



Chapter 8: Modifications & Claims

Seattle District, NWS

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Chapter 8

Modifications & Claims

1. Modifications.

a. Contract Clause “CHANGES” allows the Contracting Officer the right to modify the contract at any time. Under such circumstances, you will be requested to submit a cost proposal and subsequently enter negotiations, with the purpose of achieving a mutually agreeable and equitable contract price adjustment. Note that if a mutually agreeable contract adjustment cannot be negotiated, the Contracting Officer has the right to issue a unilateral modification setting forth an adjustment deemed reasonable.

b. All modification proposals must be forwarded in the detail required by DFAR Clause 252.243-7001 “PRICING OF CONTRACT MODIFICATIONS” and 252.236-7000 “MODIFICATION PROPOSALS—PRICE BREAKDOWN”. (Figure 8-1 gives guidelines for price breakdown. Figure 8-2 gives guidelines for modification pricing.)

c. FAR Clause 31.105(d)(2)(i)(b) allows for “predetermined schedules of construction equipment use rates”. A Special Clause in your contract refers to EP 1110-1-8, Construction Equipment Ownership and Operating Expense Schedule. Region VIII covers Washington, Oregon and Idaho. Region IV covers Montana. You can access this publication on the Internet at:

http://publications.usace.army.mil/publications/eng-pamphlets/EP_1110-1-8/EP_1110-1-8_Vol-08.pdf.

To procure this document, contact the Government Printing Office at (202) 512-1800, Toll Free (866) 512-1800, FAX (202) 512-2104, Internet address <http://www.gpo.gov/fdsys/>, or email ContactCenter@gpo.gov.

d. Figure 8-3 contains the profit calculation form Government personnel use to estimate a fair and reasonable profit. You should use this form to calculate profit for each modification proposal.

e. Figure 8-4 contains a sample format for submitting a cost proposal. If you desire an electronic copy of this Excel file you can download a copy from the JBLM Preconstruction Packet located at the following URL:

<http://www.nws.usace.army.mil/About/Offices/Construction.aspx>

f. Change order work shall not commence until a Notice to Proceed or a modification document has been signed by the Contracting Officer or Administrative Contracting Officer.

g. For all cost proposals exceeding \$700,000, either as an increase or decrease or as the total of the increases and decreases disregarding algebraic signs (absolute value), you must comply with extended procedures required by the “Truth in Negotiations Act,” 11 PL 87-653. The



threshold for Cost or Pricing Data tends to vary over time. It was \$700,000 at the time of publication. Check your contract to verify the threshold.

(1) Your proposal must conform to the format addressed by FAR 15.408, Table 15-2 (Figure 8-5), at the end of this chapter. Please note that the instructions for Cost or Pricing Data may contain requirements not relevant to construction contracts. Direct questions concerning these instructions to the Administrative Contracting Officer.

(2) Prior to negotiations, the proposal you submit may be given audit review to the extent considered necessary to verify the costs and pricing data presented by you. Such review will include, but not be limited to, compliance with contract modification pricing requirements as outlined above. Your strict observance of those requirements and close attention to supporting data will expedite agreement on pricing of contract modifications.

(3) A CERTIFICATE OF CURRENT COST OR PRICING DATA (see Figure 8-6) will be required of you upon completion of negotiations and price agreement. The executed certificate must be included in the contract file. Per FAR 15.406-2, the following instructions apply to the certification:

(a) The certificate does not constitute a representation as to the accuracy of the contractor's judgment on the estimate of future costs or projections. It applies to the data upon which the judgment or estimate was based. This distinction between fact and judgment should be clearly understood. If the contractor had information reasonably available at the time of agreement showing that the negotiated price was not based on accurate, complete, and current data, the contractor's responsibility is not limited by any lack of personal knowledge of the information on the part of its negotiators.

(b) The contracting officer and contractor are encouraged to reach a prior agreement on criteria for establishing closing or cutoff dates when appropriate in order to minimize delays associated with proposal updates. Closing or cutoff dates should be included as part of the data submitted with the proposal and, before agreement on price, data should be updated by the contractor to the latest closing or cutoff dates for which the data are available. Use of cutoff dates coinciding with reports is acceptable, as certain data may not be reasonably available before normal periodic closing dates (e.g., actual indirect costs). Data within the contractor's or a subcontractor's organization on matters significant to contractor management and to the Government will be treated as reasonably available. What is significant depends upon the circumstances of each acquisition.

(c) Possession of a Certificate of Current Cost or Pricing Data is not a substitute for examining and analyzing the contractor's proposal.



(d) If cost or pricing data are requested by the Government and submitted by an offeror, but an exception is later found to apply, the data shall not be considered cost or pricing data and shall not be certified in accordance with this subsection.

2. CLAIMS.

a. FAR 52.233-1 “DISPUTES” addresses procedures and certification requirements for claims.

b. A claim, as defined in the “DISPUTES” clause, means a written demand or assertion by one of the parties seeking, as a matter of right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

c. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not considered a claim. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in a reasonable time, it may be converted to a claim by complying with the submission and certification requirements of the “DISPUTES” clause.

d. In cases of claim requests of \$100,000.00 or more, the contractor must certify, at the time of submission of a claim, as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable, and that I am duly authorized to certify this claim on behalf of **[INSERT CONTRATOR NAME]**.

(Certifier’s Name)

(Title)

Note that the Contracting Officer has no obligation to render a decision on a claim of \$100,000 or more until the contractor has complied with certification requirements.

e. Figure 8-7 provides a suggested format in preparing claim submittals. Remember, you have the burden of proving a contract change. The detail and completeness of your claim request will reduce processing time.



f. Claims consultants may encourage you to submit a Request for Equitable Adjustment (REA), in lieu of a claim under the DISPUTES clause. They do this because they cannot recover consulting fees, if the Contracting Officer considers their efforts in furtherance of a dispute; whereas, they might recover fees, if they can show they assisted both parties to reach settlement. However, if you submit an REA instead of a claim, you lose the right to collect interest. The interest clock does not begin until the date the Contracting Officer receives a claim, which follows requirements of the DISPUTES clause.

3. CONSENT OF SURETY. FAR 28.106-3 and 28.106-5 address requirements for modifications over \$50,000 or 25% of the contract price.

a. 28.106-3 Additional bond and security.

(1) When additional bond coverage is required and is secured in whole or in part by the original surety or sureties, agencies shall use Standard Form 1415, Consent of Surety and Increase of Penalty. Standard Form 1415 is authorized for local reproduction, and a copy of the form is furnished for this purpose in Part 53 of the loose-leaf edition of the FAR.

See Figure 8-8 of this reference for a copy of Standard Form 1415.

(2) When additional bond coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 28.204 in lieu of corporate or individual surety, agencies shall use Standard Form 25, Performance Bond; Standard Form 1418, Performance Bond for Other Than Construction Contracts; Standard Form 25A, Payment Bond; or Standard Form 1416, Payment Bond for Other Than Construction Contracts

b. 28.106-5 Consent of surety.

(1) When any contract is modified, the contracting officer shall obtain the consent of surety if—

(a) An additional bond is obtained from other than the original surety;

(b) No additional bond is required and—

- The modification is for new work beyond the scope of the original contract; or

- The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or \$50,000; or

(c) Consent of surety is required for a novation agreement (see Subpart 42.12).



(2) When a contract for which performance or payment is secured by any of the types of security listed in 28.204 is modified as described in paragraph (a) of this subsection, no consent of surety is required.

(3) Agencies shall use Standard Form 1414, Consent of Surety, for all types of contracts.

If a modification requires Consent of Surety and Increase of Penalty, a Standard Form 1415 (Fig 8-8) with Power of Attorney must be received before payment can be made on that modification. See Figure 8-9, Filling Out the Consent of Surety.

Enclosures

Figure 8-1 Guidelines for Price Breakdown

Figure 8-2 Modification Pricing Guidelines

Figure 8-3 Profit Template

Figure 8-4 Contractor Proposal Template

Figure 8-5 FAR 15.408, Table 15-2: Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required

Figure 8-6 Certificate of Current Cost or Pricing Data

Figure 8-7 Contract Claims Format

Figure 8-8 SF 1415, Consent of Surety and Increase of Penalty

Figure 8-9 Filling Out the Consent of Surety

