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# A PRIMER ON THE STANDARD FORM CHANGES CLAUSE\*

ELDON H. CROWELL\*\* and W. STANFIELD JOHNSON\*\*\*

## INTRODUCTION

In the most perfect world, where the Federal Government knows precisely what it wants and the contractor knows precisely what he is to manufacture or build, there would be no need for a Changes clause. However, the United States Government could not operate in this imperfect world without a Changes clause. The purpose of this article is to present a basic analysis of the Changes clause.

It is fair to say that this clause is the most important of all the standard clauses contained in Government contracts. It stands at the center of the contractual scheme with other clauses referring to and borrowing its basic procedure as a *modus operandi*. For this reason, the Changes clause is what might be termed an "umbrella clause." For example, inspection, acceptance, and warranties are involved in the Changes clause. Defective and erroneous specifications are involved in the Changes clause. Impossibility of performance and acceleration of performance are involved in the Changes clause.<sup>1</sup>

The Changes clause is perhaps the most significant feature of the Government contract that distinguishes it from the conventional contract. By virtue of this clause, the Government is entitled unilaterally to change the contract and hold the contractor to performance under the unilaterally changed contract. It is this significant departure from the traditional concept of mutuality, with its pointed implications on the non-governmental party, that sets the Government contract apart from the conventional commercial contract. That is not to say that this unusual arrangement is altogether to the detriment of the contractor. The Changes clause provides for an equitable compensation, if it is appropriate.

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1. See, Spector, *An Analysis of the Standard Changes Clause*, 25 FED. B.J. 177 (1965).

Furthermore, the Changes clause, in connection with the Disputes clause, provides an avenue of relief if a dispute arises as to what is fair compensation. Indeed, the net effect of the Changes clause, as it operates in connection with the Disputes clause, is to provide a fair procedure for the administration of a contract designed to permit the Government to satisfy its needs as expeditiously as possible.

There are a number of forms of the Changes clause in use in Government contracts. There are half a dozen such clauses in the Armed Services Procurement Regulations. The attention of this article is directed to those two clauses having the most frequent use—the Changes clauses appearing in Standard Form 32<sup>2</sup> (fixed-price supply) and Standard Form 23-A<sup>3</sup> (fixed-price construction).

2. The language of this clause, which appears at 41 CFR § 1-16.101 and ASPR 7(103.2, is as follows:

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following:

- (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith;
- (ii) method of shipment or packing; and
- (iii) place of delivery.

If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claims asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as a result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

3. The language of this clause, which appears at 41 CFR § 1-16.401 and ASPR 7-602.3, is as follows:

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions; but nothing provided in this

The significant phrases in these clauses have their own individual history, often of crucial importance to a contract dispute. The more important phrases are discussed under the subheadings below.

AUTHORITY TO ORDER A CHANGE:  
"THE CONTRACTING OFFICER"

The opening words of the Changes clause are "The Contracting Officer." All contractors and their counsel must bear in mind that not every Government official has authority to issue changes to the contract. Many are the unfortunate contractors who have failed to heed this limitation and have been found by contract appeal boards to be noble but poor volunteers. In this event, the contractor must not only perform the work without compensation but also runs the risk of having to re-do the contract work in accordance with its unchanged requirements.<sup>4</sup>

Thus it is important to determine what meaning the regulations and cases give to the contract reference to "The Contracting Officer." Here there is a slight difference between the supply contract and the construction contract forms. The supply contract form defines "Contracting Officer" as "the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes . . . the authorized representative of a Contracting Officer acting within the limits of his authority."<sup>5</sup> In contrast, the standard construction contract defines "Contracting Officer" as "the person executing this contract on behalf of the Government, and includes a duly appointed successor or authorized representative."<sup>6</sup> It can be readily seen that the supply contract seems to be broader in scope, and seems to encourage the use of multiple Contracting Officers.<sup>7</sup>

Inevitably, confusion arises as to the authority of Government representatives. This confusion usually centers around the determination of

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clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no change for any extra work or material will be allowed.

4. See, e.g., Maxwell Dynamometer Co., ASBCA 5974 & 6055, 61-1 BCA para. 2896; Universal Match Corp., ASBCA 4797, 59-2 BCA para. 2288.

5. ASPR 7-103.1(b).

6. ASPR 7-602.1(b).

7. The use of multiple contracting officers is not uncommon. The Air Force and Army Employ a "Procurement Contracting Officer," "an Administrative Contracting Officer" and a "Termination Contracting Officer." ASPR 1-201.3. The confusion provoked by this system is not restricted to those on the contractors' side.

who is an authorized representative of the Contracting Officer, and under what conditions the orders of an unauthorized representative may be binding upon the Government. It is important to emphasize that the doctrine of apparent authority is not applicable to the field of Government contracts. In *Johnson, Drake & Piper, Inc.*,<sup>8</sup> the Armed Services Board of Contract Appeals stated:

Were we deciding a dispute between two private parties, rather than between a private party and the Government, we would not hesitate to hold that the contracting officer had apparent authority to bind his principal and that the latter was, by the actions of his agent, bound to the agreement made. These are not, however, two private parties before us. One of them is the Government and the doctrine of apparent authority cannot be invoked against the Government.

In some instances, however, the Government may be liable for the costs of a change originally ordered by an unauthorized representative if the Contracting Officer (a) actually or constructively knew that an unauthorized representative had directed the change, *and* (b) either approved or failed to countermand the change.<sup>9</sup> The Armed Services Board of Contract Appeals has gone so far as to suggest that, even though the Contracting Officer may not know of the change (either actually or constructively), the Government still may be liable.<sup>10</sup>

It has been held that a Government inspector is not an authorized representative of the Contracting Officer for the purposes of the Changes article.<sup>11</sup> However, under circumstances where the contractor has no choice but immediately to follow the inspector's extra-contractual direction, without time for inquiry to the Contracting Officer, the contractor has been permitted to recover under the Changes clause.<sup>12</sup> Where the change in contract requirements results from a rejection by an inspector, the boards have had little difficulty in recognizing the resulting change because of the inspector's actual authority to inspect and reject.<sup>13</sup>

Furthermore, contractors have received favorable treatment in those cases where there has been a long acquiescence in a course of conduct in which persons other than those designated as an authorized represen-

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8. ASBCA 9824, 65-2 BCA para. 4868, at 23068-23069.

9. Lox Equipment Co., ASBCA 8905, 1964 BCA para. 4463.

10. Barton & Sons Co., ASBCA 9477, 65-2 BCA para. 4874.

11. R&R Constr. Co., IBCA 413, 65-2 BCA para. 5109.

12. Lox Equipment Co., *supra* note 9.

13. Warren Painting Co., ASBCA 6511, 61-2 BCA para. 3199.

tative of the Contracting Officer have acted under the Changes clause.<sup>14</sup> Similarly, just as changes themselves are often brought about by implication (constructive change orders),<sup>15</sup> so also may an individual become an authorized representative of the Contracting Officer by implication from his course of conduct. For example, in *General Cas. Co. v. United States*,<sup>16</sup> the Court of Claims stated,

it would be inane indeed to suppose that the Resident Engineer was at the site for no purpose. We believe . . . that the Resident Engineer was the authorized representative of the Contracting Officer.

The contractor must face the additional problem that, even though he is dealing with the Contracting Officer himself, there are instances where that Contracting Officer's authority to approve payments or changes can be limited by specific contract provisions.<sup>17</sup>

Despite considerable liberality demonstrated by the appeal boards in their flexible construction of the phrase "The Contracting Officer," the contractor should exercise care in his own dealings. If there is any doubt, he should ask the Contracting Officer specifically to direct him to do any extra work under the Changes clause.

#### REQUIREMENTS FOR FORMALIZATION:

##### "BY A WRITTEN ORDER": THE ALL-IMPORTANT CONCEPT OF THE CONSTRUCTIVE CHANGE

The language—"By A Written Order"—had a brief and tenuous moment of significance given it by the Supreme Court in the case of *Plumley v. United States*.<sup>18</sup> In this 1913 decision, a contractor's claim under a Changes clause was denied because there was no written order. The Court stated that:

[t]here was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract.<sup>19</sup>

14. *Hayes International Corp.*, ASBCA 9750, 65-1 BCA para. 4767; *W. Southard Jones, Inc.*, ASBCA 6321, 61-2 BCA para. 3182; *see also*, *Globe Indem. Co. v. United States*, 102 Ct. Cl. 21 (1944), *cert. denied*, 324 U.S. 852 (1945).

15. *See, infra*.

16. 130 Ct. Cl. 520, 533 (1955).

17. *Johnson, Drake & Piper, Inc.*, *supra* note 8.

18. 226 U.S. 545, 547 (1913).

19. *Id.* at 547.

This decision has only been followed in the rare case where it could not in some fashion be escaped.<sup>20</sup>

In most other cases, the Court of Claims, obviously regarding the *Plumley* principle as harsh, has succeeded in avoiding its consequences. In the case of *Armstrong & Co. v. United States*,<sup>21</sup> the Court of Claims, in a three to two decision held that where a change was orally directed by a responsible officer and the changed work performed, the absence of the written order required by the contract would not preclude recovery by the contractor. A similar line of Court of Claims' decisions has favored contractors by employing a slightly different logic with the purpose of preventing unjust enrichment and avoiding inequitable results.<sup>22</sup>

The appeal boards have shown no difficulty with the *Plumley* decision. Before the appeal boards, according to ASBCA Chairman Spector, the *Plumley* approach is not argued "very seriously."<sup>23</sup> A written order is not required by the Board.<sup>24</sup> These boards simply regard as done that which should have been done and direct the Contracting Officer to grant the relief found to be due the contractor.<sup>25</sup> This equitable approach has produced the "constructive change order."

The boards' approach to this seemingly simple question of interpretation has had far reaching implications both on the scope of the Changes clause's operation and on the jurisdiction of the boards themselves. The Changes clause, in connection with the Disputes clause, provides the basis for the assertion of jurisdiction by the appeal boards. It may thus be seen that, as the Changes clause is given a narrow, literal interpretation, the boards' jurisdiction diminishes. Conversely, as the boards construe the Changes clause liberally and flexibly, their action not only produces a just result, but it also enlarges their jurisdiction and significance in the Government contracting scheme.<sup>26</sup>

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20. *Globe Indem. Co. v. United States*, *supra* note 14.

21. 98 Ct. Cl. 519 (1943).

22. *Williams v. United States*, 130 Ct. Cl. 435 (1955); *Whitman v. United States*, 124 Ct. Cl. 464 (1953).

23. Spector, *An Analysis of the Standard Changes Clause*, *supra* note 1.

24. *E.g.*, *Gil-Brown Constructors, Inc.*, IBCA 504-265, 66-2 BCA para. 5980.

25. *E.g.*, *Lillard's*, ASBCA 6630, 61-1 BCA para. 3053. This is not to say, however, that where the contractor has voluntarily performed work beyond the contract requirements, without any direction, either written or oral, that he will obtain relief. *Blake Constr. Co., Inc.*, ASBCA 3406, 57-1 BCA para. 1281; *C. H. Leavell & Co.*, ASBCA 4899, 59-2 BCA para. 2291.

26. Such liberal interpretation also has the effect, in connection with recent Supreme Court decisions, of significantly diminishing the original "breach of contract" jurisdic-

The constructive change order is a simple mechanism whereby the board directs the Contracting Officer to do retroactively that which he should have done in the beginning. Sometimes the board does not even direct that a change order be issued, but simply holds that the actions of the Contracting Officer constituted the change order itself.<sup>27</sup> Actually, what has often occurred is that the Contracting Officer has breached the contract. The classic instance is, of course, when the Contracting Officer requires work that is beyond the contract requirements or has incorrectly interpreted the contract and demands of the contractor more than the specification requirements.<sup>28</sup> But the constructive change is not restricted to this classic instance. It applies to a great range of practical problems in the performance of Government contracts, including factual situations covered by the concepts of impossibility of performance<sup>29</sup> and acceleration.<sup>30</sup> Indeed the concept of the constructive change order is so broad as to permit this recent definition:

Any conduct by a C.O. (or other Govt. representative authorized to order changes) which is not a *formal* change order, but which has the *effect of requiring* you to perform work *different* from that prescribed by the original terms of your contract, constitutes a *constructive change order*—entitling you to relief under the "Changes" clause.<sup>31</sup>

tion of the Court of Claims. See *United States v. Utah Constr. Co.*, 384 U.S. 394 (1966) (particularly n.6).

27. The board, seeing an instance where the Contracting Officer should have taken or foregone a certain course of action, pursuant to a change order in compliance with the contractual duty to cooperate and not hinder performance, decides the case as if the change order had been issued. *Hayes International Corp.*, ASBCA 9750, 65-1 BCA para. 4767; *Noonan Constr. Co.*, ASBCA 8320, 1963 BCA para. 3638.

28. *Aero Serv. Corp.*, ASBCA 4249, 58-1 BCA para. 1683; *Polan Indus., Inc.*, ASBCA 3996, et seq., 58-2 BCA para. 1982; *Fansteel Metallurgical Corp.*, ASBCA 1689 (1954).

29. The boards have often found it possible to grant relief in such difficult situations when the contractor finds it cannot perform in the manner contemplated by the parties at the time the contract was signed. Although these situations could well be categorized as a breach of contract and therefore beyond the jurisdiction of the board, the boards, however, have chosen to adopt the more imaginative approach of a constructive change, declaring that the Contracting Officer should have issued a change order at the time the contract was awarded affording relief from the impossible requirement. See, e.g., *Cuneo & Crowell, Impossibility of Performance—Assumption of Risk or Act of Submission?*, 29 LAW & CONTEMP. PROB. 531 (1964).

30. By means of this practical reasoning, the administrative boards have treated Government orders to speed up the performance of the contract as changes under the standard Changes clause, thus providing the contractor with a contractual right to an equitable adjustment for the cost of accelerating performance. See, e.g., *Cuneo & Ackery, Acceleration*, G.W. GOVT. CONTRACTS MONOGRAPH No. 9 (1964).

31. *Vom Baur, Constructive Change Orders*, Briefing Papers, No. 65-1, GOVT. CONTRACTOR (1965) at p. 2.



Thus the Changes clause has come a long way from the 1913 *Plumley* decision.<sup>32</sup> By devising a practical means of escaping the literal limitations of the Changes clause, the boards have assumed jurisdiction and have provided administrative relief. The Court of Claims has approved this use by the administrative boards of the doctrine of the constructive change.<sup>33</sup> As a result, the Government contract lawyer finds that a substantial portion of his dealings with the Changes clause involve constructive change orders.

THE LIMITS OF THE CHANGES CLAUSE:  
WITHIN THE "GENERAL SCOPE" OF THE CONTRACT

The Changes clause states that the Contracting Officer's power to make changes is limited to those changes which are within the scope of the contract. The supply contract clause uses the language—"within the general scope of this contract." The construction contract expresses the same thought through the phrase—"if within its general scope." Thus it is important in many situations to determine what the words "general scope" mean.

Considerable confusion has been caused by misuse of these words. Frequently both contractors and the Government representatives speak of any change that results in additional costs as a change in scope. This is not accurate and there is a distinction, with significant legal consequences, between a change causing extra work and a change which is beyond the general scope of the contract.<sup>34</sup>

The meaning of "general scope" is, as might be expected, a matter of degree. The distinction between those changes which are within the scope and those beyond it is often obscure. In *Saddler v. United States*,<sup>35</sup> a change increasing earth work from 8,000 cu. yds. to over 13,000 cu. yds. was held to be outside the general scope of the contract. In *Stapleton Constr. Co. v. United States*,<sup>36</sup> a change requiring that a foundation be placed on previously unspecified piles was held to be beyond the scope of the contract. The elimination of a \$99,000 nurses' quarters from a hospital contract totalling \$911,000 was held to be

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32. *Supra* note 18.

33. *Midwest Spray & Coating Co. v. United States*, No. 354-64, Ct. Cl., dec. July 15, 1966; also *Jefferson Constr. v. United States*, No. 218-64, Ct. Cl., dec. Nov. 10, 1966; *Jack Stone Co. v. United States*, 344 F.2d 370 (Ct. Cl. 1965).

34. See *Henderson v. United States*, 169 Ct. Cl. 228 (1965).

35. 152 Ct. Cl. 557 (1961).

36. 92 Ct. Cl. 551 (1940).

beyond the scope.<sup>37</sup> The Court explained its approach to this issue in *Keco Industries, Inc. v. United States*:<sup>38</sup>

Since the right to make changes was reserved to defendant, it cannot be liable for breach of contract for its exercise of that right, unless the changes were cardinal changes and exceeded the discretion which the Changes article vested in the contracting officer. See *Aragona Construction Company, Inc. v. United States*, 165 Ct. Cl. 382 (1964).

The reported decisions do not establish clear lines of demarcation between changes which may be said to come properly within the Changes article of Government contracts and cardinal changes which constitute breaches of contract. Certain guidelines in the decided cases are, however, helpful in determining how a given change should be regarded. In *Saddler v. United States*, 152 Ct. Cl. 557, 561, 287 F.2d 441 (1961), the court stated:

We think that a determination of the permissive degree of change can only be reached by considering the totality of the change and this requires recourse to its magnitude as well as its quality.<sup>39</sup>

A similar *ad hoc* approach to this question is demonstrated by the recent Court of Claims' decision in *Luria Bros. & Co. v. United States*.<sup>40</sup>

The main significance of whether a change is within the scope or outside the scope of the contract is in the type of compensation which a contractor will receive for the change and the jurisdiction of an administrative board to grant relief. If the alteration in the contract is held to be a change, he may receive an equitable adjustment at the administrative level. If the alteration is beyond the scope of the contract, he may recover damages in the Court of Claims.<sup>41</sup>

Furthermore, if a change is beyond the scope of the contract and is therefore a breach of the contract, then theoretically the contractor may not be required to proceed with the change.<sup>42</sup> The contractor may stop

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37. *Saddler v. United States*, *supra* note 35; see *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501 (1955).

38. No. 277-56, Ct. Cl., dec. July 15, 1966.

39. *Id.* at 14.

40. No. 475-59, Ct. Cl., dec. December 16, 1966.

41. It should be noted, however, that even if a directed change is "beyond the scope" but is accepted and agreed to by the contractor, it will be, in effect, a valid amendment or modification to the contract, binding on both parties.

42. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *G. L. Christian & Assoc. v. United States* 312 F.2d 418 (Ct. Cl. 1963), *recon. denied* (with opinion) 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing on cert. denied*, 376 U.S. 929 (1964), 377 U.S. 1010 (1964).

work and sue for breach of contract. This, however, is a perilous course for any contractor to adopt.<sup>43</sup>

An interesting problem is posed as to what is the legal result if the Contracting Officer issues an order calling for work beyond the scope of the contract. Clearly, if the contractor does the work he is entitled to be reimbursed. This reimbursement occurs by the application of the constructive change doctrine discussed previously.<sup>44</sup> While the Court of Claims has indicated that a contractor may stop work if the Government breaches the contract, that court has never decided a case precisely on those grounds. However, the facts of *C. W. Schmid Plumbing & Heating v. United States*,<sup>45</sup> would seem to indicate possible grounds for recovery other than damages for breach of contract.<sup>46</sup>

### WHAT MAY BE CHANGED

Neither the standard form construction nor the standard form supply contract Changes clauses contain specific language which allows the Contracting Officer to make changes in the time for delivery. There is no specific provision allowing the Contracting Officer to accelerate delivery unilaterally. The construction contract clause authorizes only changes "in the drawings and/or specifications."<sup>47</sup> The supply contract clause permits changes only in the

(i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery.<sup>48</sup>

The effort has therefore been to fit changes of time for performance into the Changes clause, even though the language of these clauses does not readily support equitable adjustment claims for changes in time for performance.<sup>49</sup>

Nonetheless, it has been held that the Contracting Officer may ac-

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43. *C. W. Schmid Plumbing & Heating v. United States* 351 F.2d 351 (Ct. Cl. 1965).

44. *Jack Stone Co., Inc. v. United States*, *supra* note 33.

45. *Supra* note 43.

46. See the discussion, *infra*, at 568.

47. *Supra* note 3.

48. *Supra* note 2.

49. Indeed the Comptroller General has ruled that the Changes Clause of the Supply Contract does not permit the inclusion of time for performance under the specification. Comp. Gen. Dec. B-149895 (Oct. 1, 1963, unpublished).

celerate deliveries unilaterally; and, in turn, the contractor may receive an equitable adjustment for the increased costs resulting therefrom. Modifications in the time for contract performance may, for example, come within the Changes clause even though such modifications are not specifically mentioned in that article. Time for performance is often set forth in the specifications of the contract, and, of course, the Changes clause covers changes in specifications. In such a case, the Contracting Officer's order to accelerate comes within the term "specifications" in the Changes clause. This has been the view adopted in construction contracts.<sup>50</sup> There is also some indication that, even though the schedule is not in the specification, acceleration claims may be allowed under the Changes clause.<sup>51</sup>

In summary, this jurisdictional problem has been more conceptual than real as the boards have been permissive in their treatment of the authorizing language.

#### ASPECTS OF THE EQUITABLE ADJUSTMENT:

##### "INCREASE OR DECREASE IN THE COST OF" WHAT?

The subject of the equitable adjustment has been treated extensively in numerous articles.<sup>52</sup> Although this article, therefore, does not address itself to the concept of measuring the contractor's damage which has been used in computing equitable adjustments, one problem is worthy of mention. There is a significant difference in the equitable adjustment language between the supply contract and the construction contract standard forms. And therein lies a tale of major importance in the history of the Changes clause.<sup>53</sup>

This major difference directly affects the nature of the costs that can be recovered under the Changes clause. The supply contract clause provides as follows:

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50. Melrose Waterproofing Co., ASBCA 9058, 1964 BCA para. 4119; Leo Sanders, BCA 1468, 4 CCF para. 60,526 (1949); Samuels & Gundling, BCA 1147, 4 CCF para. 60,703 (1949).

51. E.g., Ensign-Bickford Co., ASBCA 6214, 60-2 BCA para. 2817.

52. Ribakoff, *Equitable Adjustments Under Government Contracts*, G.W. GOVT. CONTRACTS MONOGRAPH No. 3 (1962); Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts*, 22 FED. B.J. 5 (1962); McBride, *Confusion in the Concept of the Equitable Adjustment in Government Contracts: A Reply*, 22 FED. B.J. 235 (1962).

53. It should also be noted that the Government may also receive an adjustment should the cost of performance be reduced. *Supra* notes 2 and 3.

if the change causes an increase or decrease in the cost of, or the time required for performance of any part of the work under this contract, *whether changed or not changed by such order*, an equitable adjustment shall be made in the contract price or delivery schedule or both. [Emphasis supplied.]

The construction contract lacks the underscored language—"whether changed or not changed by such order." As a result, the equitable adjustment in the case of a supply contract change has generally been broader in concept than that in a construction contract.<sup>54</sup>

The underscored language was added to the supply contract because of adverse reaction to the so-called *Rice* doctrine.<sup>55</sup> The *Rice* doctrine was interpreted by some to mean that a contractor was entitled to recover money only for the additional cost he incurred in doing the changed work itself. Under this point of view, if the change had a cost effect on the remainder of the work, these additional costs were not recoverable.<sup>56</sup> This cost effect was usually in the form of a delay or disruption to the unchanged work. The *Rice* doctrine thus provided the Government with a ready defense which was simply described by the slogans "Time for time, and money for work," or "no pay for delay."

Because time obviously costs money, there was an opposition to the *Rice* doctrine shared both by Government and contractors' lawyers. A strong statement of opposition, and undoubtedly the most significant, was expressed by the present Vice Chairman of the Armed Services Board of Contract Appeals, Joel P. Shedd, in an article entitled *The Rice Doctrine and the Ripple Effects of Changes*.<sup>57</sup>

The result of this reaction was an effort to modify the contract so that the contractors might, to some extent, be relieved of this injustice. One such change was the addition of the underscored language to the supply contract Changes clause. The addition of this "unchanged work" language has thus permitted supply contractors to recover the costs of the impact of changes.<sup>58</sup>

Construction contractors, however, were not so fortunate. The Sus-

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54. See, e.g., *Weldfab, Inc.*, IBCA 268, 61-2 BCA para. 3121; *Lumen, Inc.*, ASBCA 8364, 1964 BCA para. 4436; *Szemco, Inc.*, ASBCA 9892, 1964 BCA para. 4503.

55. *Chouteau v. United States*, 95 U.S. 61 (1877); *H. E. Crook Co. v. United States*, 270 U.S. 4 (1926); *United States v. Rice*, 317 U.S. 61 (1942); *United States v. Howard P. Foley Co.*, 329 U.S. 64 (1946).

56. *Ibid.*

57. 32 G.W.L. Rev. 62 (1963).

58. E.g., *Crane Carrier Corp.*, ASBCA 9822, 65-2 BCA para. 4945.

pension of Work clause, and its successor clause,<sup>59</sup> have permitted recovery of delay costs (but not profit) where the delay has been so unreasonable as to constitute a breach or has arisen from a breach.<sup>60</sup> But these contractual modifications have not filled the gap, nor have they quelled the resistance to the common interpretation of the *Rice* doctrine.

In 1966, the Armed Services Board of Contract Appeals released a Chairmen's decision stating that it did not have jurisdiction over a claim involving impact costs on unchanged work.<sup>61</sup> The Board declared:

simply stated, this doctrine precludes payment under the Changes article for costs of work not changed.<sup>62</sup>

Not all of the ASBCA Chairmen were in agreement. A strong dissenting opinion was presented by Vice Chairman Shedd.<sup>63</sup> This dissenting opinion cited as its authority a series of cases under which, according to Mr. Shedd, the Court of Claims had reversed the board and allowed recovery for costs akin to the so-called ripple costs.<sup>64</sup>

Even more recent events, however, indicate that the construction contract Changes clause may receive a more liberal interpretation, and one that is more consistent with traditional legal principles of recoverable damages. The Department of Commerce Appeals Board rejected the Government's usual *Rice* argument in the appeal of *A. L. Harding*.<sup>65</sup> The Board took this position:

We think the Government's analysis and conclusion in respect to this claim was wrong. It reflects a much too literal reading of the contract provision relating to "Delays" as well as the *Rice* rule, not at all in keeping with the recent trend in the handling of claims of this nature. (See, Shedd, *Rice Doctrine and Ripple Effects of Changes*, Vol. 32, G.W. Law Review, pp. 62-81 (1963), and Reda, *Impact Costs of Ac-*

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59. Price adjustment for suspension, delay, or interruption of work, FPR 1-7.602.1, ASPR 7-604.3.

60. E.g., *George A. Fuller Co.*, ASBCA 8524, 1962 BCA para. 3619. The Court of Claims has recently indicated that it views the suspension of work clauses as allowing compensation for delay even where no breach of contract is involved. *Bateson Constr. Co. v. United States*, 319 F.2d 135 (Ct. Cl. 1963).

61. *Electronic & Missile Facilities, Inc.*, ASBCA 9866, 66-1 BCA para. 5307.

62. 66-1 BCA at 24,953.

63. 66-1 BCA at 24,956.

64. *Gardner Display Co. v. United States*, 346 F.2d 585 (1965); *C. W. Schmid v. United States*, *supra* note 43; *Laburnum Construction Co. v. United States*, 325 F.2d 451 (Ct. Cl. 1964); *J. D. Hedin Constr. Co. v. United States*, 347 F.2d 235 (Ct. Cl. 1965).

65. DCAB 44, 65-2 BCA para. 5261, *aff'd on recon.*, 66-1 BCA para. 5463.

celeration, Spring 1962 issue, Fed. B.J., and cases cited therein.) Simply stated, *U.S. v. Rice*, 317 U.S. 61 (1942), the case from which the doctrine derives its name, decided that the "changes" clause permits payment only for additional expenses directly attributable to the changed work, but consequential damages to unchanged work are not compensable. However, the important question remains under that rule as to the nature of the direct costs of a change which are compensable; and in this connection it is now well established that such costs may include, inter alia, the increased cost of performance caused by disruption of the contract work if and insofar as such disruption was a direct result of the change.<sup>66</sup>

This view was recently adopted by the Armed Services Board of Contract Appeals in a March 15, 1967 decision, concurred in both by Chairman Spector and Vice Chairman Shedd. In *Hardeman-Monier-Hutcherson*, the Board expressed its new position in these terms:

. . . In the ordinary change order directing a structural change, this doctrine may dictate a harsh result, but it presents no difficulty in application. In the wider area of constructive changes, or changes by implication, the application is often more difficult, for the dividing line between changed and unchanged work is less readily apparent. Also the scope of the change which has occurred is being reconstructed after the fact. To overcome this problem the boards have returned to a modified application of the rule in *Hadley v. Baxendale*, supra. It is now frequently held that costs are allowable under the Changes article if such costs are the direct, as distinct from remote, result of the change.<sup>67</sup>

Thus the contractor was permitted to recover standby costs resulting from the change. How far these new authorities may be taken by counsel for contractors is not yet clear. But intriguing possibilities and new opportunities under the construction contract Changes clause are being developed.<sup>68</sup>

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66. 65-2 BCA at 24,777.

67. ASBCA 11785, 67-1 BCA para. 6210 at 28,749. Significantly two of the three cases cited by the Board for the quoted proposition—Northeastern Eng'r, Inc., ASBCA 5732, 61-1 BCA para. 3026, and Ivey Bros. Constr. Co., Eng. BCA 1764 (1960)—were those cases cited by Mr. Shedd in his *Rice Doctrine* law review article cited, supra note 57.

68. Notice also that, in the *Hardeman-Monier-Hutcherson* decision, the ASBCA recognizes the Court of Claims' decision in *Laburnum Constr. Corp. v. United States*, supra note 64, as holding that the *Rice Doctrine* is not applicable where the costs claimed result from the "fault of the Government." It may well be that contractors will consequently abandon the suspension clause in such cases and bring delay claims under the Changes clause, which, unlike the suspension clause, allows recovery of profit.

REQUIRED NOTIFICATION OF CLAIMS:  
"WITHIN 30 DAYS"

The Changes clause requires that a contractor assert his claim, for equitable adjustment, or give notice of it, "within 30 days" of notification of the change. The supply contract Changes clause does not require that the notice be in writing, whereas under the construction contract Changes clause notice of the claim for equitable adjustment must be in writing.<sup>69</sup>

The 30-day provision of the Changes clause is discretionary. The Changes clause for both supply and construction contracts provides that the Contracting Officer may receive and act upon any such claim asserted at any time prior to final payment. And it has been regularly held that he should do so in any case where his ability to evaluate the claim has not been prejudiced by the passage of more than 30 days.<sup>70</sup>

The Armed Services Board has held that the refusal of the Contracting Officer to consider a late claim must be reasonable, and that a refusal solely on the ground of untimeliness is not reasonable.<sup>71</sup> The Department of Interior Board of Contract Appeals has taken the same view on this question. The Interior Board has held that a Contracting Officer's refusal to waive the untimely filing of notice is a matter which the board may review on appeal. It has also held that, when there is no prejudice to the Government, untimeliness will not bar a contractor's claim. In *Monarch Lumber Co.*,<sup>72</sup> this board adopted and quoted the principle stated in the early decision in *Sanders*:

Its true purpose is the protection against delays that are injurious to the Government's interests. If not injurious then, of course, there is no object in applying the rule.<sup>73</sup>

This principle has been applied in recent decisions.<sup>74</sup> It should be emphasized, however, that a showing of prejudice will make the 30-day

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69. *Supra* notes 2 and 3.

70. *H. L. Yoh Co. v. United States*, 153 Ct. Cl. 104 (1961); *Anderson-Nichols & Co.*, ASBCA 6524, 61-2 BCA para. 3204; *J. W. Merz*, IBCA 64, 59-1 BCA para. 2085; *Hotpoint Co.*, ASBCA 3745, 57-2 BCA para. 1513.

71. *Remler Co.*, ASBCA 1113 (1952).

72. IBCA 217, 60-2 BCA para. 2674.

73. WDBCA 955, 3 CCF 862, 866 (1945).

74. *E. W. Bliss Co.*, ASBCA 9584, 65-1 BCA para. 4610; *Fletcher Aviation Corp.*, ASBCA 7669 & 8542, 1964 BCA para. 4192; see *Buford*, *Notice Requirements Under Government Construction Contracts*, 44 MINN. L. REV. 275, 280-81 (1959).



rule a bar. In *C. C. Terry*,<sup>75</sup> where the delay prevented the Contracting Officer from verifying the allegations, the board found that the Government had been prejudiced and barred the claim.

The most detailed analysis of the question of timeliness appears in *Korshoj Constr. Co.*,<sup>76</sup> where the Interior Board stated the rule as follows:

The rule that a failure to comply with a contractual protest or notice requirement prevents consideration of the claim by a board or a court is not absolute, but is subject to certain well recognized exceptions. This board and other appeal boards, in accordance with applicable court decisions, have held that a formal protest or notice is not necessary where:

- (a) the records of the government show that the contracting officer or his authorized representative in fact knew of the circumstances that formed the basis of the alleged extra, changed condition.
- (b) the contracting officer actually considered the contractor's claim on its merits without invoking the protest or notice requirement.
- (c) the failure to protest or notify is not prejudicial or injurious of the interests of the government.<sup>77</sup>

Suppose, however, the Contracting Officer finds that there are no circumstances present on which to justify consideration of a claim which has been untimely filed? This question was decided when the ASBCA held that an unqualified refusal by the Contracting Officer to consider a request for additional compensation asserted more than 30 days after notice of the change, the Contracting Officer having decided that no extenuating circumstances were present, is an appealable issue.<sup>78</sup>

The boards have recognized that, under the existing Changes clause, the 30-day notice provision does not apply with regard to a constructive change. For example in *Carlin-Atlas*,<sup>79</sup> the GSA Board stated in denying the Government's motion to dismiss:

It is likewise well settled that the 30-day limitation provision in the "Changes" clause relating to the submission of claims for changes is

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75. IBCA 330, 1963 BCA para. 3805.

76. IBCA 321, 1963 BCA para. 3848, 3865, 1964 BCA para. 4206.

77. 1963 BCA para. 3848 at 19,168.

78. Burton-Rodgers, Inc., ASBCA 5438, 60-1 BCA para. 2558.

79. GSBGA 2061, 66-2 BCA para. 5872.

not applicable where the Contracting Officer has not issued a written change order and where the claims are based on alleged constructive changes. *MECCO, Inc.*, ASBCA No. 9849, 65-2 BCA ¶ 5132. Accordingly, the bar for lack of timely submission of the claim cannot be raised by the Contracting Officer and the Government in the present appeal inasmuch as the Appellant's claim was asserted on the basis of alleged constructive change.<sup>80</sup>

This rule should be clear from the language of the Changes clause itself, which requires that adjustment claims be asserted within 30 days after receipt of the formal, written change order contemplated by the clause.<sup>81</sup>

The Court of Claims decision in *Copco Steel & Eng'r Co. v. United States*,<sup>82</sup> sets forth the general rule as to all notice requirements in government contracts:

Lack of strict compliance with many kinds of contract requirements concerning writings and notifications have frequently been held to be of no consequence where the conduct of the parties have made it clear that formal adherence would serve no useful purpose or that the parties have in fact waived it. *Thompson v. United States*, 91 Ct. Cl. 166, 179 (1940) (failure of contractor to assert a claim for adjustment of change order in 10 days waived in view of defendant's later consideration of claim on merits); *Guyler v. United States*, 161 Ct. Cl. 159 (1963) (failure of contractor to make a timely 30-day claim for equitable adjustment waived by consideration of claim on merits); *Shepherd v. United States*, 125 Ct. Cl. 724, 732, 113 F. Supp. 648 (1953) (failure of contractor to give notice of changed condition immaterial in view of defendant's knowledge of the condition); *Whitman, et al. v. United States*, 124 Ct. Cl. 464, 110 F. Supp. 444 (1953) (contract provision that amount of changed order be set forth at time of issuance does not preclude recovery where parties adopted a procedure of waiting until completion of contract to determine amounts due); *McShain v. United States*, 106 Ct. Cl. 280, 65 F. Supp. 589 (1946) (contractor permitted recovery for performance of extra work without

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80. 66-2 BCA at 27,265.

81. See *Todd Shipyards Corp.*, ASBCA 2911 & 2912, 57-1 BCA para. 1185. Nevertheless, after contractor does delay unreasonably in submitting his request for equitable adjustment under a constructive change theory, the boards may declare that such an unreasonable delay results in substantial prejudice to the Government and the claim is barred. *Eggers & Higgins*, VACAB 537, 66-1 BCA para. 5525 (5½ year delay).

82. 341 F.2d 590 (Ct. Cl. 1965).

formal written change orders where parties adopted procedure of postponing all claims for extras until completion of job).<sup>83</sup>

This statement should not provide comfort to the contract administrator, but may support the claim of a contractor whose administrator has failed to give the prescribed notice to the Government.

THE CONTRACTOR'S OBLIGATION TO KEEP WORKING:

"NOTHING IN THIS CLAUSE SHALL EXCUSE THE CONTRACTOR FROM PROCEEDING WITH THE CONTRACT AS CHANGED"

A truly unconventional limitation is thrust upon the contractor by the concluding language of the clauses, which clearly require him to continue with the work as changed. This requirement stands even though there is a dispute arising from the change. If a contractor refuses to perform, he is subject to termination for default.<sup>84</sup> Therefore, if agreement cannot be reached on an equitable adjustment, the Contracting Officer should not hesitate to issue a unilateral determination, giving a final decision subject to appeal under the Disputes clause. The contractor, in the meantime, must perform the work.

There are cases, however, where the change is unauthorized—such as those beyond the scope of the contract. In these instances, the contractor may have the right to walk off the job. As the Court of Claims stated in *Henderson v. United States*:<sup>85</sup>

If it [the Contracting Officer's order] was a breach, the prime contractor thereupon had the option of abandoning performance under the contract and suing for any damages that had been sustained as of the time of the breach (*Anvil Mining Co. v. Humble*, 153 U.S. 540, 552 (1894)) or of proceeding with the erection of the buildings despite the interference and then, after the completion of the job, instituting an action for the damages sustained as a result of the breach of contract (*United States v. Smith*, 94 U.S. 214, 217-18 (1876)).

However, this is a dangerous action for a contractor to take and it has seldom been successful.

The case of *C. W. Schmid Plumbing & Heating v. United States*,<sup>86</sup>

83. *Id.* at 616. The Government, in contrast, is not restricted by the 30-day provision, but has been required to assert its claim within a reasonable time.

84. *Dave & Gerben Contr. Co.*, ASBCA 6257, 1962 BCA para. 3493.

85. *Supra* note 34, at 241.

86. *Supra* note 43.

is illustrative, even though it had an ultimately favorable ending. This unusual controversy had its beginning in 1956 when the Corps of Engineers solicited bids for a proposed addition to a heating plant at a midwestern Air Force base. The AFB required bidders to submit data on the boiler proposed to be furnished. Schmid submitted a bid with the data sheet naming a certain company's boiler. Before the bids were opened, however, Schmid received a lower quote from a second boiler company. As a result, he reduced his bid price accordingly. He received the award of the contract, and started work on the foundation for the boilers from the second company. He submitted for approval shop drawings indicating the second company's boiler. The Contracting Officer insisted upon boilers from the company named on the data sheet submitted with Schmid's bid.

The normal procedure at this point would have been for the contractor to acquiesce in the Contracting Officer's demand, but treat it as a change and submit a claim for equitable adjustment under the Changes clause. Such a claim would have been successful.<sup>87</sup> But this was not Schmid's reaction. He insisted that the boiler shown on his shop drawings met the specifications, and that the Contracting Officer could not force him to use the more expensive boilers without a change order and an equitable adjustment. Schmid refused to proceed with the work until the Contracting Officer acquiesced in this view. Some months later, the Contracting Officer's superiors reversed his decision. Schmid, therefore, renewed his prosecution of the work.

At the same time, he submitted a claim for the standby costs incurred during the time the incorrect decision of the Contracting Officer was in force. The Contracting Officer denied his claim in 1958 and was sustained by the Corps of Engineers in 1961 and the Armed Services Board of Contract Appeals in 1962.<sup>88</sup>

Finally, in October 1965—over eight years after the date of the structure change—the U. S. Court of Claims allowed Schmid's claim. In its decision, the Court seems to rely primarily on the fact that the contractor's actions saved the Government money. The Court stated:

... we think it would be anomalous and a miscarriage of justice to declare that the contractor would have been entitled to an equitable adjustment had he followed the erroneous order and thereby increased the government's cost, but to hold he may not recover the costs that

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87. *Jack Stone Co. v. United States*, *supra* note 33.

88. ASBCA 7738, 1962 BCA para. 3458.

resulted from an admittedly correct position, which provided a substantial saving to the government. The provision in the Disputes clause about proceeding with the work should not be interpreted to prevent recovery in a case such as this where the government was wholly benefited by the contractor's failure to proceed with the work.<sup>89</sup>

Thus, Schmid was victorious and his rugged stand against the United States was, to some extent, sustained.

But it is worth reflecting that he probably would have recovered earlier and perhaps more, had he treated the Contracting Officer's erroneous decision as a constructive change order, proceeded with the work, and filed a claim for equitable adjustment. Though Mr. Schmid's story is an interesting one in the history of the Changes clause, it does not indicate a recommended practice.

#### PROPOSED NEW CONSTRUCTION CONTRACT CHANGES CLAUSE

In September 1963, the General Services Administration requested agency views concerning the advisability of modifying the Changes clause of the standard form construction contract. By virtue of this request, there was formed an inter-agency working group to draft the proposed new language. This working group issued its report in March of 1966. It recommended new language for the Changes, Changed Conditions, and Suspension of Work articles. The recommended Changes clause revision is as follows:

(a) The Contracting Officer may, at any time by written order and without notice to the sureties make changes within the general scope of the work under this contract. Any act or failure to act by the Contracting Officer, which causes any such change, shall be treated as if a written order therefor has been issued; provided, that in the absence of a written order for a change, the Contractor shall promptly inform the Contracting Officer in writing that such act or failure to act is considered to be an ordered change. If any such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Where such changes delay or postpone the performance of all or any part of the work for an unreasonable period of time, the equitable adjustment shall include an increase in the cost of performance necessarily caused by such unreasonable delay or postponement. However, no adjustment shall be

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89. 173 Ct. Cl. at 316.

made for any such delay or postponement to the extent that performance would have been so delayed or postponed by any other cause.

(b) If the Contractor intends to assert a claim for an equitable adjustment under this clause by reason of the receipt of a change order, or by reason of any act or failure to act by the Contracting Officer, he must, within thirty (30) days thereafter, submit to the Contracting Officer a notice in writing together with a statement setting forth the general nature and extent of such claim, unless this period is extended by the Government; but this requirement shall not apply where the Government has not been prejudiced by the absence of that submission.

(c) No claim for an equitable adjustment shall be asserted after final payment under this contract.

(d) If the parties fail to agree upon the existence of a change or upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions; but nothing in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed or as directed by the Contracting Officer.

Various groups in the American Bar Association and other bar associations have been given the opportunity to comment on the appropriateness of the newly drafted language. As of this time, no final recommendation has been made with regard to this proposed clause. Nor has it been put into effect by any of the major procuring departments or agencies of the Government.

The proposal faithfully reflects the history of the existing Changes clause. This is not surprising, since the draftsmen have attempted both to formalize the doctrines of constructiveness devised by the appeal boards, and to solve the problems which the boards' ingenuity has been hitherto inadequate to cure. The proposed clause recognizes and formalizes the concept of the constructive change order. It seeks to avoid the *Rice* doctrine by permitting recovery of suspension-type costs under the Changes clause. Finally, the proposed clause attempts to remedy a problem that Government lawyers and administrators have complained of for some time—namely the absence of a notice requirement where the change is a constructive one.<sup>90</sup>

It is fair to say that these proposed changes have not had the approval of the Government Contracts Bar. Indeed, the authors understand that

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90. Nelson, *The Changes Clause and a Suggestion*, 9 AF JAG L. REV. 37 (1967).

the proposals have been abandoned for the most part, and new proposals are in the making. A few observations may explain why.

No one can deny that the *Rice* doctrine has been a harsh rule. Prior to the recent *Harding*<sup>91</sup> and *Hardeman-Monier-Hutcherson*<sup>92</sup> decisions, which finally permit a sensible construction of the existing Changes clause, no one would have gainsayed the benefits of a specific modification of the Changes clause. Hopefully, however, this is no longer necessary. Furthermore, the proposed modification is far more restrictive than the traditional *Hadley v. Baxendale*<sup>93</sup> concept which the boards now may be willing to apply. Thus, the proposed change may not go far enough, leaving behind a residue of the unjust *Rice* rule. If any change is necessary, the addition of the supply contract's "unchanged work" language might be most suitable.

The doctrine of the constructive change order is a useful one, well administered by the appeal boards. The necessity for formalizing it is open to question. Indeed the result of such a formalization might well be the sterilization of a flexible and fruitful concept.

The proposed addition of a notice requirement for constructive changes is premised on a misapprehension of the fundamental nature of the constructive change order concept. The constructive change is fundamentally no more than a breach of contract given administrative cognizance by the appeal boards. It would appear that the proposed language creates a scheme whereby such a breach would not be considered a constructive change and treated as redressable, unless the contractor "promptly" characterizes the breach as a change.<sup>94</sup> The proposal thus places the administrative onus squarely on the aggrieved party. The proposal also thrusts the boards' flexible doctrine of fairness into a rigid procedural hassle. The net result of the proposal, if adopted, would thus be twofold:

1. To deprive procedurally unsophisticated but equally aggrieved contractors of breach of contract rights; and
2. To foster a divisive and costly proliferation of formal claims by sophisticated contractors who may fear that ostensibly small damages may potentially be aggravated and increased.

The merit of the constructive change order concept is that it works

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91. *Supra* note 65.

92. *Supra* note 67.

93. 156 Eng. Rep. 145 (Ex. 1854).

94. This is also the suggestion of Lt. Col. Nelson in the article cited, *supra* note 90.

effectively, flexibly, and fairly under its case-by-case administration by the appeal boards. Such a valuable concept should not be lost in a shuffle of papers because of an instinct for formality.

#### CONCLUSION

In summary, the Changes clause acts both for the benefit of the Government and for the benefit of the contractor. The Government must have the authority to change the plans and specifications, to accelerate performance, and to make other changes in both construction and supply contracts which will alter and often improve the final product. The Changes clause works for the benefit of the contractor in that he must be adequately compensated if the Government is to reserve to itself the right to make changes. The Changes clause, as it stands at the center of the Government contracting scheme, is thus an effective instrument for the administration of the unusual contract between Government and citizen.