

## CHAPTER 7. CONTRACT ADMINISTRATION

### SECTION 2. CONTRACT CLAUSES

**7.2 General.** Contract clauses are placed in government contracts to reduce contingencies in bids and to provide for other conditions which may affect cost. The Government agrees within the clauses to adjust the contract when conditions occur that are not due to the fault or negligence of the contractor. Managers must give careful attention to the time limits prescribed in contract clauses for filing the notice of claim for adjustment and for submitting proposals. Refer questionable causes arising in the field to the Contract Administration Division for guidance.

**7.2.1 Changes (FAR 52.243-4).** This clause permits the Contracting Officer to make changes in the drawings and specifications within the contract scope. However, if such changes cause an increase or decrease of cost or time to the contract, an equitable adjustment must be made and the contract modified accordingly. Thus, the *Changes Clause* provides the Contracting Officer a mechanism for revising the plans, for correcting errors, or for modifying the work within the scope of the contract to satisfy changed requirements. This is usually accomplished by a written change; however, a change may also result from a "constructive" change. The *Changes Clause* provides in part:

**"(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order."**

If the contractor is claiming a change under subparagraph (b), (s)he has to give written notice not later than 20 days after costs are incurred, except with respect to defective specifications. Therefore, it is important for the Government and the contractor to identify constructive changes. Examples of constructive changes include:

- The issuance of directives of all types which are not characterized as change by government personnel;
- An action which results in acceleration of contract performance (e.g., failure to grant time extensions for excusable delays with the implied or express demand for performance to the original schedule) without issuance of an acceleration order by the Contracting Officer;
- Defective specifications;
- Erroneous interpretation of specifications by government personnel;
- Limitation of the contractor's work method (without a change);
- Imposing higher level of test or inspection requirements than provided by the contract;
- Improper rejections of work.

**7.2.2 Default (Fixed-Price Construction) (FAR 52.249-10).** If the contractor refuses or fails to diligently perform the work within the specified contract time, the Government may, by written notice to the contractor, terminate his/her right to proceed with the work. Care should be taken in pursuing a termination for default because it can be easily converted to a termination for convenience. The contractor's right to proceed should not be terminated for default nor the contractor charged with damages if the contract performance time can be extended for excusable delays under this clause. What constitutes an excusable delay is defined by the clause and should be reviewed by all parties concerned. The delay must be beyond the control and without fault of the Contractor and his or her subcontractors and suppliers. Before a request for an extension of contract time is submitted to the Contracting Officer, the facts should be carefully reviewed and verified by the Resident Engineer against the qualifying language of the clause. Also, the effect of the delay on the entire schedule or individual schedules must be evaluated. In reviewing the delays and subsequent discussions with a contractor concerning the delays, care should be taken not to compromise the Contracting Officer's prerogative to make the final decision. The ACO should always attempt to establish an agreement based on facts as to the amount of time acceptable to the contractor and equitable to the Government.

**7.2.3 Differing Site Conditions (FAR 52.236-2)**

a. In the CSDP, ACO's have full authority to execute time and cost modifications up to \$100,000 under this clause. Before a modification can be executed, concurrence from the Center Office and the PCO must be obtained.

b. There are two types of differing site conditions under the clause: Type I or Type II. The first requirement for the Resident Office is to determine which type of condition exists, Type I or Type II. Then the RE should determine whether the prerequisites for that category have been met. The following are prerequisites for both types:

(1) The contractor *must* notify the Government before disturbing the condition so we can verify and react as necessary to mitigate costs. Claims of differing site conditions might be denied where the Government is unable to verify the condition.

(2) The condition must be something *physical*.

(3) The condition must generally *predate* the bid opening. Contact CD-CA for guidance or coordination of legal review where this is a question.

(4) The contractor must not have actual knowledge of the condition prior to bid.

(5) The standard of knowledge is that of a reasonable, intelligent contractor experienced in the particular field or area involved. Of course, if the design or specified method of performance must be changed, we need a modification regardless of whether it's a differing site condition.

c. Additional prerequisites for Type I are:

(1) It must be subsurface or "latent," i.e., hidden or concealed.

(2) The condition must differ *materially* from conditions indicated in the contract documents or language implied in the documents. Documents include the solicitation, plans, specifications, and direct references.

(3) The situation must be such that a "*reasonable*" investigation of the documents and relatively simple site viewing by a layman would have not revealed the condition. However, the standard of knowledge is what a reasonable, intelligent contractor experienced in the field concerned would know.

(4) The contractor is responsible for "*patent*" conditions, which contradict the indicated conditions. Again, for a Type I condition, the standard of site inspection is where a relatively simple inspection would have revealed the discrepancy. If the contract documents obviously contradict each other, the bidder has the duty to seek clarification.

(5) The contractor must have relied upon government representation in bid preparation. The burden of disproof of such a statement is on the Government. If an audit is involved, get the auditor to verify the basis of the original bid.

d. Additional prerequisites for Type II conditions are:

(1) The contractor must demonstrate that the condition was unknown and that it was "unusual," differing materially from those conditions ordinarily encountered and generally recognized as inherent in such work. An unknown condition is one that couldn't have been anticipated or readily discovered through a reasonable investigation or inquiry.

(2) The condition must be unusual to the area or type of work involved.

(3) To establish a Type II condition, the contractor has more burden of proof than Type I, since Type II wasn't the result of Government misrepresentation. Generally, a more thorough site investigation is deemed necessary when the Government makes no representation as to existing conditions. This requirement may be lessened considerably if the Government had knowledge of the condition but didn't reveal it to the bidders.

(4) Again, the contractor must have based his or her bid on the reasonably expected conditions.

e. Procedures for adjustment to the contract based on differing site conditions.

(1) The contractor must notify the Government before disturbing the condition. The contractor must promptly investigate and determine which type of condition exists, then determine whether the necessary prerequisites have been met. The contractor must follow-up in writing as soon as possible.

(2) The Government may also initiate a differing site condition change upon discovery of a changed condition.

(3) The Resident Engineer must decide what is the most economical course of action to take. If the design must be changed, or if it is suspected that the design could be affected, the Resident Engineer should

contact the Project Manager (CH) for coordination with ED as soon as possible. If no change to the design is necessary and sufficient funds are available, the Resident Engineer should issue an applicable directive to the contractor. The contractor should only proceed at the direction of the Government.

(4) The Resident Engineer then prepares a rough-order-of-magnitude (ROM) estimate of cost increases/decreases including potential impact (both time and money to this and other contracts) and pre-validate sufficient funds to execute a contract modification subsequent to negotiations.

(5) If a change is necessary, either to the design or the specified method of performance, consider whether a notice to proceed (NTP) modification must be issued under the undefinitized contract modification (UCM) procedure, pursuant to the Changes and Differing Site Conditions clauses. The Statement in Support of a UCM must be approved by the Contracting Officer.

(6) Before the ACO can initiate a modification, a Memorandum for Record must be prepared to support the differing site condition. The Memorandum for Record must contain the following information:

(a) Notice Requirement. When did the contractor (or Government) discover the condition? Whom did he tell and when? Before disturbance?

(b) Government Investigation: When and who investigated and verified the physical condition?

(c) Analysis: Type I or II and why determined to be a differing site condition. Document that all of the previously discussed prerequisites have been considered and are met.

(d) Changes Required: Document discussion, concurrence and resolution provided by CH or ED, if applicable. Generally describe changes necessary as a result of the condition.

(e) Potential Cost Impact: Both time and money on the progress of the work on this and/or other contracts. (Note: Maintain accurate and detailed records including exact use of all equipment, materials, and labor during the entire period the contractor is working under the alleged conditions.)

**7.2.4 Disputes (FAR 52.233-1).** The *Disputes Clause* included in the contract is subject to the Contract Disputes Act of 1978. The *Disputes Clause* is the contract provision, which establishes the right of a contractor to an administrative remedy for settling disputed matters. This provision binds the parties to an administrative process for disposing of disagreements arising within the contract. Strict adherence to procedure, as required by the clause, is required in order to perfect a claim and thus the entitlement of interest. The Contracting Officer's written decision will be final, unless the contractor appeals or files a suit as provided in the Act. The *Disputes Clause* requires a contractor to proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision pending final resolution of the dispute.

**7.2.5 Inspection of Construction (FAR 52.246-12).** Under this clause, any defective material or workmanship will be replaced and/or corrected unless, in the public interest, a recommendation is provided to the Contracting Officer for acceptance of such with an appropriate adjustment in price. Prior to final acceptance the contractor can be directed to remove or tear out work to permit an examination and a

determination that work complies with the contract requirement. If work is found to be in compliance, the contractor may be entitled to reimbursement for removing and replacing the completed work. However, any commitment to reimburse the contractor should be considered in view of the contractor's responsibilities under his or her quality control program. The reimbursement and any adjustment in contract price and/or time will be made under this clause.

**7.2.6 Use and Possession Prior to Completion (FAR 52.236-11).** This clause gives the Government the right to take possession of, and use, any completed or partially completed part of the work. Under provisions of this contract clause, if prior possession or use by the Government delays the progress of the work or causes additional expense to the contractor, an equitable adjustment will be made in contract price and/or time. Note that while the Government has possession of or is using a portion of a facility, the Government assumes responsibility for protection of that work until it is returned to the contractor prior to acceptance. Use and possession by the Government starts the warranty period for that portion of a facility.

**7.2.7 Suspension of Work (FAR 52.242-14).** If work is suspended by written order or otherwise for an unreasonable length of time for the convenience of the Government, the contractor may be entitled to an adjustment in contract price. **Any price adjustment allowed under the Suspension of Work clause, including standby time and extra mobilization-demobilization, must exclude profit.** Do not use this clause in any instance where an equitable cost adjustment is provided for or excluded under any other contract provision. Note that any time extension associated with an unreasonable delay caused by the suspension is issued under the default clause. Adjustments for unreasonable delays prior to issuance of a NTP for a change or differing site condition must be treated as "suspension of work" rather than under the other clauses. Separate costs attributable to the change orders and costs attributable to the "suspension" for application of profit. The next step is to estimate potential impact and commit sufficient funds. If time permits, the ACO should try to negotiate an equitable adjustment and issue the suspension of work as a bilateral supplemental agreement. If time does not permit, the suspension of work will be issued as an Unfinalized Contract Modification (UCM) in accordance with Chapter 7, Section 6 in this plan. *The Contracting Officer must approve all unilaterally directed suspensions prior to the suspension of work directive.* The Statement in Support of an Unfinalized Contract Modification along with evidence of sufficient funding will accomplish this approval action. After approval, the Contracting Officer or the ACO within his or her designated authority will issue the suspension of work directive by the fastest written means available. Be sure to document when the contractor was informed that the A suspension of work is lifted. Accomplish this by one of the following ways: (1) Orally, then confirmed in writing; (2) electronic means signed by the Contracting Officer; or, (3) modification issuing a NTP, including a statement that, "This change order ends the suspension of work dated on . . ." Because not all causes of delays are compensable under this clause, field offices should consult with CD-CA for a determination prior to settlement with the contractor.

**7.2.8 Termination for Convenience of the Government (Fixed-Price)(Short Form) (FAR 52.249-1) and Termination for Convenience of the Government (Fixed-Price) (FAR 52.249-2).** In the normal administration and management of construction contracts the need to delete work frequently arises. When this happens there are two possibilities open to the Contracting Officer. (S)He might issue a partial termination for the convenience of the Government or (s)he might issue a change request deleting portions of the work under contract. In some cases, the amount of compensation received by the contractor will be materially different depending on which course of action is followed. Therefore, it is important to

understand the extent of the Government's rights in this area. One of the primary reasons for distinguishing between a change and a termination for convenience is the likelihood of different pricing results. For a contract where the contractor would have made a profit had the contract gone to completion, the pricing of a termination is based on costs incurred on work done plus a reasonable profit on those costs. On the other hand, a deletion under the *Changes Clause* will be priced by taking out the estimated cost of the work deleted plus an estimated profit. For a contract where the contractor would have sustained a loss had the contract gone to completion, the pricing of a termination is based on costs incurred on work done less a pro rata share of the loss on those costs. However, the *Changes Clause* calls for an "equitable adjustment" for deletion of work, which results in reduction of the total contract price. In arriving at this price reduction the pro rata adjustment for loss rule does not apply. There is no intent on the part of the Government to actually have optional ways of pricing a deletion of work in order to achieve an advantage over the contractor. Further, the use of the *Termination for Convenience Clause* indicates that the parties have agreed to a specific set of rules and procedures to govern situations where the Government decides to order the contractor to stop prior to completion of the work. It follows that the *Termination for Convenience Clause* should override the *Changes Clause* when the only effect of the order is to delete a significant amount of the work. The *Changes Clause* should be restricted to the normal type of change - where the deletion is connected with additions or other alterations to the work, or where the deletions are minor in their effect on the overall work.

**7.2.9 Federal, State, and Local Taxes (FAR 52.229-3).** Inclusion of this tax clause provides that the basic contract price includes the costs of federal, state and local taxes applicable at the date of the contract. However, it further provides that if, during performance, new federal excise taxes or duties become effective, or prior applicable federal excise taxes or duties ineffective, and the amount of such taxes or duties as they affect the basic contract exceed \$100, an adjustment will be made to reflect the actual variation, upward or downward. It is noted that this clause specifically excludes adjustments to social security taxes or other employment taxes. **Note that this clause does not authorize an adjustment for new or changed state and local taxes or duties.**

**7.2.10 Value Engineering - Construction (FAR 52.248-3).** This clause applies to Value Engineering Change Proposals (VECP) voluntarily initiated and developed by the contractor for changing the drawings, specifications, or other contract requirements that would result in a savings to the Government by providing less costly items or methods than those specified without impairing any of their essential functions and characteristics. The VECP clause is a special purpose change clause applicable only to contractor-initiated cost reduction proposals. If approved, the contractor shares in the resultant savings. Until a notice to proceed or a contract modification is issued by the Contracting Officer or the ACO acting within his or her authority, the contractor is obligated to perform in accordance with the original contract requirements. Acceptance or rejection of all or part of the VECP by the Government is final and not subject to the *Disputes Clause* of the contract. However, the terms of the modifications implementing the acceptance are subject to the *Disputes Clause*. (Notice: In an ASBCA Decision, it has been held that profit is to be excluded from the Instant Contract Savings computation.) The Government will take appropriate credits for General and Administrative overhead, field overhead, bond, and applicable gross receipt tax.

Exhibit 7-2\*1 is a value engineering change proposal (VECP) flow chart that shows the approval process for VECPs. The PCO has delegated to USAESCH/ACO the authority to monitor the contractor's Value Engineering Program. Neither the USAESCH/ACO nor the Field ACO has the authority to approve a

VECP. The VECP's must follow configuration management procedures and after the VECP has been programmatically and technically approved, an ECP will be processed to implement the change. The USAESCH VE Officer will be kept informed by CD-CA. The Resident Engineer will send all VECP's through CD-CA.

**7.2.11 Price Reduction for Defective Cost or Pricing Data - Modification- Sealed Bidding (FAR 52.214-27).** This clause provides that if the Contracting Officer determines that any price, including profit, negotiated for any modification in excess of \$500,000 was increased by any significant sums because the contractor or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as of the date of execution of the contractor's Certificate of Current Cost or Pricing Data, then such price will be reduced accordingly and the contract modified in writing to reflect such adjustment.

**7.2.12 Government - Property (Fixed-Price Contracts) (FAR 52.245-2) and Government-Furnished Property (Short Form) (FAR 52.245-4).** The Government may find it convenient and desirable to furnish Government-owned property to construction contractors for their use in performance of the contract. Such property is identified in detail in the plans and specifications of the basic contract. In some cases the Government will not be able to furnish the property in accordance with its commitment, thus, the duties and obligations of the parties will vary from those established by the basic contract. Accordingly, a contract modification will be necessary to adjust the rights of the parties in the new situation. Special Clauses entitled Government-Furnished Property, Property Records (April 1984), and Identification of Government-Furnished Property (April 1984) should be included in the contract if Government-furnished property is added to the work after a contract award. These three separate clauses can be used to amend the contract to account for the revised condition. However, any equitable adjustment will be made in accordance with the procedure of the *Changes Clause*.

**7.2.13 Variation in Estimated Quantity (FAR 52.211-18).** This clause is a self-operating clause if the contract contains estimated quantity items. The clause provides that when the actual quantity of a pay item (CLIN) varies more than 15 percent above or below the estimated quantity stated in the contract, an equitable adjustment in the contract price will be made *upon demand of either party*. See section 15, Special Considerations, of this chapter for a more detailed explanation of the *Variation in Estimated Quantity Clause*.

**7.2.14 Exhibits.**

Exhibit 7-2\*1      Value Engineering Flow Chart

VALUE ENGINEERING CHANGE PROPOSAL FLOW CHART

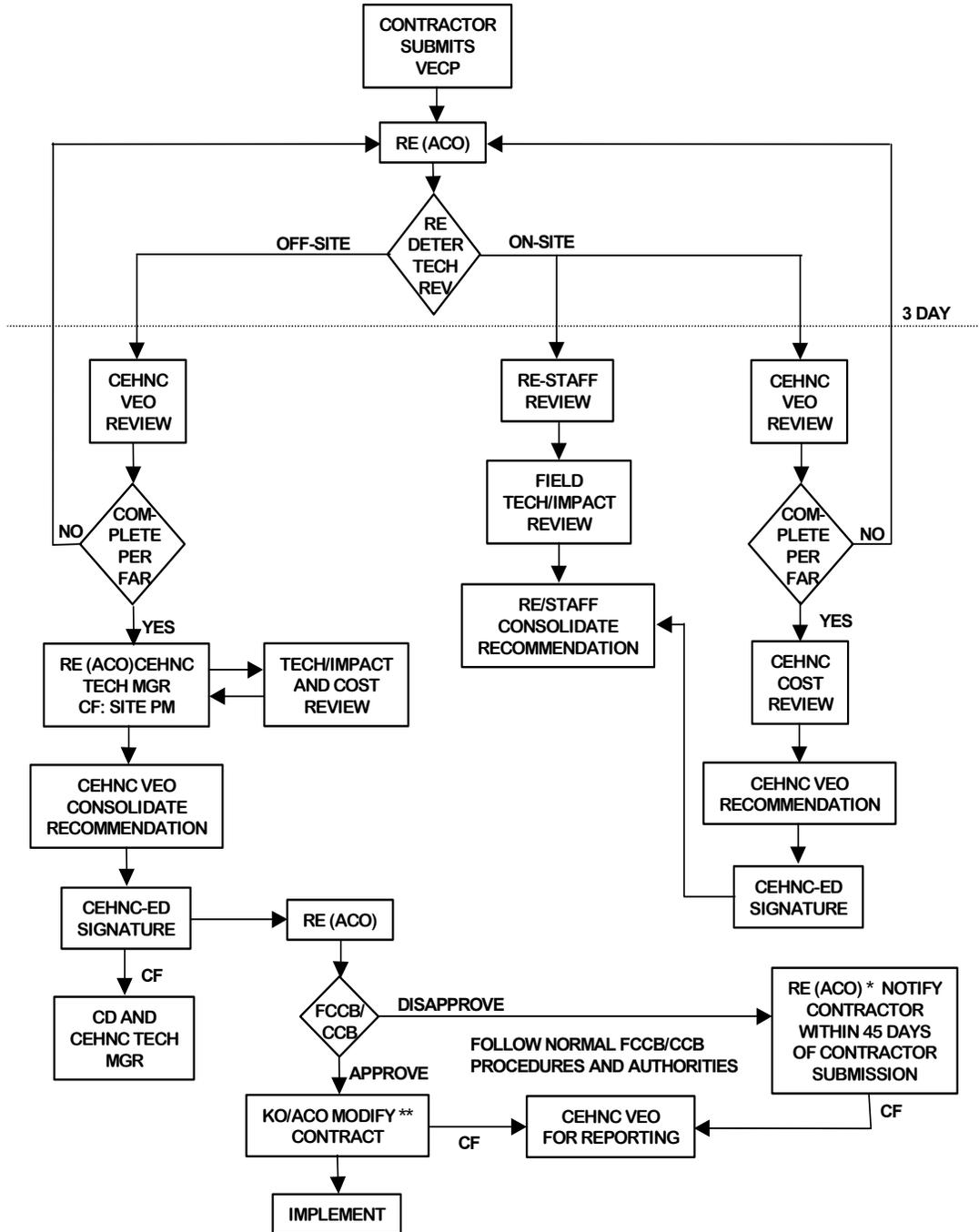


Exhibit 7-2\*1. Value Engineering Flow Chart