
CHAPTER 7. CONTRACT ADMINISTRATION

SECTION 14. PROCEDURES FOR ISSUING UNILATERAL MODIFICATIONS

7.14.1 Introduction. The primary purpose of the *Changes Clause* is to provide the Government with a flexible procedure by which it may respond expeditiously to changing needs. This clause entitles the Government to order changes in the manner or method of performance, and binds the contractor to perform the work as changed. Basically, contract modifications can be issued in one of two ways: (1) unilateral modifications in which the Government orders a change and agreement on price occurs at a later time; or (2) bilateral modifications in which the Contracting Officer and the contractor agree to a price and/or time adjustment before the modification is issued. In either event, both parties should exchange information to clarify the scope and to effect the contract change.

7.14.2 Preferred Method. The bilateral procedure is the normal and preferred procurement method because the Government can obtain a fixed price and time commitment for the change early in the change process. If the change order is unilateral, the price, which the Government ultimately is obligated to pay, and the period of performance remain uncertain. If negotiations on cost and time are delayed until a substantial portion of the change work is accomplished, it may be difficult to separate the costs resulting from the change directive from the costs properly attributable to ineffective actions by the contractor or his subcontractors or suppliers. FAR 43.102(b) states:

"Contract modifications, including changes that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of the Government. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a maximum price shall be negotiated unless impractical."

7.14.3 Concerns. Current procedures and contract provisions require the contractor to make a detailed estimate of the cost impact of the change (both monetary and time). Generally, this data provides the necessary basis for negotiating the costs to be incurred. However, two major concerns often arise using this procedure. First, both Government and the contractor may not know the point of application of the change. They may need to perform additional investigations, such as manufacturing and testing, to determine the specific nature of the change; thus, the time required for this work may be an indeterminate length. Similarly, the change may require the contractor to perform detailed design work for the changes, making the full cost impact of the work difficult to predict at the beginning. In either case, the Contracting Officer might be able to issue a bilateral modification for the initial phases of the effort and follow up with a subsequent modification when the details are known. In many cases, particularly on construction projects, there is a very short time period available for the Government to issue the change. In other words, in construction the need for a change is frequently recognized shortly before the contractor arrives at the point in the work where the change is required. If a change order is not issued quickly, part or perhaps all of the work will stop. Since it is highly undesirable to stop work, the parties may attempt to negotiate a bilateral modification. But they may resort to a unilateral change action if it becomes apparent that there is a significant disagreement on the price. In this case, the undefinitized contract modification (UCM) keeps the work moving. A subsequent modification can be issued to define the UCM and establish an equitable adjustment as quickly as possible.

7.14.4 Objective. Previous experience indicates the need for a uniform procedure and understanding when circumstances require issuing a unilateral order. Accordingly, this guidance's purpose is to emphasize the appropriate steps necessary to first obtain a bilateral agreement and, alternatively, to achieve a unilateral modification. The bilateral agreement can be met only if the parties have a mutually accepted understanding of the desired changes. Therefore, the initial written change request becomes the starting point in reaching an understanding that will lead to an equitable adjustment. The change request should clearly outline the changed requirements and the desires of the Government. In turn, the contractor is required by contract provisions to provide a detailed proposal to the satisfaction of the Contracting Officer. If the proposal is not in sufficient detail or in the necessary format, the RE/ACO should advise the contractor. Unless the effect of the change on the project schedule and the unchanged work is stated, the contractor's proposal is not complete and it should not be accepted. At this point, the primary responsibility is to reach an agreement that is in the best interest of the Government, price and all other factors considered. To carry out this responsibility, various other facets must be compatible. A basic element is the independently prepared Government Estimate. This pricing objective should be a price that is the lowest reasonable under the circumstances of the change. This objective recognizes that the goal is an equitable adjustment as required by the *Changes Clause*. The most fitting purpose of the equitable adjustment theory has been described as one that leaves the parties in the same position cost-wise and profit-wise as they would have occupied had there been no change, preserving as nearly as possible the advantages and disadvantages of each party's bargain. Negotiations should continue until all reasonable efforts to reach an agreement have been exhausted.

7.14.5 Bilateral Settlement Not Achieved.

a. If it is not possible to reach a reasonable final agreement with the contractor, a unilateral modification may be justified. If a unilateral modification becomes necessary, base it on the Government's estimate of cost and time for the work. The contractor, after review, may sign the modification, but if he fails to sign or submits a non-acceptance letter, issue a Contracting Officer's Decision (COD). The COD places the burden on the contractor to either accept or appeal his decision, but he must proceed with the work covered by the modification.

b. Since the contractor has the right of appeal on the dollar amount and the time stated in a unilateral order, the Government's estimate must be complete and accurate in every detail, including time to accomplish the work. If a bilateral agreement is not effected, the unilateral modification accomplishes the following desirable results:

- (1) It places the risk on the contractor,
- (2) It permits an orderly revision of the progress schedule, and

(3) It eliminates the possible cost-plus contractual relationship on the modification, which develops if negotiations are deferred until the changed work is nearly or completely accomplished.

7.14.6 Procedures. The procedures below should be followed before a unilateral modification is issued. It is the Resident Engineer's responsibility to assure the prompt completion of all steps in the process, up to the point of making a recommendation.

a. The Resident Engineer must re-examine the Government's Estimate. Since the major issue requiring or necessitating a unilateral modification is usually price and/or time disagreements, the Government must be able to fully justify its estimate of costs and/or time determinations with facts, judgments based on facts, best available information, logic, knowledge of the job status, knowledge of material deliveries, and availability of manpower and equipment. Accordingly, a detailed Government Estimate must be prepared, reviewed, approved, and be supported with narratives justifying quantities, labor requirements, equipment requirements and pricing data. The estimate must contain an analysis of the current job status to explain why time extensions were or were not allowed. An analysis of impact costs (indirect costs) and why these costs were considered or not allowed is also required.

b. The Resident Engineer will personally participate in the negotiations with the contractor in order to attempt a bilateral settlement when it appears an impasse is developing.

c. The modification file should be documented with letters, memos, diaries, notes, etc., which show the Government's attempts to obtain the proposal and efforts to negotiate a settlement. Document areas of disagreements and agreements. The record should also contain a time and impact analysis.

d. The Resident Engineer will prepare and sign the Price Negotiation Memorandum. Provide data and information in the PNM that gives complete identification of the quantum and entitlement of issues involved attempts at bilateral settlement, and the justification to support a recommendation by the Resident Engineer that a unilateral modification should be issued.

e. When failure to reach a mutual agreement on an equitable adjustment occurs (due to an impasse), prepare a modification on Standard Form 30 along with a letter of transmittal. Prepare the modification in such a manner that it appears to be bilateral. Forward the modification, transmittal letter, and complete record file to CD-CA for processing. The Office of Counsel will review the proposed unilateral modification for adequacy of detail and accuracy. The review is essential to insure that adequate documentation is in the hands of the appropriate offices should the contractor file a claim for time and/or money with regard to the matters identified in the proposed unilateral modification. The CD-CA will forward the *certified* transmittal letter, unilateral modification, signed by the appropriate authority, and a copy of the resume of negotiations or MOF, explaining the Government's position to the contractor; this gives the contractor an opportunity for further review and possible acceptance of the modification.

f. When failure to reach mutual agreement on an equitable adjustment is due the contractor not providing adequate proposals, or a modification must be issued quickly, field personnel will prepare a contract modification on Standard Form 30 and a letter of transmittal to the contractor. These, along with the record file, will be forwarded to CD-CA personnel for processing through Office of Counsel, to the Contracting Officer, and then to the contractor for possible acceptance.

g. In either of the above two cases, if the contractor accepts the modification without reservation, the modification will follow normal processing procedures. If the contractor does not accept the modification, change the SF 30 to show that the modification is issued unilaterally. If agreement cannot be reached and the contractor requests a Contracting Officer's decision and provides the applicable certification in accordance with the Contract Disputes Act, the change becomes a claim under the Act. The RO will follow the guidance in section 16 of chapter 7, Contract Claims and Disputes, to handle the situation. A thorough technical and legal review of the file by Huntsville Center personnel and a meeting between the contractor and Contracting Officer will precede a final decision. If the Price Negotiation Memorandum, Government Estimate, time analysis, and impact analysis sufficiently justify and support the Government's position, further analysis will not be required.

7.14.7 Emphasis. The Government emphasizes, again, that issuing a unilateral modification is recommended only after reasonable efforts to negotiate a bilateral settlement have failed. Do not use unilateral modifications as a threat, but as a management technique for efficient and effective contract administration.

7.14.8 Sample Formats. Exhibit 7-14*1 is a sample letter transmitting a unilateral modification to the contractor. Modify the letter appropriately.

Certified No.

Subject: Contract Number DAA09-92-C-XXXX, Anniston Chemical Agent Disposal Facility,
Anniston, AL.

Mr. I. M. Contractor, President
R & C Defense Company, Inc.
P.O. Box 1000
Anniston, AL 35054

Dear Mr. Contractor:

Modification Number A (Change request number AN-2-XXX-2) is enclosed for your acceptance under the subject contract. Although circumstances surrounding this change have not resulted in a Bilateral Agreement, I consider the modification fair and reasonable, reflecting an equitable adjustment. Please indicate your acceptance in Blocks 15A, 15B and 15C and return the original to this office, Attention: CEHNC-CD-CA. Retain the copy marked "Duplicate Original" for your file. The modification will be effective upon your acceptance. Please revise your progress schedule to reflect the adjustment.

If this modification is unsatisfactory, return the original, unsigned, with a letter providing full explanation and with supporting documentation of your reasons for not accepting the modification. You may then consider the modification effective upon the date of my signature in Block 16C. Then, revise your progress schedule accordingly.

After considering your reasons, a final Contracting Officer's Decision may be issued in accordance with the "Disputes" provisions of the contract. In any event, your response is requested within ten days after you receive this letter.

Enclosure

Sincerely,

/s/

T. Goodfellow
Authorized Representative
of the Contracting Officer

Exhibit 7-14*1. Sample Letter for Bilateral Agreements