# Contracts Disputes Act: Claims Arising Out of a Change to the Contract

**A Practical Guidance® Article by**
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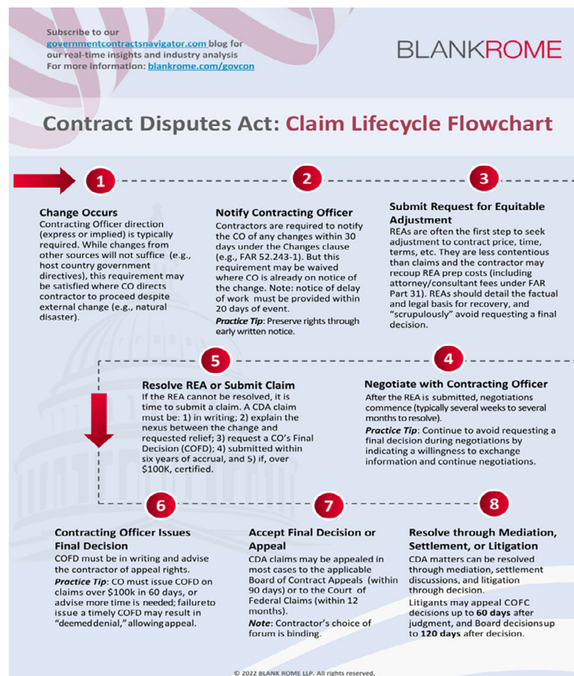
*This article will explore the claims process under the Contract Disputes Act, 41 U.S.C.S. 7101 et seq., and will provide practical guidance stemming from recent case law The Contract Dispute Act provides a set of procedures for negotiating and litigating government contract disputes.*

The claims landscape for government contractors can be a minefield of both procedural and substantive issues. In this article, we will provide guidance to one type of claim common to government contractors: those arising out of a "change" to the contract.

The infographic below illustrates the lifecycle of a typical claim. This article focuses on Steps 1 and 2 of this process: identifying when a change has occurred and providing timely notice to the Contracting Officer.



An initial foundational question that must be addressed is: **what is a change?** There are two primary types of changes: actual changes and constructive changes.

**With regard to actual changes,** according to the Federal Acquisition Regulation ("FAR"), a change occurs when the Contracting Officer issues a written order to make changes within the general scope of the contract to matters such as drawings, designs, or specifications; the method of shipment or packing; or the place of delivery. *See*, *e.g.*, FAR 52.243-1. In contrast, a constructive change arises when the contractor is required to perform work beyond the contract requirements, but the Government does not issue a formal change order. Constructive changes can arise from informal orders, defective specifications or other misrepresentations, interference from the Government, or constructive accelerations of performance.

## Is Contracting Officer direction required for a change?

Typically, yes. Except in rare circumstances, a change is only compensable if it was ordered (expressly or impliedly) by the Contracting Officer. *See* FAR 43.102(a).

- Exceptions to this rule include: Where another Government employee is acting with "implied actual authority" when ordering a change (but note that "apparent authority" will not suffice). Northrop Grumman Sys. Corp. v. United States, 140 Fed. Cl. 249, 277 (2018).
- Where the Contracting Officer ratifies a prior change that would not have otherwise been binding (which requires that the Contracting Officer have knowledge of the facts relevant to the change). *Id.*
- Where the Contracting Officer orders the contractor to meet the original contract deadline, despite a change stemming from an external source (*e.g.*, host-country restrictions). Cf. Pernix Serka Joint Venture v. Dep't of State, CBCA No. 5683, 20-1 BCA ¶ 37,589 (2020), *aff'd sub nom*, Pernix Serka Joint Venture v. Sec'y of State, 849 F. App'x 928 (Fed. Cir. 2021).

## Is there a notice requirement to recover increased costs stemming from contract changes?

Yes, the FAR has several applicable notice requirements:

- 30 days for actual changes (*e.g.*, FAR 52.243-1(c))
- 20 days for constructive changes under construction contracts (FAR 52.243-4(d)), and/or
- The period of time selected for FAR 52.243-7 (CO fills in notice period).

Although the FAR does not contain an express notice requirement for constructive changes on non-construction contracts, contractors should still provide timely written notice of such changes when possible to preserve their recovery rights under other clauses that may provide a basis for entitlement (*e.g.*, FAR 52.242-15, Stop Work Order (30-day notice) or FAR 52.242-17, Government Delay of Work (20-day notice)).

The good news for contractors is that these notice requirements are frequently waived, so long as the Government is on notice of the underlying events. *See*, *e.g.*, Grumman Aerospace Corp., ASBCA Nos. 46834 *et al.*, 03-1 BCA ¶ 32,203 (holding that the "written notice requirements should not be construed hypertechnically to deny legitimate contractor claims when the Government was otherwise aware of the operative facts."); Nova Group/Tutor-Saliba v. United States, 159 Fed. Cl. 1 (2022), *appeal docketed*, No. 22-1740 (Fed. Cir. Apr. 29, 2022) (holding that failure to give notice under FAR 52.243-4(d) did not bar recovery because the Contracting Officer had "actual or imputed notice of the circumstances giving rise to the claim") (citations omitted). Thus, a failure to provide timely written notice will not, in many cases, preclude the contractor from recovering its costs.

## How do I determine if a constructive change has occurred?

Constructive changes can be difficult to identify because, by their very nature, they are not accompanied by a formal change order. The primary elements the contractor must show are that (1) it performed work beyond the contract requirements and (2) the Government ordered this extra work—whether expressly or impliedly.

The following cases illustrate the challenge of establishing the latter element:

- **Express Instructions from Contracting Officer Resulted in Valid Constructive Change Claim:** The COFC found that the contractor successfully established that a constructive change occurred where the Government demanded compliance with an original contract deadline, despite having caused an excusable delay. Nova Group/Tutor-Saliba, 159 Fed. Cl. at 56-57. In this case, the Government requested additional work to evaluate a design, even though it had already approved the design. This, in turn, caused a significant delay on the project, which required the

contractor to accelerate the remainder of the work in order to meet the project's deadline. Critically, the Contracting Officer pressed the contractor to complete the project on time, despite the lengthy work stoppage—thereby effecting a compensable constructive change.

- **No Constructive Change Claim Where Contractor Did Not Submit Extension Request to Government:** The Federal Circuit reached a different result, denying a contractor's constructive change claim, in a case involving closure of a border crossing route needed for contract performance. Zafer Taahhut Insaat ve Ticaret A.S. v. United States, 833 F.3d 1356 (Fed. Cir. 2016). Here, the critical defect in the contractor's claim was that the contractor never requested a specific time extension from the Government, despite being directed to do so, and the Government thus never denied the (non-existent) request.
- **No Constructive Change Claim Where Government Did Not Order Change:** In Pernix Serka Joint Venture, CBCA No. 5683, a case arising out of an Ebola outbreak in Sierra Leone and related host-country restrictions, the Civilian Board of Contract Appeals ("CBCA") found that there was no constructive change because the U.S. Government repeatedly declined to provide any guidance to the contractor about how to handle the Ebola crisis—thereby undermining the key element that the Government order the change. The CBCA further clarified that the Excusable Delays clause may have provided an avenue for the contractor to obtain additional time for performance, but an excusable delay alone, without direction to accelerate performance, does not entitle the contractor to additional compensation.
- **Claim Precluded by the Sovereign Acts Defense:** In JE Dunn Constr. Co., 2022 ASBCA LEXIS 42 (A.S.B.C.A. April 25, 2022), in a case arising out of Fort Drum implementing COVID-19 quarantine restrictions, the Armed Services Board of Contract Appeals ("ASBCA"), denied the contractor's constructive change claim for additional costs of its employees' quarantine because the sovereign acts doctrine barred the claim. The ASBCA found that Commander of Fort Drum's act (issuance of mandatory 14-day quarantine for anyone travelling beyond 350 miles) met the sovereign act defense because it was general and public, even though it also rendered performance of the contract impossible.

These cases demonstrate the importance of an express or implied Government order for the added or changed work. However, generally applicable orders that render contract performance impossible may still be subject to the sovereign acts defense.

## Key Takeaways:

- Identify if there has been a change to the contract and evaluate whether further Contracting Officer direction is needed to increase the likelihood of recovering added costs.
- Provide timely notice to the Contracting Officer (but if you forget to do so, seek legal advice regarding whether the notice requirement may be waived).

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Stephanie M. Harden was recently recognized as a *Law360* Rising Star—one of only five government contracts attorneys nationally to receive this recognition. She has extensive experience representing government contractors in a wide array of litigation and counseling matters, including:

- **Bid Protests:** Stephanie has represented clients in dozens of bid protests before the Government Accountability Office ("GAO") and U.S. Court of Federal Claims, including several complex multibillion dollar procurements. Two of Stephanie's significant protest wins are *Lockheed Martin Corp. v. United States*, 124 Fed. Cl. 709 (2016) (successfully defeating preliminary injunction alleging a range of protest allegations in major defense procurement) and *AllWorld Language Consultants, Inc.* (2016 CPD ¶ 12) (sustained protest of GSA Schedule contract award where putative awardee's FSS contract did not meet solicitation requirements).
- **Cost and Pricing Matters:** Stephanie regularly counsels clients on responding to Government audits (including by DCAA, DCMA, and SIGAR), the submission of Requests for Equitable Adjustments and claims, defective pricing matters, and claims litigation before the Boards of Contract Appeals. Stephanie has helped clients recover millions of dollars of costs in these matters. Stephanie regularly speaks and writes on cost accounting and pricing issues and currently serves as a Vice Chair on the American Bar Association's Accounting, Cost and Pricing Committee, where she is also leading a Task Force Working Group on potential changes to the Contract Disputes Act and related regulations.
- **False Claims Act ("FCA") Litigation:** Stephanie has extensive experience with FCA litigation, particularly cases involving complex government contracting principles.
- **Internal Investigations/Compliance:** Stephanie has counseled clients on compliance matters and internal investigations involving all manner of federal regulatory requirements, including the mandatory disclosure rule, small business regulations, the Anti-Kickback Act, and gift and gratuity regulations.

Stephanie writes and speaks regularly about issues facing government contractors, including, most recently the contractor vaccine mandate. In 2018, Stephanie co-authored the chapter "History and Development of Suspension and Debarment" in *The Practitioner's Guide to Suspension and Debarment, Fourth Edition* (ABA Book Publishing, 2018).

Stephanie previously served as a law clerk to Judge Victor J. Wolski on the U.S. Court of Federal Claims in Washington, D.C. She also worked as a summer associate at the GAO. While in law school, she was an editor of the *Harvard Journal on Legislation*.

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David's practice encompasses all areas of government contracting with a focus on regulatory compliance, data rights, claims, government investigations, and bid protest litigation. He has experience before the:

- U.S. Government Accountability Office
- U.S. Court of Federal Claims
- Armed Services Board of Contract Appeals

Prior to joining Blank Rome, David served as an attorney advisor for the U.S. Department of the Navy Office of General Counsel where he advised program managers on major weapon systems acquisition issues. He gained valuable experience advising on contract negotiation, contract claims, intellectual property issues, other transaction agreements, ethics compliance, and defending bid protests.

He also served as a Contracting Officer with an unlimited warrant at the U.S. Department of State. He procured U.S. embassy security services, professional support services, IT supplies, and software licensing.

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