

## Change Management

Throughout the term of the contract it may become necessary to make changes to the contract. These changes can be minor, administrative changes such as a change of address or they can be substantial changes that affect the price and delivery. There are basically two ways to change a contract. One is a bilateral amendment, in which all parties to the contract agree that a modification is necessary because the scope of work, the term of the contract, or some other provision of the contract needs to be altered. The second is the right to unilaterally modify the contract. In this case, terms and conditions in the original contract set forth the situations under which the agency may exercise a right to modify the contract without the contractor's consent.

Agencies should have an effective change management process in place. Failure to manage and control changes can result in an unintentional modification to the scope of work, extension of the schedule, increase in the contract cost, circumvention of management controls and diminished contractor accountability. An effective change management process includes but is not limited to:

- Formal, written approval of all changes prior to the change taking place. Do not verbally authorize the vendor to begin working on a change before formal process is fully analyzed, documented and approved in writing.
- Evaluation of the impact of each change to the contracting objective, the corresponding deliverable and/or products, the schedule, cost, and increase in agency overhead resulting from the change, impact to work in progress/completed work, standards, and acceptance criteria.
- If the contract contains a contingency allowance, develop a plan for how draws against this allowance will be requested and approved.
- Documentation of all changes, no matter how small and avoids any informal undocumented change process.
- Establish a single point of contact to recommend or authorize any change. Document the change as approved or disapproved. If a change is approved, document the change and the impact to the scope of work through a contract amendment or purchase order change notice, whichever is applicable.

### **Contract Changes and Contract Scope**

Whether or not a contract may be changed, depends upon certain principles. State law requires a competitive process in most situations. The specific method of competition depends upon the type of goods or services needed. If competitive, the resulting contract must be consistent with what was asked for during the competition, usually contained in the solicitation document. Not being consistent can violate the competitive process requirements.

If a change is needed to a contract, the change has to be within the scope, or range, of what was provided in the solicitation. A significant difference would be a material or substantial change in the scope of services, and would not be allowed because it had not been originally subject to fair competition. To permit such a change would go against the ideas of competition and a fair playing field for all of the vendors. Transparency in government procurement is a key government responsibility.

By way of example, if a contract to buy 10 desks is amended to include 300 file cabinets, the change is outside the scope of the contract because vendors did not have the opportunity to compete for the sale of 300 file cabinets. Additional vendors may have competed had they known that file cabinets were being solicited. Such a large quantity of file cabinets could also have had an impact upon which vendors competed. Other vendors may have been interested in bidding on file cabinets that were not interested in bidding on desks.

In order to determine what constitutes scope changes to advertised specifications, the significant question is whether the changes are material or substantial.

Material or substantial changes are not measured by the number of changes made to the original specifications. Rather, they are measured by whether the extent of the changes would so substantially alter the original specifications that not re-advertising the revised specifications would deny a procurement opportunity to someone who would have been able to respond to the revised specifications. If much is revised, then those changes will be treated as a new proposal. A new solicitation is needed to ensure compliance with the bidding statutes.<sup>lxviii</sup>

Although limited, there are several decisions that explain the principles.

In one situation, a Commissioners Court awarded a construction contract. After awarding the contract, it was decided that a tile floor had to be excluded from the original plans. Since the advertised specifications formed the basis for the contract award, the Attorney General Opinion determined that all bidders would need to be given an opportunity to bid on the new specifications. No material or substantial change in the terms could be allowed without that opportunity.<sup>lxix</sup>

In a different procurement, a City advertised for competitive bids on a treatment plant contract. When each of the five bids submitted exceeded money available for the project, the City made more than thirty-five (35) changes to the original plans. But the City only presented these revisions to the original low bidder, who submitted a revised bid—one much lower than its original one. It was determined in the Attorney General Opinion that these changes were substantial enough that the revised plans constituted new specifications requiring new bids. Just because a company is the lowest bidder on one set of specifications does not mean it will be the lowest bidder when the specifications change.<sup>lxx</sup>

Another example involved a County that received bids exceeding its project funds. Initially only negotiating with the lowest bidder for a proposal to reduce scope, it later apparently realized its error and the proposal was rejected. When the lowest bidder appealed his loss in the trial Court, the appellate Court upheld the trial Court's judgment. It emphasized that the competitive bidding process is designed to stimulate competition, and that compliance with statutory bidding requirements is mandatory.<sup>lxxi</sup>

As a general rule, whether a change is material or substantial is a fact question. What is fundamental is the principle that materially changing solicitation specifications after receipt of responses denies an opportunity for others to participate in the solicitation. Therefore, any contract amendments are required to be within the scope of the original contract and the competitive process underlying the original contract.

It is important to remember that application of the above principles will depend upon your particular fact situation, and may not apply to the specifics of a request for proposal or request for offer. Always consult with your legal staff members before proceeding.

## **Administrative Changes**

These are changes that are within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral amendment. Examples of administrative changes include:

- Changes in billing instructions or address;
- Corrections of typographical errors not affecting the substance of the contract;
- Changes as permitted by the specific contract language;
- Changes in agency personnel assigned to the contract.

## **Substantive Changes**

These are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- Change in the price of the contract.
- Change in the delivery schedule.
- Change in the quantity.
- Change or nature of deliverables. (i.e. the specifications)
- Change of key personnel.
- Change of any terms and conditions.

## **Constructive Changes**

If a contractor perceives that work beyond the scope of the contract was ordered by the agency, the contractor may claim that the contract was “constructively” changed, and the contractor may be entitled to additional compensation for the changes. Generally, a constructive change will require a bilateral amendment. Constructive changes may occur when agency personnel:

- Provide suggestions to a contractor;
- Accelerate the delivery schedule;
- Direct the work to be performed differently;
- Change the sequencing of the work;
- Delay accepting or rejecting deliverables;
- Delay reviewing invoices and approving payment;
- Interfere with or hinders performance.