

## Scope Determinations

Often, because of the sophistication of our requirements, the complexity of our acquisitions, the length of our contracts, and myriad other reasons, we at SMC frequently face the possibility of changing the terms of those contracts – revising the statement of work due to evolving technology or threats, amending the DD254 due to revised security regulations, adding clauses due to new policy, extending the period of performance to account for delays, etc. We are permitted to modify our contracts without running afoul of the Competition In Contracting Act so long as the modification is adjudged to be “in scope.”

The determination of whether a proposed modification is in scope (and thus not tantamount to an improper sole-source award made in contravention of CICA’s competitive procedures) is a decision that may be challenged via protest to the Government Accountability Office, the Court of Federal Claims, or the contracting agency itself. Although the specific considerations we undertake when making our determinations are not explicitly spelled out in statute or regulation, the courts have established common law standards of review by analogizing to the cardinal change doctrine: generally stated, the standard for determining whether a contract modification is in scope is whether there is a “material difference” between the modified contract and the original contract.<sup>1</sup> This question turns on whether the modified contract calls for “essentially the same performance” as the original contract. In written opinions explaining their review of contract scope challenges, the GAO and COFC typically analyze the facts and circumstances of each situation against the following factors:

- Extent of any changes in the **type and/or nature of the work** to be performed.
- Extent of any changes in the **performance period**.
- Extent of any changes in the **cost** of performance.
- **Foreseeability** of the changes.

The first three factors are straightforward in concept and warrant no underlying explanation. The Foreseeability factor encompasses a sophisticated analysis attendant to the expectations of all interested parties at the time of original contract award (the Government; the successful offeror / contractor; unsuccessful offerors; and the universe of potential offerors, known or unknown, who ultimately did not submit proposals or otherwise compete for the work): whether the changes would have materially altered the field of competition for the contract if known prior to the original award.

Although by no means an exhaustive list, following are a few considerations that may offer prima facie evidence of the Foreseeability of the proposed changes at issue and how those changes could have affected the field of competition for the work: Whether the changes are of a type that reasonably could have been anticipated given the nature of the work and the stated terms of the contract; Whether the changes are of a type authorized or reasonably contemplated by a clause or other term included in the original contract (such as the Changes clause, the exercise of an option, or the triggering of a Special Studies clause); Whether the original solicitation adequately advised offerors of the potential for the type of changes being made.

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<sup>1</sup> See, for example, Executive Bus. Media, Inc. v. United States Dep’t. of Defense, 3 F.3d 759, 764 (Fed. Cir. 1993) for a recitation of this common-law standard as well as the others described herein.

When examining a proposed contract modification against the above factors, Contracting Officers should compare (1) the instant modification to the original contract; (2) the conformed contract (the original contract plus cumulative modifications prior to the instant modification) plus the instant modification to the original contract; and (3) the instant modification to the conformed contract. Particularly for the Foreseeability factor, in addition to the proposed modification and the contract itself Contracting Officers should also consider other documentation related to the procurement such as the Acquisition Strategy Document, the Market Research Report, communications with industry, the Request for Proposal, and any other documents relevant to establishing the expectations of the parties and the bounds of the procurement.

The culmination of the determination is an integrated assessment of the factors set forth above. The evaluation of the changes attendant to each factor as well as the weight of each of the factors relative to each other is a matter of judgment; there are no mechanical or arithmetical answers to the question – each situation must be analyzed on its own unique facts and circumstances, giving just consideration to the magnitude and character of the changes to logically inform the ultimate conclusion. For example, changes may be more reasonably anticipated under a cost-type contract than a fixed-price contract because the latter contract type includes well-defined requirements with a firm delivery schedule, and therefore likely has a more precise scope. Similarly, R&D contracts may warrant additional latitude for changes to their performance terms because the type of work under such contracts involves greater uncertainty.

With respect to considering the extent of changes in the type and/or nature of the work to be performed, performance period, and cost of performance, none of these factors has the same degree of importance in every contract. Substantial increases in cost, for example, may not compel a conclusion that a contract has been modified beyond its intended scope when that contract is for a major weapons system requiring significant cutting-edge development and subject to significant testing of new technologies. By the same token, an extension of a single day to a period of performance in a short-duration contract for commercial items with a tight delivery schedule may have significantly affected the prices offered and thus affected the original award decision. In many cases, the impact of the first three factors will be informed by an analysis of how each of those factors influences the Foreseeability factor. It also may be helpful to consider the overall mission or end-item and the purpose of the original contract as a whole when performing the analysis.

If the Contracting Officer determines the proposed modification to be outside the scope of the contract, approval to deviate from CICA should be sought (such as through a Justification & Approval pursuant to FAR Subpart 6.3, an Exception to Fair Opportunity pursuant to FAR 16.505(b) (2), or some other valid sole-source avenue) or a competition for the work should be held.

Finally, in addition to concerning ourselves with determining whether a proposed modification is within the scope of the *contract*, Contracting Officers must also consider whether the *acquisition authority* exists to make the proposed change. Most commonly, the parameters of a procurement are set forth in an Acquisition Strategy Document (or equivalent). These parameters may be explicitly scope-defining or may in some way restrict the acquisition in such a way that precludes the proposed modification. Contracting Officers need to ensure the proposed modification is permissible consistent with the terms of the approved Acquisition Strategy with respect to both the program and the specific contract at issue (because some Acquisition Strategies encompass multiple contracts and specifically identify how the requirements of each contract are to be divided).

When determining whether a proposed modification is within the scope of a contract and is sanctioned by proper acquisition authority, the key is to apply the unique facts and circumstances of the situation to the factors established above. A reasonable conclusion with a rational basis will likely withstand challenge so long as that conclusion and its supporting rationale are contemporaneously documented. To that end, the template at the end of this guide offers a framework for documenting the Contracting Officer's determination that proposed changes are both within the program's and contract's acquisition authority as well as within the contract's scope.

## Memorandum For Record

### In-Scope Determination for Modification *[Modification #]* to Contract *[Contract #]*

This memorandum substantiates my determination that contract modification *[Modification #]* is within the scope of contract *[Contract #]*.

**BACKGROUND:** *Briefly describe the purpose of the contract. Summarize relevant (to this scope determination) contract features such as contract type, period of performance, dollar value, etc. Describe the circumstances surrounding the initial contract award – Sole source? Competitive? Summarize any modifications and other scope-related events since award.*

**DESCRIPTION OF THE INSTANT ACTION:** *Provide details about the proposed modification – what changes are being made to the contract? What is the impetus for the changes?*

**ACQUISITION AUTHORITY:** *Explain why the proposed modification is within the bounds of the approved Acquisition Strategy attendant to the contract. Reference specific language from the ASD or equivalent document.*

#### CONTRACT SCOPE CONSIDERATIONS:

- (a) Type and/or nature of work to be performed. *Discuss the extent of any changes to the type and/or nature of work to be performed. Compare the changes being made in (1) the instant modification to the original contract; (2) the conformed contract plus the instant modification to the original contract; and (3) the instant modification to the conformed contract.*
- (b) Performance period. *Discuss the extent of any changes to the performance period. Compare the changes being made in (1) the instant modification to the original contract; (2) the conformed contract plus the instant modification to the original contract; and (3) the instant modification to the conformed contract.*
- (c) Cost of performance. *Discuss the extent of any changes to the cost of performance. Compare the changes being made in (1) the instant modification to the original contract; (2) the conformed contract plus the instant modification to the original contract; and (3) the instant modification to the conformed contract.*
- (d) Foreseeability. *Describe the factors and circumstances that contribute to the conclusion that the changes being made would NOT have materially altered the field of competition for the contract if known prior to the original award. Reference the specific documents and cite the specific terms and statements from those documents that inform this conclusion.*

INTEGRATED ASSESSMENT: *Explain how an integrated assessment of the above factors supports the conclusion that the proposed changes are within scope to the contract. Use the facts and analysis described above and apply professional judgment with respect to their import. Consider how the relative significance of each of the factors and how they interrelate – as informed by the unique facts and circumstances of the situation – weigh in the assessment. Lead the reader through a logical demonstration that leaves no doubt about the conclusion.*

Based on the assessment explained herein, I determine the changes being made in Modification *[Modification #]* to Contract *[Contract #]* call for essentially the same performance as the original contract and therefore do not constitute a material difference between the contract as modified and the original contract. The changes being made in Modification *[Modification #]* are within scope.

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CONTRACTING OFFICER

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DATE