

## CHAPTER 7. CONTRACT ADMINISTRATION

### SECTION 3. THE MODIFICATION PROCESS

**7.3 General.** This part provides general guidance on the elements or components of the modification process. Detailed guidance is provided in follow-on parts to completely describe the process.

#### **7.3.1 Description of Change.**

a. The description of the changed work must not only provide the contractor with a full understanding of the required changes, in order that he may prepare a complete and responsive proposal, it also serves as a permanent record of the completed modification requirements. The description must be brief. It must provide sufficient detail for reviewers not familiar with the work to fully understand the scope of the change. If necessary, a detailed scope of work may be provided.

b. Changes may originate in various ways. In the CSDP, an approved Engineering Change Proposal (ECP) must first be provided to the Resident Engineer. The ECPs must follow procedures for configuration management as specified in the CSDP Configuration Management (CM) Plan. This guidance does not cover the CM procedures. The Resident Engineer is a member of CM Control Boards. The Resident Engineer, for administrative purposes, shall identify all changes in order that CM procedures can be followed and sources of all changes can be audited. Approved ECPs originating from other than the Resident Office, will be transmitted by CD-CA.

c. The CEHNC ACO has unlimited authority and the Resident Engineer has limited ACO authority on the Firm Fixed Price (FFP) phases of the contract only. The PCO (IOC) has unlimited authority on all phases of the contract, and is responsible for all other (CPAF) contract changes/ modifications.

**7.3.2 Request for Proposal (RFP).** The RFP provides the contractor with a description of the change and establishes a suspense date for receipt of the Contractor's proposal. The description must be the same scope or statement of work in the approved ECP. A separate description may not be necessary. However, preparers of the RFP must ensure that the description is clear to provide the basis of subsequent negotiations. The RFP is initiated by letter from the Resident Engineer, ACO, or PCO.

#### **7.3.3 Government Estimate.**

a. FAR/EFARS 36.203 and FAR 36.214 require that Government Estimates be used to help establish reasonableness of price. To comply with the requirements of EFARS 36.203-102, it is no longer mandatory that all negotiated increases in price be equal to or less than the amount of the Government Estimate. However, when the Government estimate is changed during or subsequent to conferences or negotiations, the basis for the revision or changes in price or prices shall be fully explained and documented in the price negotiation memorandum.

b. A formal Government Estimate is required for all proposed modifications involving \$100,000 or more, including increases, decreases or a combination/aggregate of both (FAR 36.203). The Government Estimate must be prepared independently of the contractor's proposal and **a statement to this effect included on the estimate cover sheet**. This statement is not required on a revised Government Estimate when it is changed to include data supported by the contractor during negotiations.

- c. See Section 7.5, "Government Estimates" for procedures in preparing Government Estimates.

**7.3.4 Notice to Proceed.** The preferred policy (forward pricing) is to issue the notice to proceed (NTP) for a change only after the full scope of work is determined, the Government Estimate is prepared, an audit is obtained, if applicable, an equitable adjustment is negotiated with the contractor, and the funds are committed, or otherwise certified as available by the Finance and Accounting Officer. If it is determined that the work under the contract would be unacceptably delayed by the process of concluding negotiations, and the contractor must proceed with the changed work before a formal modification can be negotiated, the availability of funds will be ascertained, a NTP modification (undefinitized change order) will be issued to the contractor before agreement is reached on price and time. See Section 7.6, Undefinitized Contract Modifications.

**7.3.5 Truth in Negotiations - Contractor Cost or Pricing Data.** As required by FAR 15.403, when any single source action is received which requires certified cost or pricing data, the contractor must furnish a detailed proposal with labor, material, equipment, general plant, overhead, profit and bond markups itemized. The contractor must certify the completeness and accuracy of the factual aspects of the cost or pricing data, upon conclusion of the negotiations. The fact that an independent Government estimate of cost is developed does not, of itself, provide a basis for exception from the requirement to obtain cost or pricing data from the contractor. Likewise, a certificate of current cost or pricing data shall not be considered a substitute for examination and analysis of the contractor's proposal. If the contractor should refuse to provide such data or certification, follow the procedure outlined in FAR 15.404-2 for withholding award or price adjustment and refer the matter to higher authority. Upon receipt of the cost or pricing data, make an analysis to assure reasonableness of the pricing. For complete information and instructions concerning the Truth in Negotiation requirements, see Section 7.7.

### **7.3.6 Technical Analysis.**

a. A technical analysis is a review by technical personnel in the Resident office generally familiar with the contractor's operation and technical nature of the work affected by the contract action. As a minimum, it covers a review and assessment of the quantities and types of materials, labor, equipment, any special facilities or tooling needed, reasonableness of waste factors, tear-out, impacts, time analysis, field overhead, productivity rates, etc. FAR 15.404-1 requires the Government to make a technical analysis of all proposals where cost or pricing data are required. In addition, Huntsville Division requires a technical analysis for all proposals exceeding \$100,000.

b. The ACOs should perform technical analysis of ALL proposals as good business practice. For changes NOT exceeding \$100,000, the technical analysis need not be formally documented. However, the pre-negotiation objectives should incorporate significant results.

c. For proposals over \$100,000 or otherwise requiring cost or pricing data submission, but not needing an audit requirement, the technical analysis may be documented within the pre-negotiation objectives or as an attachment. Also recommended is a marked-up proposal included in the file. See Section 7.7 for further guidance and samples.

### **7.3.7 Cost/Profit Analysis of Contractor's Proposal.**

a. Cost analysis is an evaluation of the reasonableness of individual cost elements comprising the proposed price. The primary reason for requiring and analyzing cost data for modifications is the fundamental principle that the price adjustment is to be based on the effect of the action on the contractor's cost had the action not occurred. It is not based on the fair market value from the contractor to the Government. The other main reason is to facilitate a review of the contractor's understanding of the scope of work, to ensure that both parties comprehend the scope.

b. Cost analysis is required whenever cost or pricing data submission is mandatory (FAR 15.404-1). In addition, Huntsville Division requires a documented cost analysis for all modifications exceeding \$100,000. As a matter of sound business practice, for the reasons stated above, some degree of cost analysis should be performed on all pricing actions, where resources permit.

c. Cost analysis takes into account requests of the audit, market survey information, technical analysis, previous experience and cost histories, and application of the cost principles in FAR, Part 31.

d. The negotiator can perform cost analysis on changes not requiring "cost or pricing data" by analyzing the proposed breakdown required by Contract Clause, Modification Proposals - Price Breakdown (DFARS 52.236-7001). Offices should discuss this requirement with contractors and require a cost breakdown regardless of the proposed amount (except perhaps for small, relatively simple changes).

e. When any element of a proposal differs significantly from the Government's estimate, when cost or pricing data is not required, FAR 36.214 requires the Contracting Officer/Administrative Contracting Officer to request a breakdown of work and cost data to compare with the estimate.

f. Profit analysis is required under the same circumstances as cost analysis (FAR 15.404-4). It is really an element of cost analysis. Profit analysis is a comparison of proposed profit rate with the Government's profit rate developed using the Corps of Engineers' Weighted Guideline Method prescribed by EFARS 15.973 (See Exhibit 7.5.15). The EFARS method must be used to establish the profit portion of the Government's pre-negotiation objective.

g. Specific procedures for cost/profit analysis are covered in Section 7.7.

### **7.3.8 Price Analysis of the Contractor's Proposal.**

a. Price analysis is an evaluation of the reasonableness of overall price or prices without scrutinizing details of the cost elements comprising the price. Examples include comparison of bottom-line price, bid item price, cost per linear meter, cost per cubic meter, overall labor, overall materials, overall equipment, etc., against other yardsticks. Price analysis is required for all pricing actions (FAR 15.404-1, and 36.214). Section 7.7 covers specific procedures for price analysis.

b. Price analysis is not a substitute for cost analysis; rather they complement each other. Price analysis is a macro-perspective, while cost analysis is a micro-perspective.

c. When a Government Estimate is necessary, the negotiator must review the proposal for accuracy and compare it to the Government's estimate. When any element of the proposal varies significantly from the Government's estimate, or if the proposed price is significantly lower, the negotiator must take steps to analyze and resolve the differences to ensure that both parties understand the scope of work (FAR 36.214).

d. If there is no Government Estimate for a change less than \$100,000, other price analysis comparisons are necessary to ensure a fair and reasonable price. When the nature of the change makes this difficult, the negotiator should require a cost breakdown and perform cost analysis.

**7.3.9 Audit.** When the proposal involves in excess of \$500,000, including increases, decreases, or a combination of both, the ACO should consider whether an audit by DCAA is necessary to support proposal analysis (FAR 42 & DFARS 215.404-2). The Resident Engineer shall forward the proposal and any other pertinent documents such as the Request for Proposal, a Government cost estimate and technical analysis **through the Directorate of Contracting to the Project Specialists** to the DCAA. The Resident Engineer may also request specific audit attention on items that appear controversial. The CD-CA or the Resident Engineer Office, through mutual agreement, will formally request the audit. Where the need exists, audits may be requested for proposals less than \$500,000. Audit reports are "FOR OFFICIAL USE ONLY." The Contracting Officer (HNC-ACO) may authorize release of an audit report to the contractor, upon written request. Section 7.7 also furnishes additional details on obtaining audits.

#### **7.3.10 Pre-negotiation Objectives.**

a. FAR 15.406-1 (DFARS 15.406-1) requires the Contracting Officer to develop pre-negotiation objectives (PNO) prior to any pricing action. The pre-negotiation objectives describe the negotiator's price and time objectives in dollars and number of days, respectively. The objectives may be stated as a specific number or as a range or desired results. The PNO contains a comparison summary of the contractor's cost and time proposal; results of audit, if applicable; technical analysis, if applicable; cost analysis, if applicable; price analysis; the Government Estimate, if applicable; and individual cost element objectives, when cost analysis is required.

b. The PNO includes a narrative summary of significant differences between the elements of the proposal and the cost/time objective and explains what forms the basis for the objectives. When time extensions are expected, the PNO will explain how time related costs are or are not included after having considered all concurrent delays from all causes. The PNO must document any exceptions taken to the audit. The original PNO are part of the official contract file, signed and dated by the negotiator and stamped "For Official Use Only."

c. When an audit report is involved, after finalization of the modification, the Resident Office will provide a copy of the POM, and PNM, to the DCAA. See Section 7.8 for detailed instructions on Prenegotiation Objectives.

**NOTE:** Need HNC-ACO concurrence to change this - discuss.

#### **7.3.11 Negotiation.**

a. In the sequence of events involved in the Elements of Modification Process, negotiations should follow the receipt and cost and/or price analysis of the contractor's proposal, the establishment of pre-

negotiation objectives, and, when applicable, revision of the Government Estimate.

b. Negotiations must be conducted in all cases, regardless of whether the contractor's proposal is reasonable in comparison with the Government Estimate, to insure that the parties understand the scope of the change. When there are major variances, the negotiator cannot rely on the fact that the total proposal is lower than the total Government Estimate without comparing the scope of work, and exploring the propriety of the differential costs/prices. (FAR 36.214). If cost or pricing data is required, the negotiator has performed cost and technical analysis, as discussed earlier. In these cases, the negotiator must address and eliminate proposed costs, which are unallowable, or unallocable, FAR Part 31, regardless of whether the proposal is less than the Government Estimate. Proposed "factual" data must also be resolved during negotiations of modifications requiring cost or pricing data.

c. Negotiations must address time extensions in all cases, even if to confirm that no time extension is necessary.

d. Negotiations must address and resolve impacts. While it is not advisable to solicit impact costs, it is unwise to ignore the issue, hoping the contractor won't think of it. In order to reach a mutual understanding and full agreement to an equitable adjustment, the negotiator must ensure the contractor understands all cost directly or indirectly attributable to the change. Do not rely on the contractor's signature on the modification containing the accord and satisfaction language as evidence that he agreed impacts were considered in the settlement. Boards and courts have ruled time and time again that unless the subject was clearly discussed and documented there is no "meeting of the minds." Exculpatory statements on modifications are not documentation that there is agreement. As a minimum, get the contractor to confirm that he has considered all costs in the settlement, including impacts on the unchanged work.

e. Impact costs included in the Government Estimate, but not resolved during negotiations (i.e., not discussed or the contractor reserves his rights to impacts in a future modification or claim), must be removed from the Government Estimate for purposes of comparison with the negotiated amount. Otherwise, the scope of the agreement won't match the scope included in the Government Estimate.

### **7.3.12 Price Negotiation Memorandum (PNM).**

a. FAR 15.406-3 specifies that the price negotiation memorandum contain the "...most significant facts or considerations controlling the establishment of the pre-negotiation price objective and the negotiated price including an explanation of any significant differences between the two positions." EFARS 15.808 requires complete documentation and justification for issuance and negotiation of all construction contract modifications. The PNM must address the points raised in the pre-negotiation objectives to show a logical progression of resolution of all issues. Document agreed changes to the scope of work, forming a basis for settlement, in the price negotiation memorandum.

b. The negotiator may make changes in the Government Estimate necessary to add any pertinent factors, which have not been considered in the preparation of the estimate (FAR 36.214 and EFARS 36.203- (102). Show explanations for each revision in the applicable block on the price negotiation memorandum.

c. The PNM must document discussion and agreement on time extension or that no time extension was necessary. If the agreed time extension varies from the pre-negotiation objectives, document the basis for the time extension.

d. The PNM must document discussions and agreement that impacts were considered in the final settlement.

e. See Section 7.10 for PNM procedures.

**7.3.13 Memorandum of Facts (MOF).** Prepare a Memorandum of Facts to justify the issuance, negotiations and execution of each supplemental agreement under the Default clause and for multi-part changes, excluding the definitization modification. The appropriate Contracting Officer or the ACO, for actions within their authority shall sign MOFs. Such memoranda are not contractual instruments and will not be revealed to the contractor. However, they are a required part of the official record file and contain essential information for those reviewing such documents for legal and technical sufficiency. See Section 7.12, General Guidelines for a Memorandum of Facts.

**7.3.14 Legal Sufficiency Review.** EFARS 1.602-2 requires Office of Counsel to verify to the Contracting Officer, in writing, that any proposed contract action (suspension, modification, change order, termination, etc.) of \$500,000 or more is legally sufficient, prior to issuance. Legal review is required for any action regardless of dollar value, which may lead to a claim. The Contracting Officer may request legal review of actions less than \$500,000.

**7.3.15 Standard Form 30 (SF 30).** Standard Form 30 when properly executed by the contractor and the Contracting Officer or Administrative Contracting Officer, after legal review, if applicable, constitutes a modification to the contract. The Administrative Contracting Officer's authority for use of the Form 30 is limited to modifications pursuant to the Changes, Differing Site Conditions, and Suspension of Work clauses within his designated amount (as of 26 Feb 98, HNC is seeking authority under the Value Engineering Clause). It is used also, for extensions of time under the Default clause. Follow instructions in Section 7.11 for preparation of SF 30.

**7.3.16 Performance/Payment Bonds and Consent of Surety.** The Request for Proposals (RFP) or the solicitation required the offeror to furnish a performance and payment bond on the construction phases of the contract, Phases II, III, and IV, in the amount indicated in the RFP and within the time stated. The performance bond ensures that the contractor fulfills all contract requirements for these phases of the project. The payment bond ensures that the contractor makes payments to all persons supplying labor and material for the prosecution of the work provided for in these phases. The consent of surety advises the surety of a change in the contract or the construction phases and obtains his consent to extent the bond coverage accordingly. For changes \$50,000 or greater, but less than \$100,000, execute SF1414, Consent of Surety. For changes \$100,000 or greater, execute SF1415, consent of Surety and Increase in Penalty. See Section 7.13 of this relative to performance/payment bonds and consent of Surety Procedures.

#### **7.3.17 Exhibit.**

Exhibit 7-3\*1 Steps in the Modification Process

## STEPS IN THE MODIFICATION PROCESS

Required contracting actions for modifications - FAR, DFAR, AFAR, EFAR	< \$100 K	= > \$100 K < \$500 K	> \$500 K
Justification for change	X	X	X
Independent Government Estimate	A	X	X
Funding Document (MCD)	X	X	X
Request for Proposal (RFP)	X	X	X
Contractor's Proposal	X	X	X
Certificate of Relief over \$100K		X	X
Contractor's Cost Analysis		A, B	B
Cost or Pricing Data	C	A	X
Technical Analysis	A	X	D, X
Audit Report	C	A	X
Government Cost Analysis	A	X	X
Government Price Analysis	X	X	X
Pre-Negotiation Objective	X	X	X
Price Negotiation Memorandum	X	X	X
Certificate of Current Cost or Pricing Data	C	A	X
DD Form DD 1547 - Profit survey			X
Form SF 30 - Modification of Contract	X	X	X
ACO Signature	X		
Contracting Officer Signature	A	X	X
Legal Sufficiency Review	A	A	X
Contract Modification Package Review	A	X	X
SF1414 - Consent of Surety	X		
SF1415 - Consent of Surety/Increase in Penalty		X	X

X – Required; A-May be necessary or may be required by Contracting Officer; B-Contractor required to conduct analysis of the Sub's proposal (FAR 15.404-3); C-The Government is not allowed to request (FAR 15.403-1); D-Provide report to DCAA auditor for items requiring an audit.

Exhibit 7-3\*1. Steps in the Modification Process