



Guide on the Use of the Changes Clause: What Modifications Trigger Competition?

An Additional Help for ADS Chapter 302

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Guide on the Use of the Changes Clause: What Modifications Trigger Competition?

A Justification and Approval (J&A) is required for an existing award when a proposed action triggers competition. Competition is not triggered by any action taken specifically in accordance with a term and condition of the award. Competition may be required for modifications of existing contracts that exceed the scope of the original contract by adding new work through an increase to the total estimated cost (TEC) of the award, a change to the Statement of Work (SOW), or an extension of the period of performance (POP).

Every contract is unique. Each situation must be analyzed on its own facts and circumstances, considering the magnitude and type of changes ordered within the scope of the contract and their cumulative effect upon the contract as a whole. Exercise of a priced option or an equitable price adjustment are examples of contract actions that do not trigger competition. Other examples of the types of contract modifications that generally do not trigger competition include the following:

- **Cost overrun** - An increase in the TEC of a cost reimbursable contract in order to allow the contractor to complete work already specified in the contract that costs more than originally anticipated;
- **Delay** - An extension to the POP granting the contractor additional time to complete the deliverables specified in the existing SOW (Delays can be “Excusable,” “Government-caused,” or “Contractor-caused,” or “concurrent,” each of which have different contractual implications);
- **Changes** - Changes within the general scope of the contract subject to the applicable changes clause, FAR 52.243-1 through -5, that could have been reasonably anticipated by the offerors; or
- **Any combination of these.**

a. Cost Overruns

The contractor requires additional funding in order to complete the contract. Do I need a J&A to increase the TEC?

If the CO needs to increase the TEC of a contract to allow the contractor to incur additional costs not originally anticipated to complete work already within the scope of the contract, the contract has a cost overrun. The CO has discretion to fund or not fund an overrun.

In a Cost-Plus-Fixed-Fee (CPFF) completion type contract, FAR 16.306 states that “in the event the work cannot be completed within the estimated cost, the Government

may require more effort without increase in fee, provided the Government increases the estimated cost.” Under a CPFF term type contract, a cost overrun may generally occur if the cost of labor exceeds what was anticipated and/or indirect costs are higher than anticipated.

Funding a cost overrun does not require a J&A. Cost overruns are sometimes an unavoidable risk of the cost-reimbursement type contract. While overruns are occasionally caused by contractor waste or inefficiency, often they are due to the unavoidable lack of certainty in contract requirements. Given the nature of the work acquired by cost-reimbursement contracts, contractor performance often evolves in ways neither the contractor nor the Government foresaw at the time of award.

Cost Overrun Examples:

- 1) A CPFF completion type contract is issued for a construction project for the building of a road overseas. The host country government had promised to facilitate the contractor in obtaining the necessary permits. The host government experienced difficulty in its engagement with the local government authorities. The contractor had to hire a local law firm to facilitate the permitting, resulting in additional unanticipated costs.

Determination: The increased costs under this contract are not the result of new work being added to it, so competition requirements are not triggered. In accordance with FAR part 16.306(d)(1), in the event the work cannot be completed within the estimated cost, the Government may require more effort without increase in fee, provided the Government increases the estimated cost.

- 2) By year three of a CPFF term type contract, the contractor’s overhead rates had increased by 20%. Additionally, the exchange rate changed from when the contract was executed, costing significantly more money to perform the contract.

Determination: The increased costs under this contract are not the result of new work being added to it, so unless the contract’s terms and conditions contained a different agreement on exchange rate fluctuations or a ceiling on indirect costs, competition requirements are not triggered. If the CO elects to increase the TEC of the contract with no additional fee authorized, this action would not require a J&A.

- 3) A 5-year CPFF completion contract for technical assistance to support the Mission’s eight Government to Government (G2G) agreements required the contractor to help manage the Mission’s portfolio of G2G awards and provide capacity building services to the host country implementers. By the end of year 4, the G2G portfolio had grown to twelve agreements and the COR has directed the contractor to take action with respect to all of them. The contractor informs the CO that it will run out of funds in two months, but the contract period of performance does not end for 10 months.

Determination: The addition of four new G2G agreements that the contractor must provide oversight for, as well as the new host country partners, has resulted in a cost increase. Although the contractor was performing essentially the same work, the cost increase was a direct result of the additional agreements it was required to help manage. This is not a cost overrun because the additional cost resulted from work not contemplated in the original award.

b. Delays

Can my contract period of performance be extended due to a delay without a J&A?

If you need to extend the period of performance to allow the contractor to complete work that is already specified in the contract, then you may not need a J&A. It is important to understand the specific contract type and cause of the delay in order to determine the appropriate action.

Excusable delays are defined as delays beyond the control of the contractor and without the fault or negligence of the contractor. The Excusable Delay clause allows the government to either revise the delivery schedule/period of performance or terminate the contract for convenience.

- Under a cost plus fixed-fee (CPFF) completion type contract, the contractor may be given additional time to complete the deliverables specified in the existing SOW. If there was an "excusable delay," then the authority to extend the period of performance would be the excusable delay clause, FAR 52.249-14. If there was no excusable or government caused delay, then the CO can terminate for default or give the contractor additional time to complete the work in return for some consideration.
- Under a CPFF Term contract, the contract ends when the contractor provides the agreed upon level of effort (LOE). The Excusable Delays clause would allow for extension of the period of performance to allow the contractor to provide the LOE included in the contract, but this clause does not allow for additional LOE to be added to the contract.

Government-caused delays. If the government was the cause of the delay, it may be required to extend the time for completion.

Contractor-caused delays. A delay the government has not authorized and for which the contractor is at fault. The CO should negotiate consideration for the government allowing performance to continue. The delay should be reflected in the contractor's Contractor Performance Assessment Reporting System (CPARS).

Concurrent delays. It is possible to have a delay, elements of which were caused by both the contractor and the government.

Excusable Delays Example:

- 1) The completion of a CPFF completion contract was delayed due to security incidents that occurred in the districts of the host country where the contract activities were being implemented. The host country government restricted access to the region while addressing the incidents. The contractor was delayed in their performance because they were unable to access the region as planned.

Determination: These delays were outside of the Contractor's control. In this case the FAR clause 52.249-14 Excusable Delays authorizes the CO to extend the contract. The CO may extend the contract to adjust the period of performance after analyzing the impact the delay had on the contract schedule.

- 2) A CPFF term contract called for the contractor to provide 5,000 days of labor under the local technical assistance line item. During the last year of performance, a global pandemic struck. Based on a contractor request, the technical office asks the CO to use the excusable delay clause to extend the contract and add LOE since performance was delayed and there are sufficient funds on the contract.

Determination: The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if the performance is considered satisfactory by the Government, the fixed fee is payable at the expiration of the agreed-upon period, upon contractor statement that the level of effort specified in the contract has been expended in performing the contract work. In accordance with FAR 16.306, "Renewal for further periods of performance is a new acquisition that involves new cost and fee arrangements." FAR 52.249-14, Excusable Delays, which is to be included in all cost-reimbursement contracts, provides in paragraph (c) that the relief granted to the contractor in this scenario is revision to the "delivery schedule," not additional LOE. The CO may extend the period of performance to allow the contractor to provide the LOE under contract, but may not add additional LOE to the contract without a J&A.

Excusable Delays - Indefinite Delivery/Indefinite Quantity (IDIQs) and Task Orders

- 1) A Task Order's (TO's) work is delayed when much of their staff are on ordered departure or quarantined due to issues associated with the COVID-19 outbreak in 2020. As a result, the CO wants to use the Excusable Delays clause to extend the task order long enough to allow the contractor to complete the work.

Determination: The Excusable Delays clause can be used to extend a Task Order. However, in addition to the requirements normally applicable to a stand-alone contract, the CO must examine the IDIQ as well. The CO must confirm that extending the task order will not cause the TO to go beyond the IDIQ's period of performance (POP). If the extension does go beyond the POP end date, then the IDIQ must also be extended. The IDIQ CO can also use the Excusable Delays clause to extend the IDIQ's POP and then the Task Order CO can extend the TO's POP.

- 2) An IDIQ's ordering period is expiring soon. Due to the COVID-19 outbreak in 2020, multiple orders were delayed because of shutdowns in operations, quarantine actions, authorized departures, redesigning programs based on new operating parameters as a result of the outbreak, and the need to calculate increased costs associated with new operating measures (PPE, virtual workspace, etc.). Can we use the Excusable Delays clause to extend the ordering period?

Determination: No. Under an IDIQ, there is not any guarantee that the full order amount (TEC) will be ordered collectively by the government. IDIQs create an opportunity for COs to place orders in an expedited manner. The excusable delays clause authorizes contractual remedies when a failure to perform was outside of the control of the contractor. In this scenario, there is no existing work on contract that requires additional time for performance. In most cases, to extend the ordering period of an IDIQ, a CO will need to execute a J&A. Please remember to submit that J&A to the justificationsanda@usaid.gov mailbox for clearance by the ACA.

c. Changes

Are there any situations other than cost overruns and excusable delays in which the CO can make non-administrative changes to the contract without triggering competition?

There is a difference between a prospective out-of-scope contract modification (cardinal change) that requires a J&A and a within-scope contract modification that does not trigger the need to document use of noncompetitive authority. Generally, all modifications must be within the overall scope of the contract. This principle applies in the context of both competitive and non-competitive acquisitions.

In certain circumstances, changes to elements of a contract may be necessary to achieve the results or deliverables of the contract. Changes that are within the general scope of the contract can be made pursuant to the applicable Changes clause (FAR 52.243-1 through -5).

How does the CO determine whether a proposed change falls within the scope of the Changes clause?

When considering whether a change is authorized under the Changes clause, each case must be analyzed on its own facts and in light of its own circumstances. First, the change must relate to one of the elements described in the clause itself (e.g., the following elements are described in FAR 52.243-2 Changes-Cost-Reimbursement, Alternate I for services):

- (1) Description of services to be performed.*
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).*
- (3) Place of performance of the services.*
- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.*
- (5) Method of shipment or packing of supplies.*
- (6) Place of delivery.*

The CO must consider the magnitude and quality of the changes ordered and their cumulative effect upon the contract as a whole. Contract modifications cannot materially depart from the scope of the original procurement without a J&A. The analysis with respect to scope is an objective one viewed from the perspective of potential offerors for the original procurement, so the CO must examine the scope of the proposed contract modification in comparison to the original solicitation.

The courts and GAO determine whether a change is within the scope of the contract by examining if offerors should have reasonably anticipated this type of contract change based upon the information that was available in the solicitation. If an offeror would not have anticipated that type of change, then the modification would represent a cardinal change and a J&A is required because the modification would prevent potential offerors from participating in what should be a new procurement.

Changes Clause Examples:

- 1) A contract was awarded for civil society engagement in governance in a fragile state. The solicitation had put offerors on notice that should armed conflict arise in the target regions, the contractor may be required to identify new regions in the country in which to focus their effort. As performance begins, insurgents start a takeover of one of the regions in which the contractor is performing. The CO directs the contractor to pull out of this region, to provide analysis on other

potential regions to target, and then has the contractor restart the interventions in this new identified region.

Determination: Both the change in the additional place of performance as well as the costs associated with the shutdown in one region (and set up in another), can be included in the contract using the Changes Clause because these changes are within the general scope of the contract, change in the place of performance is covered by the clause, and the language in the solicitation put offerors on notice that they should expect such a change.

- 2) The solicitation of an education contract included a line item for upgrade of the educational facilities. After the award, less funding was received for the program and so the contract was descoped to remove the upgrade of five schools. Funding priorities subsequently changed and a modification was proposed to rescope the contract and add the funding for the five schools back into the contract.

Determination: The Changes Clause included in the contract can be properly cited in the proposed modification, rescoping the contract (and adding back the funds that were removed as part of the descoping) because the work was included in the original solicitation.

- 3) A malaria program includes a combination of bed nets, spraying, etc. During implementation of the program, a new mosquito spray that was previously unavailable was approved for use in the country for the particular challenge. In order to use the new technology, the CO modifies the contract to make the necessary changes and cover the associated costs involved with the changes.

Determination: The Changes Clause can be properly cited for modification to the contract since the original nature and purpose of the contract has not been changed. The spray identified in the solicitation and contract was the only spray in use at the time and offerors were not evaluated on the spray mixture. The change in spray composition did not prejudice any of the offerors, all of whom should have reasonably understood that if the approved spray in the host county changed, the contract would need to be modified in order to achieve its original purpose.

- 4) The Goat Sellers Activity was competitively awarded by a USAID Mission for five years with a TEC of \$11,880,000. The activity was designed to identify interventions in goat products export supply chain from farm to dock. These interventions were designed to improve the overall export of goat products by 10 percent from 2016 export levels. After award, the European Union (EU) announced new certification requirements for all goat product imports. The EU is the host country's single largest goat product market. There are no certifying officials in the host country, therefore, once the certification becomes

mandatory, the host country will be denied its most significant goat product market if it cannot comply.

The best solution to meet the goals of the award is that the contractor begins implementation of a train-the-trainers program at the host country's College of Agriculture to create a cadre of trainers for future certifying officials. Since the activity is already embedded in the College of Agriculture, the 'training of trainers' program can fit seamlessly into ongoing programming. In addition, the contractor will provide enough certifying officials in the form of Short Term Technical Assistance to allow for the continued export of goat products to the EU for a 120-day period. Afterwards, sufficient local certifying staff will be available having completed the College of Agriculture's training program. USAID estimates that the total increase in cost will be \$915,000, which will be added to the TEC in addition to these certification objectives.

Determination: The CO reviewed the solicitation and noted that as part of increasing goat product exports, it stated the need to identify export market requirements. Once identified, the contractor was expected to assist goat product producers to introduce processes into the supply chain where needed to meet those requirements. The CO determined that a reasonable person could expect those requirements to apply to both existing and new markets. Also requirements in an existing market might vary depending on the targeted market area, *i.e.*, animal, person, organic, grass fed, etc. It is reasonable to expect that requirements might be fluid at times as regulatory changes take place. This is a change that an offeror/contractor could reasonably have expected.

- 5) The Mission has a CPFF contract in place to provide access to technical services, training, and capacity-building related to improving urban and local governance. The technical team is seeking to modify the contract's scope of work to make explicit the installation of street signs, lighting, and light landscaping for municipal streets and city parks. The proposed activities are estimated to cost approximately \$600,000 over the remaining period of performance (three years) of a \$30 million contract. The activities fit very closely with the sub-purposes of the SOW: improved service delivery, increased responsiveness to citizens' priorities, and enhanced capacity to promote community resilience. For instance, the installation of street lighting would have a direct, immediate, and visible impact on improving the service delivery of municipalities. Additionally, the contractor has conducted numerous surveys and needs assessments of the municipalities for which it is providing technical assistance: these activities have been identified as a priority of the citizens. Will the CO add these activities to the SOW and include the required construction clauses in the contract using the changes clause?

Determination: Despite the relatively small increase to the TEC that would result from this action and the benefits it would provide to the program's objectives; this action would likely trigger competition requirements. It is clear

that the original solicitation and contract did not anticipate construction activities under the award, since this is a technical assistance contract that did not anticipate construction, as demonstrated by the SOW and the lack of any construction clauses. Offerors would not have reasonably expected this change.

Documenting the determination:

[ADS 302.3.4.5\(c\)](#) requires that the CO make a written determination that the change does not trigger competition. This determination can be incorporated into the modification negotiation memorandum or documented in a “stand-alone” specific determination memorandum. A [sample Determination Memo](#) is located on the M/OAA Business Process Improvement (BPI) page.

The CO should consider the issues below in making and documenting the determination:

- Does the original contract, as modified, call for essentially the same performance?
- Does the solicitation or the initially awarded contract contain information that would lead an offeror or contractor to reasonably anticipate the need for a change of this nature?
- Does the modification substantially change the type of product or service being delivered or performed, the quantity of the product or service, the performance period, and/or the cost between the original contract and modified contract?
- Does the modification include additional time spent on performance of the contract when such time is extended to add significantly more quantity or new requirements to the contract?

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