Ch 6 - Pricing Equitable Adjustments and Settlements

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6.0 Chapter Introduction

This chapter will examine the application of equitable adjustment and settlement concepts in a variety of situations.

6.1 Issues And Factors To Consider In Making Equitable Adjustments

This section will examine some of the major concepts and issues that you should consider in making an equitable adjustment.

- 6.1.1 - Equitable Adjustment Concepts
- 6.1.2 - Cost Issues
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- 6.1.4 - Proposal Analysis And Negotiation Process Issues

Defining Equitable Adjustment. The term "equitable adjustment" appears expressly or implicitly several places in the FAR text and several contract clauses (e.g., Changes, Government Property, and Differing Site Conditions). Unfortunately, neither the FAR text nor the contract clauses objectively define what is equitable, so we are left with subjective definitions.

- *Webster's Third New International Dictionary* defines "equitable" as "characterized by equity...fair to all concerned ... without prejudice, favor, or rigor entailing undue hardship...that can be sustained or made effective in a court of equity or upon principles of equity jurisprudence."
- As suggested by the dictionary definition, the Courts and Boards of Contract Appeals (BCAs) have relied on such concepts as "fair and reasonable" and legal precedent to define "equitable adjustment."
  - Unfortunately, there are no hard and fast rules that will always assure agreement between contractors and the Government.
  - There are not even any rules that will always assure success before the Courts and BCAs.
- The material presented in this chapter offers a framework for you to consider in pricing equitable adjustments.

6.1.1 Equitable Adjustment Concepts

Need for Equitable Adjustments. Equitable adjustments are necessitated by some modification of the contract effort. In general, contract modifications can be defined in one of three ways:

- Addition of work to the contract.
- Deletion of work from the contract.
- Substitution of one item of work for another (i.e., an addition with a related deletion).

This modification may come from an overt change in Government requirements or it may come from a change in the conditions surrounding the contract (e.g., differing site conditions or late delivery of Government-furnished property).

Certification Requirements (DFARS 243.204-70 and 252.243-7002). The Department of Defense requires a Certification of Requests for Equitable Adjustment for any request exceeding the simplified acquisition threshold. The amount of the equitable adjustment is the aggregate sum of the dollar increase plus dollar decrease.

- The required language of the certification reads:

"I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief."

- The instructions for completing the certification put the contractor on notice that the certification requires full disclosure of all relevant facts, including:
  - Any required cost or pricing data; and
  - Actual cost information and information to support any estimated costs, even if cost or pricing data are not required.

Objectives in Making an Equitable Adjustment (Condor Reliability, Inc., 90-3 BCA ¶23,254).

Whatever the reason for the contract modification, the related equitable adjustment should be based on the difference between the reasonable cost of performing the contract without the addition, deletion, or substitution and the reasonable cost of performing with it.

In other words, the contractor should not be left in a better or worse profit position on the unchanged work after the change than it was before the change.

To attain this objective, the price adjustment should include the:

- Direct cost of added work;
- Estimated direct cost of deleted work not already performed;
- Indirect cost affected by the modification; and
- Profit/fee affected by the modification.

Approaches to Equitable Adjustment. Over the years, Courts and BCAs have generally used one of the following four approaches to establish equitable adjustments in specific cases:

- Reasonable cost;
- Jury Verdict;
- Total cost; or
- Reasonable value.

Reasonable Cost Approach (FAR Table 15-2, 31.201-3, and Bruce Construction v. U.S., CT-CL 97 324 F2d 516, Wyman-

Gordon Co., 59-2 BCA ¶2344, Walsh Const. Co., 57-2 BCA ¶1475, Grumman Aerospace Corp., 76-1 BCA ¶11,671, and General Dynamics/ Astronautics Corp., 63 BCA ¶3685).

Since the Court of Claims decision on Bruce Construction in 1963, the reasonable cost approach has generally been considered the best approach for pricing an equitable adjustment. Use it whenever accurate information is available concerning contractor costs affected by the modification. However, if contractors do not have accurate cost information, you should consider other approaches.

- Under the reasonable cost approach, the net cost of a contract modification is calculated as follows:

N = A - D + C

Where:

N = Net change in cost related to a contract modification

A = Current estimate of the cost to complete added work

D = Current estimate of the cost to complete deleted work not yet performed

C = Actual cost of all deleted work already performed

- Consider the following points whenever you use this approach:
  - **General tests of cost reasonableness.**
  - Is this type of cost generally recognized as necessary in conducting business?
  - Is the cost consistent with sound business practice, law, regulation, and the principles of "arms-length" bargaining?
  - Does the contractor's action reflect a responsible attitude toward the Government, other customers, and the public at large?
  - Are the offeror's actions consistent with established practices?
  - **No presumption of incurred cost reasonableness.** If you challenge an actual cost after an initial review of the facts, the contractor has the burden to prove that the cost is reasonable. As you answer the above questions on cost reasonableness, consider the contractor's:

    - Situation at the time that the cost was incurred.
    - Unique business judgment.
    - The amount of cost incurred and the actions of the contractor in incurring those costs.
    - **Prudent effort.** Contractors may incur excess costs despite good faith efforts. Such costs are generally considered reasonable as long as they do not exceed the costs that a prudent person would have incurred under the circumstances. For example:
        - When a contractor's decision affecting contract cost does not require Government approval, you should consider the contractor's prudent effort and the facts available when the decision was made.
        - However, if the contractor's decision required Government approval and the contractor proceeded without the required approval, the resultant costs in excess of what the Government would have approved should normally be considered unreasonable.

Jury Verdict Approach (Michael-Mark Ltd., 94-1 BCA ¶26,453, Herman B. Taylor Const. Co., 96-2 BCA ¶28,547, Conner Brother Const. Co. Inc., 95-2 BCA ¶27,910, Geo-Con, Inc., 96-1 BCA ¶28,112, and Dawco Const., Inc. v. U.S., 930 F2d 872, FAR 52.243-6, Michael-Mark Ltd., 94-1 BCA ¶26,453, Herman B. Taylor Const. Co., 96-2 BCA ¶28,547, Conner Brother Const. Co. Inc., 95-2 BCA ¶27,910, Geo-Con, Inc., 96-1 BCA ¶28,112, and Dawco Construction, Inc. v. U.S., 930 F2d 872).

Where costs cannot be segregated and identified for reasonable cost analysis, both the Government and the contractor must approach an equitable adjustment with fewer facts and increased reliance on judgment.

- In such cases, the Courts and the BCAs often use the Jury Verdict approach -- an approach that relies on available facts and expert opinion.
    - Experts for the contractor and the Government have an opportunity to present the available evidence, including the opinions of qualified experts (e.g., estimators).
    - Both sides have the opportunity to directly challenge the facts and judgment presented by the other side.

    - Based on the information presented, the Court or BCA can reach a decision on an equitable adjustment in the same manner as a jury.
- Normally, your negotiations to arrive at an equitable adjustment will not have the formality of a courtroom or a hearing room. However, you should consider the key principles of the Jury Verdict approach in cases where the following elements are present:
    - **Clear evidence that an adjustment is appropriate.** Do not use the principles of this approach, unless the facts of the case clearly demonstrate that an equitable adjustment is appropriate.
    - **Not enough information available to use for reasonable cost approach.** Good business practice and the findings of Courts and BCAs require you to use the Reasonable Cost approach when adequate cost information is available.
    - **Lack of cost information is not unreasonable.** There are many situations where it is reasonable for a contractor to have incomplete records on costs affected by a contract modification. However, you should normally not use this approach in situations where the contractor was required to maintain adequate cost information (e.g., the contractor was required to comply with the Change Order Accounting clause).
    - **Convincing evidence of costs affected.** To use this approach, you should have convincing evidence of the nature and kinds of costs affected.
    - **Reasonable basis for judgment.** This approach uses judgment instead of the calculations of the Reasonable Cost approach, but that judgment must be based on the facts available. If the facts available do not provide a reasonable bases for adjustment, you should consider the viability of the Total Cost approach before continuing.

Total Cost Approach (WRB Construction Co., v. U.S., 12 CCF ¶81,781, Phillips Const. Co., v U.S., 12 CCF ¶81,001, Servidone Const. Corp. v. U.S., 19 ClCt 346, Servidone Const. Corp. v. U.S., 931 F2d 860, and Neal & Company Inc. v. U.S., 19 ClCt 463).

Under the Total Cost approach, the total cost of the change is the difference between the original contract

price and the actual cost of performing the contract as changed.

- Generally, this approach is considered to be less desirable than the approaches above for two reasons:
  - Total costs can include not only the additional costs properly attributable Government action or inaction, but also those attributable to contractor action or inaction.
  - Original contract prices are often based on unrealistically low bids/proposals.
- Consider using the key principles of the Total Cost approach in cases where the following elements are present:
  - **Clear evidence that an adjustment is appropriate.** Do not use the principles of this approach, unless the facts of the case clearly demonstrate that an equitable adjustment is appropriate.
  - **Impracticable to use another approach.** Only use this approach when it is not practicable to use the Reasonable Cost or Jury Verdict approach to calculate the equitable adjustment required. Consider use when costs cannot be allocated to specific changes and the facts available do not permit development of reasonable estimates of actual costs.
  - **Lack of cost information is not unreasonable.** Normally, you should not use this approach in situations where the contractor was required to maintain adequate cost information on the contract modification (e.g., the contractor was required to comply with the Change Order Accounting clause).
  - **Realistic base for adjustment.** Only use this approach when you can establish a realistic price for contract work without the modification.
  - The basis for adjustment is normally the contract price before the modification took place.
  - If the contract price before the modification was unrealistically low, do not permit the contractor to "get well" by over-pricing the contract modification.
  - When the contract price before the modification was unrealistic, you may consider another basis for adjustment (e.g., the contract price adjusted for known elements of unrealistic pricing).

- **Reasonable total cost.** Only use this approach when the contractor's total cost records are accurate and the total cost appears reasonable for the effort required.
- **Contractor not responsible for added cost.** Before using this approach, you must be reasonably sure that the increased costs resulted from the modification and include only those cost increases attributable to Government action/inaction.

Reasonable Value Approach (Bruce Construction v. U.S., CT-CL 97 324 F2d 516). In the past, reasonable value, was frequently used to estimate the change in contract value that resulted from the contract modification. However, this method has been replaced by the reasonable cost approach since the Court of Claims decision on Bruce Construction in 1963.

- In that case, Bruce Construction claimed a $42,425.98 price increase for replacing concrete blocks in a construction project with sand blocks.
- Based on market prices, that claim appeared reasonable because the market price for sand blocks was generally higher than the price for concrete blocks in the area.
- In fact, Bruce purchased sand blocks for the price of concrete blocks.
- The Court rejected the claim -- finding that cost is the best measure of value.

6.1.2 Cost Issues

Contract Clauses Control Adjustment Costs. You can consider both the direct and indirect costs of the contract that are affected by the contract modification. However, applicable clauses may set limits on the types of cost that you can consider. Carefully read the applicable clause in your contract before you attempt to negotiate an equitable adjustment. Several of the most often used clauses will be examined in later sections of this chapter.

Direct Impact Costs (FAR Table 15-2 and T.C. Bateson Const. Co. v. U.S., 177 CT-CL 1094). Direct impact costs are costs that can be foreseen and as the result of a contract modification and readily calculated based on the

information available. Most direct costs affected by a contract modification are direct impact costs.

Consider the following points when estimating direct impact costs:

- The cost for added work not yet performed should be the current best estimate of the costs involved. Remember that an apparently minor modification (e.g., changing a single component) may have substantial related effects:
  - Other components may have to be changed for compatibility.
  - The labor hours or labor rates to install the new component may be affected.
  - Labor hours could be effected by different product requirements or the effect of the new component on the efficiency of assembly operations.
  - Rates could be affected by factors such as worker qualification requirements, timing of the labor effort, or overtime required to meet schedule requirements.
  - Delays in obtaining the new component may cause schedule delays which affect other costs.
  - Changing a single component could force a redesign to assure system compatibility (e.g., increased power requirements).
  - Such factors as a work sequence interruption, lack of a steady flow of work, and the unavoidable use of less- experienced labor may seriously affect a contractor's efficiency and increase costs.
  - Excessive overtime necessitated by additional work may affect labor efficiency. For example, the Court of Claims found that a 12-hour workday and a 6-day workweek tend to impair labor efficiency.
- The cost for added work already performed should be the reasonable actual cost of the work involved.
- The cost of deleted work not yet performed should be the current best estimate of the costs involved.
  - The estimate used to price the original contract may have been much higher or lower. For example, the original estimate for a component may have been $30,000 but the current estimate is $60,000.

In this situation, $60,000 should be deleted from the contract cost.
    - Do not allow the contract modification to change the contractor's profitability on the unchanged contract effort.
- The cost of deleted work already performed must be retained in the contract cost. For example, the contractor already acquired components for $30,000, but the contract modification requires the contractor to use different components in the final system.
    - That cost must be retained in the total contract cost along with the cost of the replacement component.
    - The contract provision requiring the equitable adjustment will define the Government's right to prescribe the manner used to dispose of property made obsolete by a contract modification.

Unallowable Costs (FAR Part 31 and 31.205-20). Costs of a type that are unallowable for other contract actions are also unallowable for contract modifications. For example, many requests for equitable adjustment include costs for interest related to financing additional work under the contract. Like other interest expense, interest related to contract modifications is unallowable.

Cumulative- Impact Costs (Freeman-Darling, Inc., 89-2 BCA ¶21,882, Claude R. Smith, Trustee v. U.S., 40 CCF ¶76,854, and Ingalls Ship. Div., Litton Systems, Inc., 78-1 BCA ¶13,038.45).

Cumulative-impact costs are costs that are unforeseeable or costs that were not readily computable at the time of an initial equitable adjustment. They typically occur as the result of an unanticipated loss of efficiency or productivity caused by numerous contract modifications on a single major contract. As you examine a request for equitable adjustment to cover cumulative impact, consider the:

- **Need For Separate Adjustment.** Whenever possible, you should negotiate all adjustments for a contract modification at the same time. However, unforeseeable or uncomputable costs may be considered later.
    - A contractor cannot request a separate adjustment for cumulative-impact costs simply because it

underestimated the impact of the change on other operations.
    - To request a separate adjustment for cumulative-impact costs, the contractor must show that neither side intended to consider such costs during previous equitable adjustments. For example, a contractor could assert during negotiations of an equitable adjustment that the modification or modifications have far reaching effects on efficiency that cannot be estimated at the time but must be considered after contract completion. If it is not clear that the equitable adjustment covers all costs related to the modification, the contractor might later claim the right to such an adjustment.
- **Unforeseeable Effect Of Numerous Modifications.** To obtain a separate adjustment for the cumulative effect of numerous modifications, the contractor must provide documented evidence that there were numerous changes and reasonable evidence that there was an unforeseen or uncomputable effect on contract operations efficiency related to those changes.
    - Cumulative impact costs were allowed in the Ingalls Shipbuilding case -- where three shipbuilding contracts were affected by several thousand change orders that occasioned a 58 percent contract price increase (from $113 to $209 million) and spawned a 4-year delay in the first incremental delivery.
    - Cumulative inpact costs were denied in the Dyson case (Dyson & Company, 78-2 BCA. ¶13,482, affirmed, 79-1 BCA ¶13,661)-- where cumulative impact costs presented in behalf of a mechanical subcontractor whose work had been exposed to 39 change orders that increased subcontract performance costs by roughly 19 percent ($612,454 was added to $3.3 million) and added 100 days of time extension.
- **Unforeseeable Effect Of A Single Modification.** The contractor could assert that there was an unforeseeable impact from a single contract modification. For example, in the Penner case (Joseph Penner , 80-2 BCA ¶14,604), the contractor obtained an equitable adjustment for the delay, disruption, and ripple effects which resulted from the Government's directive to change the method of pile driving under a construction contract. In that case:

    - During the installation of piling, it became apparent that the vibrations produced by the steam-activated pile-driving rig being used might damage adjacent property, and the Government directed the contractor to change to using water jetting.
    - While the contractor took reasonable steps to prepare for the large amounts of water produced by the jetting procedure, the firm was overwhelmed by the actual amount of water and mud that resulted.
    - As a result, the contractor was forced to make changes in the sequence of work and experienced considerable delay in its projected schedule.
    - Since the contractor was not at fault for the type of jetting used or the method of work, the Government was responsible for the unanticipated consequences of the contract modification.
- **Effect On Modified Contract Only.** A contractor is normally not entitled to recover cumulative impact costs for the ripple effect of Government-caused disruption of one contract on the contractor's efficiency and productivity on other Government contracts, unless there is specific contract language authorizing such damages. For example, if the component produced in Contract A is Government-furnished property for Contract B, any delay in providing the item under Contract B would be grounds for a separate equitable adjustment.

Normal Indirect Cost Adjustment for Additions and Deletions (FAR 15.404-1(c), 15.404-2(a), 15-404-2(d), 15.407-3, and CBC Enterprises, Inc., 24 CT-CL 187).

In most cases, you should estimate the indirect cost effect of additions or deletions using the current estimated or actual indirect cost rates and bases for each accounting period affected by the equitable adjustment. As with direct costs, the current rates may be substantially different than those used to price the contract. As you estimate the effect of the contract change on indirect costs, consider applicable:

- **Forward Pricing Rate Agreements.** A Forward Pricing Rate Agreement (FPRA) is a formal bilateral agreement that binds the contractor to propose the negotiated rates and the Government to accept them in pricing

individual contract actions. Each agreement includes provisions for canceling all or a portion of the agreement if circumstances change and the rate(s) are no longer valid representations of future costs. If the contractor and the Government have negotiated a forward pricing rate agreement (FPRA), and:

  - The effect of the Government action is relatively small considering the contractor's total business base, you should normally use the FPRA rates in negotiating an equitable adjustment.
  - The effect of the Government action is relatively large considering the contractor's total business base, you should contact the contracting officer responsible for FPRA negotiation, to discuss the possible need to reopen FPRA negotiations.

- **Forward Pricing Rate Recommendations.** Forward Pricing Rate Recommendations (FPRRs) are formal rate recommendations developed by the cognizant ACO for all Government buying activities.
  - Although FPRRs are only recommendations, you should not develop an independent position without first contacting the contract administration office that issued the FPRR. The contract administration office should be able to supply information supporting the reasonableness of the recommended rate.
  - Consider inviting the ACO who issued the FPRR and cognizant auditor to attend negotiations concerning indirect cost rates.
- **Audit Recommended Rates.** These are rates developed by Government audit personnel as a result of their review of the contractor's indirect cost rate proposal. The recommendation may result from the audit of the current contract proposal, a recent (within the last 12 months) contract proposal, or a separate indirect cost rate proposal. These are important recommendations, because auditors are the only members of the Government Acquisition Team who have general access to the contractor's accounting records. However, they are recommendations. The contracting officer is still responsible for evaluating contract price reasonableness.

Unabsorbed and Extended Overhead (DCAM 12-603 and 12-803). Indirect costs are absorbed (charged) to various cost objectives using indirect cost rates. As a contract incurs

the indirect cost allocation base, indirect costs are absorbed using the appropriate indirect cost rates.

When the Government stops or delays all or part of the contract effort, the actual indirect cost allocation base (e.g., hours or dollars) for the accounting period will decrease. Unless new, expanded, or rescheduled work under other contracts can replace the affected effort or the indirect cost pool can be reduced, the lower allocation base will increase the actual indirect cost rate for the period. The higher indirect cost rates will directly affect the cost of other contracts.

You can provide equitable adjustment relief to cover any unabsorbed or extended overhead associated with Government delays or work stoppages, if the contractor can show that it necessarily suffered actual damage because the nature of the delay or work stoppage made it impractical to undertake the performance of other work.

Methods for estimating the proper relief for unabsorbed indirect cost are presented later in the chapter.

6.1.3 Profit/Fee Issues

Authority to Adjust Profit (FAR 52.242-14(b)).

Before you allow profit/fee as part of an equitable adjustment, assure that the contract permits such an allowance, either expressly or by implication. For example, the FAR Suspension of Work clause specifically excludes profit from any adjustment resulting from a suspension, delay, or interruption of work under the clause.

Consistent Profit/Fee Rationale. Use the same rationale to establish the profit/fee on added work that you use to establish the profit/fee on deleted work. However, depending on the nature of the work added or deleted and the risk involved, the rates for work added and deleted by the same modification could be different.

Basic Contract Profit/Fee Rate (FAR 15.404-4(c)(6)). For equitable adjustments, you may use the basic contract profit/fee rate as the prenegotiation objective for an

equitable adjustment when the contract change or modification:

- Calls for essentially the same type and mix of work as the basic contract; and
- Is of relatively small dollar value compared to the total contract value.

Major Adjustment Profit/Fee Rate (FAR 15.404-4). When an equitable adjustment does not meet one of the criteria identified above, you must develop a profit/fee objective considering the FAR profit/fee factors and applicable agency guidance.

Incurred Costs And Risk Evaluation. When you evaluate risk as part of profit/fee analysis, consider the relationship between incurred costs and profit/fee. For example, if the negotiations are to definitize an undefinitized contract action, contractor cost risk may be reduced, because substantial costs may have already been incurred. As long as incurred costs are reasonable, they are not subject to estimating error or any type of speculation. There is no forward pricing risk associated with these costs. In addition, the experience gained in incurring these costs may have reduced the cost risk on the remainder of the contract.

Follow your agency profit/fee analysis guidelines in evaluating the effect of incurred costs on contract risk. For example (DFARS 215.404-71-3(d)(2) and NASA 1815.404-471-3(d)(2)):

- If you are assigned to a DoD organization, you must consider any reduced risk on the portion of the contract performed before definitization and the portion that will be performed after definitization.
  - When costs have been incurred prior definitization, generally regard contract type risk to be at the low end of the designated range.
  - If a substantial portion of the costs have been incurred prior to definitization, you may assign a value as low as zero percent to cost risk, regardless of the contract type.
- If you are assigned to NASA, your evaluation of contract risk must consider all attendant circumstances and should not be based solely on the

portion of costs incurred, or percentage of work completed, before definitization.

- Under some circumstances, you may reason that the total amount of cost risk has been effectively reduced.
- Under other circumstances, you may reason that the contractor's cost risk is substantially unchanged.

6.1.4 Proposal Analysis And Negotiation Process Issues

Consider the steps in the following table as you evaluate contractor proposals for equitable adjustments or termination settlements (FAR 43.204(b)).

Analysis And Negotiation Process	
Step	**Action**
1	Assure that the contractor has provided any required cost or pricing data or information other than cost or pricing data in a format suitable for analysis.
2	Request technical and/or audit support required to support proposal analysis. If you need field pricing support, ensure that your request includes a list of any significant contract events which may aid in the analysis of the proposal such as: • Date and dollar amount of the contract award and/or modification. • Date of submission of the initial contract proposal and dollar amount. • Date of alleged delays or disruptions. • Performance dates as scheduled at date of award and/or modification. • Actual performance dates. • Date entitlement to an equitable adjustment was determined. • Date of certification of request for adjustment if certification is required. • Dates of any pertinent Government actions or other key events during contract performance which may have an impact on the contractor's request for equitable adjustment.

3	After technical and/or audit support is received, determine if fact-finding is required to support resolution of identified issues. In determining the need for fact-finding, consider the: • Complexity of the issues involved. • Technical complexity of the requirement. • Dollars involved.
4	Establish your negotiation objective based on the contractor's proposal and other available information. Document and coordinate your objective in accordance with agency procedures. Depending on the circumstances, your objective may be an increase, a decrease, or no change in contract price.
5	Conduct negotiations. During negotiations remind the contractor of the importance of providing current, accurate, and complete data, especially when the contractor is incurring contract costs while negotiations are in progress.
6	Use a bilateral contract modification to document agreement on an equitable adjustment. If the modification definitizes a change order, assure that the modification includes a release similar to the following:
7	If you cannot reach agreement on a fair and reasonable price, issue a unilateral change administratively changing the contract price to a figure that you can support as being fair and reasonable. Advise the contractor that it has the right to pursue a claim under the Disputes clause.

Cost or Pricing Data Exceptions (FAR 15.403-1(c)). **NEVER** require cost or pricing data if the contract or subcontract modification meets one of the following requirements:

- Price analysis clearly demonstrates that the proposed price is reasonable, based on comparison with current or recent prices for the same or similar items;
- Prices are set by law or regulation;
- A commercial-item contract modification does not change the item from a commercial item to a noncommercial item; or

- The head of the contracting activity, without power of delegation, has waived the requirement for cost or pricing data submission.

Requirement for Cost or Pricing Data (FAR 15.403-4(a)). If none of the above exceptions apply, you must obtain cost or pricing data before pricing a contract modification (whether or not cost or pricing data were initially required) when the price is expected to exceed the cost or pricing data threshold:

- When deciding whether cost or pricing data are required, sum the value of related increases and decreases in contract requirements. For example, a $150,000 modification resulting from a reduction of $350,000 and an increase of $200,000 is a $550,000 price adjustment when determining the need for cost or pricing data.
- Do not sum the value of unrelated and separately priced changes for which cost or pricing data would not otherwise be required. Such changes may be included in the same contract modification for administrative convenience.

Modification Cost or Pricing Data Threshold (FAR 52.215-13 and 52.215-21). For prime contract and subcontract modifications, the applicable cost or pricing data threshold is established by the prime contract.

- For most contracts, the applicable cost or pricing data threshold is the current threshold on the date of agreement on price, or the date of award, whichever is later.
- Some older contracts specify a dollar threshold that does not automatically change as the current threshold changes. However, a specific dollar threshold can be updated using a bilateral contract modification.

Cost or Pricing Data Below the Threshold (FAR 2.101 and 15.403-4(a)(2)). You may require cost or pricing data below the cost or pricing data threshold, but only if all three of the following requirements are met:

- The estimated value of related increases and decreases priced together exceeds the simplified acquisition threshold.

- No exception to requiring cost or pricing data applies.
- The head of the contracting activity (without power of delegation) authorizes you to require cost or pricing data.
    - The head of the contracting activity must justify the requirement for cost or pricing data.
    - File documentation must include a written finding that cost or pricing data are necessary to determine whether an offered price is fair and reasonable and the facts supporting that finding.

Cost or Pricing Data (FAR 15.401, 15.406-2, and 52.215-21). Cost or pricing data are all facts that, as of the date of price agreement or, if applicable, another date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Submissions:

- As a minimum, must meet contract data requirements for modifications.
- Require certification as accurate, complete, and current in accordance with FAR 15.406-2.

Information Other than Cost or Pricing Data (FAR 15.401, 15.406-2, and 15.403-3). Information other than cost or pricing data, is any type of offeror information that is necessary to determine price reasonableness or cost/price realism, but does not require certification as accurate, complete, and current, in accordance with FAR 15.406-2. It may include pricing, sales, or cost information.

If you can establish an equitable adjustment using price information alone, you should limit offeror information requirements to price information other than cost or pricing data. For example, the contract modification replaces one catalog-priced item with a similar catalog-priced item. Normally, the equitable adjustment will be limited to the price difference between the two products. Price information other than cost or pricing data should be enough to support the adjustment.

If you need cost information other than cost or pricing data, you can use FAR Table 15-2 as a guide to assist you in developing tailored information requirements. Limit requirements to the information that you need to determine

price reasonableness. Normally, you should permit the contractor to select the format that the firm will use to submit information other than cost or pricing data.

6.2 Pricing Contract Changes

Contract Change Authority. A change is any alteration within the scope of the contract that is made under the authority of the contract Changes clause. As delineated in the table below, the type of changes that can be made under the authority of the Changes clause depends in part on the type of contract involved.

Contract Changes Under the Changes Clause	
Type of Contract	**Changes That Can Be Made**
Non-Commercial Supply-Fixed-Price Contract or Cost-Reimbursement FAR 52.243-1 FAR 52.243-2	• Drawings, designs, or specifications when the supplies to be furnished are to be specifically manufactured for the Government in accordance with the drawings, designs, or specifications. • Method of shipping or packing. • Place of delivery
Non-Commercial Service-Fixed-Price Contract or Cost-Reimbursement FAR 52.243-1, Alt I or II FAR 52.243-2, Alt I or II	• Description of services to be performed. • Time of performance (i.e., hours of the day, days of the week, etc.). • Place of performance of services.
Time-and-Material or Labor-Hour FAR 52.243-3	• Drawings, designs, or specifications • Method of shipping or packing. • Place of delivery • Amount of Government-furnished property
Architect-Engineer or Other	• Services to be performed.

Professional Services Contracts-Fixed Price FAR 52.243-1, Alt III	
Transportation Services - Fixed Price FAR 52.243-1, Alt IV	• Specifications. • Work or services. • Place of origin. • Place of delivery. • Tonnage to be shipped. • Amount of Government-furnished property.
Research and Development-Fixed-Price Contract or Cost-Reimbursement FAR 52.243-1, Alt V FAR 52.243-2, Alt V	• Drawings, designs, or specifications. • Method of shipping or packing. • Place of inspection, delivery, or acceptance.
Construction or Dismantling, Demolition, or Removal of Improvements-Fixed-Price Contract FAR 52.243-4	• Specifications (including drawings and designs). • Method or manner of performance of the work. • Government-furnished facilities, equipment, materials, services, or site. • Acceleration in the performance of the work.
Construction -Cost-Reimbursement FAR 52.243-2, Alt III	• Plans and specifications or instructions incorporated in the contract.
Facilities-Cost-Reimbursement FAR 52.243-2, Alt IV	• Facilities or work described in the contract.

Initiation of Changes. You can implement contract changes, initiated by the Government or the contractor, under the

Changes clause. For example, you can change the contract specifications because of a change in Government requirements or because of a product improvement recommended by the contractor.

Unilateral and Bilateral Modifications (FAR 43.103, 43.101, 52.212-4(c), and 52.243-1). In Government contracting, there are two basic types of authorized contract modifications -- unilateral and bilateral:

- Unilateral modifications are signed only by the contracting officer.
  - Unilateral modifications are not permitted under the standard FAR Contract Terms and Conditions -- Commercial Items clause. However, the clause may be tailored to provide for unilateral contract modification.
  - Unilateral modifications under Changes clauses for all other contracts are known as change orders.
  - You can use a change order to direct the contractor to modify the contract elements identified in the contract Changes clause without the contractor's consent.
  - The contractor is required to continue performance of the contract as changed and can request an equitable adjustment within the period prescribed in the contract.
- Bilateral modifications are signed by both the contractor and the contracting officer. You can use a bilateral modification to:
  - Define all aspects of the contract modification, including an equitable adjustment, at the time that the change is made;
  - Incorporate a negotiated equitable adjustment that resulted from a unilateral contract change; or
  - Definitize a letter contract.

Preference for Bilateral Modifications (FAR 43.102(b)). Price contract modifications, including changes that could be issued unilaterally, before their execution if you can do so without affecting the interest of the Government. If a significant cost increase could result from the contract modification and time does not permit price negotiation, negotiate a not-to-exceed price whenever practical.

Costs to Consider (FAR 52.243-1, 52.243-2, 52.243-3, and 52.243-4). Carefully read the Changes clause in the contract before you attempt to negotiate an equitable adjustment. The Changes clauses for fixed-price supply and service contracts, cost-reimbursement supply and service contracts, time-and-materials/labor-hour contracts, and fixed-price construction contracts all include words similar to the following:

> If any such 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 or not changed by the order, the Contracting Officer shall make an equitable adjustment....

The various Changes clauses require the contractor to assert its right to an equitable adjustment within a specific number of days. However, if the facts justify, the contracting officer may receive and act upon a request received at any time prior to final payment under the contract.

An equitable adjustment under the Changes clause can consider:

- **The Cost of Changed Work.** You can negotiate an adjustment in both the direct and indirect costs of changed work.
- **The Cost Effect on Unchanged Work.** You can negotiate an equitable adjustment for any increased costs for unchanged work incurred as a result of the change.
- **The Cost of Preparing a Request for Equitable Adjustment.** To obtain an equitable adjustment, the contractor must submit a proposal asserting its right to an adjustment. Since this proposal is required by the contract, the costs related to proposal preparation are allowable in accordance with the terms of the contract.
- **Costs Related To The Change Incurred Before Contractor Notice in Construction.** The Changes clause for fixed-price construction contracts is unique in that it includes a provision allowing you to consider costs related to changes other than written contract modifications signed by the contracting officer.
    - Other written or oral orders (including direction, instruction, interpretation, or determinations) may be considered as changes

under the Changes clause provided that the contractor provides the contracting officer with a written notice stating the following:
  - The date, circumstances, and source of the order.
  - The contractor regards the order as a change order.
  - Under this clause, you can make an equitable adjustment for costs related to a change that were incurred even before the contractor provided written notice of the change. If the request for equitable adjustment is:
  - Based on defective specifications and the Government is responsible, include in the equitable adjustment any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
  - Not based on defective specifications, do not make any adjustment for change-related costs incurred more than 20 days before the contractor provided written notice.

Costs Not to Consider (FAR 31.201-2, 31.205-47(f)(1), 52.243-1, 52.243-2, 52.243-3, and 52.243-4).

Never consider the following types of cost when making an equitable adjustment:

- **Affected Costs On Other Contracts.** A contract modification may affect the costs of performing other contracts. For example modifying a production operation could eliminate labor-hour improvement anticipated when a related contract was priced. Do not consider an equitable adjustment for cost increases or decreases for other contracts, unless there is specific contract language authorizing such adjustment.
- **Costs Of Changes Made By Persons Other Than The Contracting Officer.** Except for construction (see above), the Changes clauses do not provide for equitable adjustments based on changes made by persons other than an authorized contracting officer.
- **Costs Of Prosecuting A Claim.** The costs of preparing an equitable adjustment are allowable, but the costs of prosecuting a claim or appeal against the Government are not. Normally, a request for equitable becomes a claim when it is certified as a claim or the

contracting officer issues a final decision and the contractor proceeds with action under the contract Disputes clause.

- **Costs That Are Otherwise Unallowable.** Costs that are generally unallowable for other contract actions under the general factors for determining cost allowability are also unallowable for contract changes.

Profit/Fee (FAR 52.243-1, 52.243-2, 52.243-3, and 52.243-4). Equitable adjustments for a contract change should include profit/fee unless specifically precluded by the contract. The FAR Changes clauses do not preclude including profit/fee in an equitable adjustment. However, another contract clause may preclude including profit/fee in an adjustment.

Change Order Accounting (FAR 52.243-6). If the contract includes the Change Order Accounting clause, you may require change order accounting whenever the cost of a change or a series of related changes exceeds $100,000. Under change order accounting, the contractor must maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable direct costs (less allocable credits) for work, both changed and unchanged, allocable to the change order. The contractor must maintain the accounts until the parties agree to an equitable adjustment or the matter is conclusively disposed of in accordance with the Disputes clause.

If the contract does not include the Change Order Accounting clause, assure that the contractor knows that accurate records of actual costs can be extremely valuable in pursuing any request for equitable adjustment.

Resolution and Release (FAR 43.204(c)). To avoid later controversy, ensure that the equitable adjustment addresses all elements that require adjustment as a result of the contract modification.

If the modification definitizes a change order, assure that the modification includes a release similar to the following:

Contractor's Statement Of Release
In consideration of the modification(s) agreed to herein as complete equitable adjustment(s) for the

Contractor's _____(describe)_____ "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts and circumstances giving rise to the "proposal(s) for adjustment" (except for _____).

6.3 Other Situations Requiring Adjustment

Other Equitable Adjustment Situations. Contracts contain other clauses that provide for an equitable adjustment for Government action or inaction that affects contract performance. This section examines adjustments related to: Government property; suspension of work; Government delay of work; or a stop-work order.

Clauses Providing Basis for Adjustment		
Clause	**Use ...**	**The contractor may be due an equitable adjustment if...**
Government Property (Fixed-Price Contract Contracts) FAR 52.245-2	Required for all non-commercial-item fixed-price contracts unless Short Form is used or cost of item to be repaired does not exceed simplified purchase threshold.	• The property is not delivered to the contractor by the scheduled time. • The property is received by the contractor in a condition not suitable for the intended use. • The Government decreases the property provided or provides substitute property. • The Government fails to repair or replace Government property for which the Government is responsible.
Government Property (Cost-Reimbursement Contract, Time-and-Material, or Labor-Hour Contracts)	Required for all cost-reimbursement, time-and-material, and labor-hour contracts unless Short Form is used.	

FAR 52.245-5		
Government Property (Short Form) FAR 52.245-4	Optional for non-commercial-item fixed-price, time-and-material, or labor-hour contracts under $100,000.	That property, suitable for its intended use, is not delivered to the contractor.
Suspension of Work FAR 52.242-14	Required for non-commercial-item fixed-price construction or architect-engineer contract	Performance of all or any part of the contract work is, for an unreasonable time, suspended, delayed, or interrupted: • By an act of the contracting officer in administration of the contract, or • By the contracting officer's failure to act with the time specified in the contract, or within a reasonable time if not specified.
Government Delay of Work FAR 52.242-17	Required for non-commercial-item fixed-price supply contracts. Optional for non-commercial-item fixed-price service contracts.	Performance of all or any part of the work is delayed or interrupted: • By an act of the contracting officer that is not expressly or implicitly authorized by the contract; or • By the failure of the contracting officer to act within the time specified in the contract, or within a reasonable time if not specified.
Stop-Work	Optional for	The stop-work order results

Order FAR 52.242-15	non-commercial-item fixed-price contracts for supplies, services, or research and development Required (Alt I) for cost-reimbursement contracts	in an increase in the time required for, or in the contractor's cost properly allocated to, the performance of any part of the contract; and The contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; or if the facts justify the contracting officer may receive and act on a claim any time before final payment.

Government Property Clauses (FAR 52.245-2, 52.245-4, and 52.245-5). As shown in the table above, all three of the Government property clauses listed provide for an equitable adjustment when the Government fails to provide required Government-furnished property (GFP). In general, any equitable adjustment under one of the Government property clauses must follow the same procedures outlined earlier in the chapter for pricing contract changes.

However, the coverage of the three clauses is not identical. In particular, you should consider the key differences between the long-form and short-form clauses.

Adjustments Under Long-Form Government Property Clauses (FAR 52.245-2 and 52.245-5). The Government Property (Fixed-Price Contract Contracts) and Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts) clauses provide similar detailed guidance concerning when a contractor may be entitled to an equitable adjustment and guidelines affecting that adjustment:

- If Government furnished property (GFP) is received by the contractor in a condition not suitable for the intended use:
  - The contractor must notify the contracting officer, detailing the facts.

    - As directed by the contracting officer, the contractor must either repair, modify, return, or otherwise dispose of the property.
    - After completing the directed action, the contractor can submit a written request for an equitable adjustment.
- If the GFP is not delivered to the contractor by the required time, the contractor can submit a written request to the contracting officer requesting an equitable adjustment for any delay caused the contractor in performing the contract.
- If the contracting officer, decreases the GFP provided or to be provided to the contractor, or substitutes other GFP for the property to be provided by the Government, or acquired by the contractor, under the contract:
    - The contractor must promptly take action as directed by the contracting officer regarding the removal, shipment, or disposal of the property.
    - The contractor can submit a written request for an equitable adjustment based on the contracting officer's action.
- If the contracting officer, withdraws authority for the contractor to use Government property provided under another contract or lease, the contractor can submit a written request for an equitable adjustment.
- If damage occurs to Government property and the risk has been assumed by the Government under the contract:
    - The contractor must repair the property as directed by the contracting officer.
    - If the contractor cannot make required repairs within the time required, the contractor must dispose of the property as directed by the contracting officer.
    - When any property for which the Government is responsible is replaced or repaired by the contractor, the contracting officer must make an appropriate equitable adjustment.

Short-Form Property Clause (FAR 52.245-4). The Government Furnished Property (Short Form) clause provides less detailed coverage than the other two clauses on what situations merit consideration for equitable adjustment. Under this clause, if property suitable for the intended use is not delivered to the contractor, the contractor can submit a written request for an equitable adjustment.

Similar Coverage Under the Suspension of Work and Government Delay of Work Clauses (FAR 52.242-14 and 52.242-17).

Note from the table above that the Suspension of Work and Government Delay of Work clauses both:

- Provide for equitable adjustments as a result of similar acts or failures on the part of the contracting officer.
- Require an equitable adjustment for a performance cost **(excluding profit)** increase necessarily caused by the suspension, delay, or interruption.
- Preclude an equitable adjustment under the clause for any suspension, delay, or interruption:
    - To the extent that performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor, or
    - For which an equitable adjustment is provided for or excluded under any other term or condition of the contract.
    - For any costs incurred more than 20 days before the contractor notifies the contracting officer in writing of the act or failure involved (but this requirement shall not apply to a claim resulting from a suspension order under the Suspension of Work clause).
    - Unless the claim, in a stated amount, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

Unique Government Delay of Work Clause Coverage (FAR 42.1304(b) and 52.242-17). The Government Delay of Work clause (unlike the Suspension of Work clause) does not authorize the contracting officer to order a suspension, delay, or interruption of contract work, and the FAR specifically forbids use of the clause for that purpose.

Stop-Work Order (FAR 52.242-15). The Stop-Work Order clause provides for an equitable adjustment **(including profit)**, if:

- The contracting officer issues a stop-work order;

- The order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of the contract; and
- The contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage. However, the contracting officer may receive and act upon the claim submitted at any time before final payment under the contract.

Adjustment for Unabsorbed Indirect Cost (DCAM 12.803 and 12.804, Togo D. West, Jr., Secretary of Veterans Affairs v. All State Boiler; and All State Boiler v. Togo D. West, Jr., Secretary of Veterans Affairs; US-CT-APP-FC, 42 CCF ¶77,323).

Any of the clauses examined in this subsection could result in an equitable adjustment related to Government delay of contractor performance. When a delay occurs, contractors will often request an equitable adjustment for unabsorbed indirect cost.

- Consider an equitable adjustment for unabsorbed indirect cost when the contractor shows that it was required to stand by during the Government-caused delay and that it was impractical to take on additional work during that period.
    - A contractor is on standby when contract work is suspended for a period of uncertain duration and the contractor can at any time be required to return to work immediately.
    - The contractor can use any relevant information to demonstrate that it was impractical to replace the contract effort in the allocation base. To prevent recovery, the Government must either show that:
    - It was not impractical for the contractor to obtain other work to which it could re-allocate its indirect costs; or
    - The contractor's inability to obtain other work was caused by some circumstance other than the Government-caused delay.
- Consider whether the Eichleay formula results are equitable BCAs and Courts have generally ruled that the Eichleay formula is **the acceptable method** for computing unabsorbed overhead resulting from Government-caused delay.

    - The Court of Appeals for the Federal Circuit has specifically ruled that the Eichleay formula is the exclusive means for calculating unabsorbed overhead in cases arising out of construction contracts.
    - The Armed Services Board of Contract Appeals (ASBCA) has supported the application of the Eichleay formula for the recovery of unabsorbed overhead on manufacturing/supply contracts.
- If the basic Eichleay formula produces inequitable results, consider adjustments to the formula.
- If the use of the Eichleay formula is not appropriate, consider other approaches to estimating unabsorbed indirect cost.

Eichleay Formula. The basic Eichleay formula was originally developed to allocate home office expenses on construction contracts when there is an assumption that almost all overhead is fixed rather than variable. Under the basic Eichleay formula, the normal fixed overhead allocable to a contract is identified and expressed in terms of a daily rate. The daily rate is then multiplied by the days of delay to arrive at the total amount of unabsorbed overhead.

Using the Eichleay formula, the unabsorbed indirect cost of a delayed contract is calculated as follows:

$$\text{Unabsorbed Indirect Cost Adjustment} = \frac{\left(\frac{A}{B}\right) \times C}{D} \times E$$

Where:

A = Total billings for the delayed contract between the date of delayed-contract award and the date of delayed-contract completion.

B = Total company billings for all contracts between the date of delayed-contract award and the date of delayed-contract completion

C = Total fixed overhead between the date of delayed-contract award and the date of delayed-contract completion.

D = Number of days of actual performance between the date of delayed-contract award and the date of delayed-contract completion.

E = Number of days that performance was delayed.

Note: You may use estimates for A, B, C, and D above when the equitable adjustment is negotiated before contract completion and actual values are not known.

Calculation example: Assume that you are administering a contract to remodel office space at your facility. The contractor is denied access to the area for ten days because of a terrorist threat. An equitable adjustment can be calculated using the Eichleay Formula.

A = Total billings on the remodeling contract.	$954,800
B = Total billings on all contracts between award and completion of the remodeling contract.	$3,410,00
C = Total fixed overhead between award and completion of the remodeling contract.	$411,431
D = Number of days between award and completion of the remodeling contract, including the delay.	180
E = Number of days that performance was delayed.	10

$$\text{Unabsorbed Indirect Cost Adjustment} = \frac{\left(\frac{A}{B}\right) \times C}{D} \times E$$

$$= \frac{\left(\frac{\$954,800}{\$3,410,000}\right) \times \$411,430}{180} \times 10$$

$$= \frac{.28 \times \$411,430}{180} \times 10$$

$$= \frac{\$115,200}{180} \times 10$$

$$= \$640 \times 10$$

$$= \$6,400 \text{ equitable adjustment for the delay}$$

Inequitable Eichleay Formula Results (DCAM 12-805). Use of the Eichleay formula is based on the assumptions presented below. If the current situation does not meet these assumptions, consider use of a modified form of the formula or an alternative approach:

- Overhead costs include only fixed costs.
- The contractor cannot replace the suspended work with other work.
- There is a total work stoppage.
- The cost of the delay is the same regardless of the percentage of contract completion. (The formula will produce the same result whether the contract is 1 percent or 99 percent complete.)
- The facilities are operating at or near capacity.

Eichleay Formula Adjustments (DCAM 12-805). The following adjustments to the Eichleay formula may produce more equitable results in the situations identified. Carefully document your rationale for using any of these adjustments.

- **Eichleay Formula Adjusted for a Partial Replacement of Work.** If the contractor replaced a portion of the work involved, consider adjusting the number of delay days to compensate. For example, assume that there is a 40-day delay period and that the contractor cannot replace 75 percent of the work while 25 percent is replaced. Using the basic Eichleay method, the number of delay days would be 40. However, you can compensate for the partial loss by only considering 30 delay days (75 percent of the 40).
- **Eichleay Formula Adjusted for a Partial Work Stoppage.** In cases of a partial work stoppage, the number of days of the stoppage may be adjusted. For example, consider a 50 percent work stoppage for 30 days. Using the basic Eichleay method, the number of days would be 30. You can adjust for the partial stoppage by only considering 15 delay days (50 percent of 30).
- **Eichleay Formula Adjusted for Less Than Capacity Operation.** If the value of total contractor billings during the contract period has been depressed from full capacity, consider adjusting the value of the billings upward to approximate what the value would have been.

Other Methods. If you can document why use of the Eichleay formula is not appropriate, even with adjustments, you may

consider other approaches to estimating unabsorbed indirect cost.

- **Allegheny Formula** (DCAM 12-808). This method visualizes the impact of a delay as a time line. It involves an attempt to recreate what would have happened had the delay not occurred. The difference between the recreated indirect cost rate and the rate actually incurred is the effect on indirect cost expense caused by the Government delay. Only consider this method in situations where:
  - The contractor has the capacity to perform the delayed work simultaneously with other scheduled work.
  - The contractor did not turn down other work during the period of extended contract performance.
- **Simulation Method.** Under the simulation method:
  - Contract billings are divided by the actual days worked to determine average contract billings per day worked.
  - The daily average is then multiplied by the number of days of delay to simulate the work that would have been performed had the delay not occurred.
  - This amount is added to both contract billings and total billings, the resulting ratio is used to allocate total overhead to the contract.
  - The total amount so allocated, less the amount allocated to actual work performed, yields the cost of the delay.
- **Burden Fluctuation Method.** Do not use this method if you believe that the original contract offer may have been underestimated. Under this method:
  - The difference between the experienced rates and the rates used by the contractor in its bid/proposal is calculated, and this difference is multiplied by the value of residual labor costs.
  - The residual labor costs represent the difference between the incurred total direct labor dollars and the labor dollars incurred on the contract.
  - The result is designated as unabsorbed overhead.
- **Total Cost Method.** This method is seldom used by BCAs. In the rare cases where this method must be used, a price adjustment would represent the difference between the total cost used to estimate total contract

price and the costs actually incurred in contract performance. Before considering this method require the contractor to prove that:
  - The nature of the delay/disruption makes it impossible or highly impracticable to directly determine actual delay costs with a reasonable degree of accuracy.
  - The original offer was realistic.
  - The actual incurred costs were reasonable.
  - The Government was responsible for the differences between the offered and incurred costs.

Other Cost Considerations. Other unique costs that you will encounter in considering equitable adjustments related to suspensions, delays, or interruptions will include the following:

- **Labor stand-by cost.** During the suspension, delay, or interruption, there may have been a period of time when the contractor had to pay workers for non-productive effort.
  - To the extent the contractor could not eliminate the cost, the Government is liable.
  - If the contractor simply kept the work force standing by and did not take prudent steps to reassign work or release workers, then the Government would not be liable for the excess costs.
- **Rental equipment stand-by.** Rental equipment may be required to stand by during the suspension, delay, or interruption:
  - If the contractor has rented equipment for use on the contract, and must incur additional rental costs, the Government is liable.
  - If the contractor had the opportunity to use the equipment on another job or return it to the rental company during the period of delay, then the Government would not be liable for the excess costs.
- **Loss of efficiency.** While more abstract than the previous examples, the contractor may be entitled to compensation for increased costs due to inefficiencies resulting from the suspension, delay, or interruption. For example, the layoff and rehiring of skilled tradesmen can create inefficiencies due to different people than the original work force members being

rehired and retrained. In this case, cost/price analysis must be used to determine if inefficiency exists, and what the difference is between the actual cost of performance and what the costs would have been if not for the suspension, delay, or interruption.

6.4 Definitizing Undefinitized Contract Actions

Undefinitized Contract Action (FAR 16.603, DFARS 217.7401, and 217.7601). An undefinitized contract action (UCA) is any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. As used here:

- The term includes:
  - Letter contracts -- written preliminary contractual instruments that authorize the contractor to begin immediately manufacturing supplies or performing services;
  - Unpriced orders under basic ordering agreements; and
  - Provisioned item orders -- an undefinitized order issued under a contract which includes the Government's requirements for an established range and quantity of spare parts, repair parts, support equipment, and test equipment required to operate and maintain an end item for an initial period of service.
- The term does not include:
  - Unilateral changes under the contract Changes clause;
  - Administrative changes;
  - Funding modifications; or
  - Any other modifications that are within the scope and under the terms of the contract (e.g., engineering change proposals or value engineering proposals).

Undefinitized Contract Action Use (FAR 16.603-2(a) and DFARS 217.7403). UCA use must be approved by the head of the contracting activity in accordance with FAR and agency guidelines. Only consider UCA use when:

- The negotiation of a definitive contract action is not possible in sufficient time to meet Government requirements, and
- The Government interest demands that the contractor be given a binding commitment so that contract performance can begin immediately.

Definitization (DFARS 217.7401(b)). Definitization is the agreement on, or determination of, contract terms, specifications, and price, which converts an undefinitized contract action to a definitive contract.

Ceiling Price (FAR 16.603-2(b) and DFARS 217.7404-2). Each UCA should include a not-to-exceed price.

- All letter contracts awarded based on price competition must include a not-to-exceed price.
- All UCAs issued by DoD activities must include a not-to-exceed price.

Definitization Schedule (FAR 16.603-2, 52.216-25, and DFARS 217.7404-3(a)). Each letter contract must include a definitization schedule, including the following:

- Dates for submission of the contractor's:
  - Price proposal;
  - Required cost or pricing data;
  - Make-or-buy plan (if required); and
  - Subcontracting plan (if required).
- A date for the start of negotiations.
- A target date for definitization. Establish the earliest practicable target date for definitization.
  - Unless the period is extended following agency procedures, letter contracts must be definitized no later than
  - 180 days after the date of the letter contract; or
  - Before completion of 40 percent (50 percent for the DoD) of the work, whichever occurs first.
  - In the DoD, all UCAs must provide for definitization by the earlier of the following dates:
  - 180 days after UCA issuance (this date may be extended but may not exceed 180 days after the contractor submits a qualifying proposal), or

    - The date on which the amount of funds obligated under the contract action is equal to more than 50 percent of the not-to-exceed price.

Maximum Liability (FAR 16.603-2(d), 52.216-24, and DFARS 217.7406(a)). Use the Limitation of Government Liability clause to limit Government contract liability prior to definitization. Under that clause, liability is restricted to a maximum of 50 percent of the contract price (unless a higher maximum is approved in advance by the official that authorized the letter contract).

Provisional Billing Prices. In some cases contractors have asked the Government for billing prices for use on items delivered under UCAs. Take care to ensure that such requests are appropriate under the unique circumstance of the contract action. Further, the billing price should be set at a level where the contractor will still be motivated to negotiate within the definitization schedule and within the funding limits established in the contract action.

6.5 Special Considerations For Pricing Claims

Introduction (FAR 52.233-1). Any of the pricing actions considered in this chapter may result in a claim against the Government.

- A claim is a written demand or assertion by one of the contracting parties seeking, as a matter of right:
    - The payment of money in a sum certain;
    - The adjustment or interpretation of contract terms; or
    - Other relief arising under or relating to the contract.
- A written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a claim under the Disputes clause until it is certified (see Claim Requirements below).
- A voucher, invoice, or other routine request for payment may be converted to a claim under the Contract Disputes Act, by complying with the submission and certification requirements.

Contractor Claim Submission (FAR 33.206(a)). A contractor claim must be made in writing and submitted to the

contracting officer for written decision within six years after accrual of the claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995.

Government Claims (FAR 33.206(b)). The contracting officer must issue a written decision on any claim initiated by the Government against the contractor within six years after accrual of the claim, unless the contracting parties agree to a shorter period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

Requirement for Claim Certification. Contractors must certify any claim:

- Exceeding $100,000. Increased costs and decreased costs must be added to determine if the dollar threshold has been met.
- Regardless of amount when using:
  - Arbitration conducted pursuant to 5 U.S.C. 575-580; or
  - Any other Alternate Dispute Resolution (ADR) technique that the agency elects to handle in accordance with the Alternate Dispute Resolution Act (ADRA)

Certificate Execution (FAR 33.207). The certification must:

- Read as follows:

"I certify that the claim is made in good faith; that the supporting data are accurate complete and current to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor."

- Be executed by a person duly authorized to bind the contractor with respect to the claim. That person should have knowledge of the:
  - Basis of the claim;

    - Accuracy and completeness of the support data; and
    - Claim itself.

Defective Certification (FAR 33.208). A claim certification that does not meet the above requirements is defective. A defective certification will not deprive a Court or BCA of jurisdiction over the claim. However, the Court or BCA must require correction of a defective certification before entry of final judgment.

Fraudulent Claims (FAR 33.209). If the contractor is unable to support any part of a claim and there is evidence that the inability is attributable to contractor misinterpretation of fact or contractor fraud, you must refer the matter to the agency official responsible for investigating fraud.

Cost or Pricing Data Certificate (FAR 33.207). The contractor is not required to submit a Certificate of Current Cost or Pricing Data in support of a claim under the Disputes clause.

Contracting Officer's Authority (FAR 33.210). As a contracting officer, you have authority, within the limits of your warrant to decide or settle all claims arising under or relating to a contract subject to the Contract Disputes Act. This authority does not extend to:

- A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
- The settlement, compromise, payment, or adjustment of any claim involving fraud.

Contracting Officer's Decision (FAR 33.211). When a claim cannot be resolved by mutual agreement and a decision on the claim is necessary, you must:

- Review the facts pertinent to the claim.
- Secure assistance from legal and other advisors.
- Coordinate with the contract administration office or contracting office as appropriate.
- Prepare a written decision following FAR requirements. If the decision results in a finding that the

contractor is indebted to the Government, the decision must include a Demand for Payment.
- Furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by other method that provides evidence of receipt.

Interest on Contractor Claims (FAR 33.208). The Government must pay interest on any amount found due under a contractor's claim.

- Interest must be on the amount found due and unpaid from:
  - The date the contracting officer receives the claim (properly certified, if required); or
  - The date payment otherwise would have been due, if that date is later.
- If the contractor submits a claim with a defective certification:
  - Interest must be paid from the either the date that the contracting officer initially received the claim or October 29, 1992, whichever is later.
  - If a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest must be paid from the date the proper certificate was received by the Government.
- Simple interest is calculated from the proper date above until the date of payment. The rate shall be the rate determined by the Secretary of the Treasury which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period that the claim is pending.

Interest on Government Claims (FAR 32.614-1, 33.208(b), and 52.232-17). The contractor may also be required to pay interest on an amount found due under a Government claim.

- The FAR Interest clause requires interest on any contractor debt unpaid after 30 days from issuance of a demand unless the contract:
  - Specifies another due date or procedure for charging or collecting interest;
  - Is a kind excluded from the requirement to include the Interest clause;

    - The contract or its debt has been exempted from interest charges under agency procedures.
- If interest is not already applicable under the contract terms, interest in contractor debt must be made an element of any agreement entered into on deferment of collection.
- Unless otherwise specified in the Interest clause, the interest charge must be at the rate established by the Secretary of the Treasury under Public Law 92-41 (also known as the Prompt Payment Act Interest Rate and available at the Treasury's Bureau of Public Debt Website) for the period in which the amount becomes due. The interest charge must be computed for the actual number of days involved beginning with the due date and ending on the date:
    - On which the designated office receives payment from the contractor;
    - Of issuance of the Government check to the contractor from which an amount otherwise payable has been withheld as a credit against the contract debt;
    - On which an amount withheld and applied to the contract debt would otherwise have become payable to the contractor; or
    - Of any applicable tax credit under Section 1481 of the Internal Revenue Code.