified as a noncompetitive acquisition.

6 FAH-2 H-534 PROCESSING CONTRACT MODIFICATIONS

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Either the U.S. Government or the contractor may initiate a modification through a written request. When a modification is necessary, the COR must prepare a procurement request (you may use Form DS-1969 or Form DS-1970 as the cover page) to document the need for the modification. Attach, as necessary, the following information:

- (1) The contractor's name and address;
- (2) An explanation of the circumstances (who, what, when, where, why) that resulted in the need for the modification;
- (3) A full description of the work to be changed or modified;
- (4) An Independent U.S. Government Cost Estimate, if the modification involves a cost increase and a certification of funds availability from the cognizant finance office; and
- (5) The estimated total time necessary to accomplish the required services, if the time must be extended.

6 FAH-2 H-535 CONSTRUCTIVE CHANGES

(TL:CORH-2; 11-19-2003)

a. The term "constructive change" derives from the verb "to construe" and not from "to construct." A "constructive change" is a situation that can be construed as having the effect of a change order. A "constructive change" arises when, by informal action or inaction by the U.S. Government, the contractor's situation is so altered that the effect is as though a change order had been issued.

b. The following are the most common reasons for the occurrence of constructive changes:

(1) **Inadequate (latently defective) specifications.** If a specification is defective and a reasonable review prior to preparation of the bid or proposal would not disclose the defect (i.e., the defect is latent), the work is made more difficult for the contractor than would be expected. Adding a work requirement in this accidental manner is tantamount to making a change to the specifications and results in an obligation by the U.S. Government to make the same equitable adjustment that would be made under the Changes clause. The same holds true when defective specifications make performance impossible;

(2) **Improperly interpreted specifications.** If, during the course of contract performance, questions arise concerning the meaning of the specifications or other contract terms, the contractor is required to inquire of the U.S. Government as to the meaning. The U.S. Government's interpretation may differ from that of the contractor. Under the Disputes clause, the contractor must comply with any "final decision" of the contracting officer. Later, this disagreement may be subject to review by an Agency Board of Contract Appeals or a Claims Court. If it is determined that the U.S. Government has required more than a reasonable reading of the specifications would require, then the contractor is entitled to an adjustment;

(3) **Overly strict inspection.** Overly strict inspection presumes that a delivery has been made. The COR, in the role of inspector, rejects the item and requires corrections which the contractor then makes. If the contractor later makes a claim for the additional work, and it is determined that the initial delivery was not defective, the adjustment will be under the principles of constructive change;

(4) **Improper technical direction.** Improper technical direction usually is the result of the COR either not determining the limits of his or her authority or ignoring such limits. Contractors will often comply with improper orders for "free" services to maintain the goodwill of the COR.

c. The amount of financial adjustment which should be negotiated under the equitable adjustment process is measured by cost; specifically, the contractor's increased or decreased cost resulting from the change action. The concept of the equitable adjustment includes, in addition to a cost adjustment, an equitable adjustment of profit or fee for the change. The total amount of adjustment should be based upon a measure of the cost impact upon the contractor resulting from the change.

d. Avoiding constructive changes. To avoid constructive changes, the COR should:

(1) Prepare the work requirements and resulting contract with care to remove all ambiguities from the specifications. Take care to be specific when drafting modifications;

(2) Know the requirements of the contract. Erroneous interpretation of specifications and overly strict inspections often result from a failure by the COR to know and understand the contract requirements; and

(3) Keep proper records. Be especially careful to document interim and final inspections, and identify specific problems in writing.

6 FAH-2 H-536 THROUGH H-539 UNASSIGNED