

THE “CONSTRUCTIVE CHANGE DOCTRINE”—AN IMPORTANT EXCEPTION TO THE CHANGES CLAUSE’S NOTICE REQUIREMENTS FOR EQUITABLE ADJUSTMENT

BY JACK HORAN, JD

ON MAY 2, 2008, THE U.S. NAVAL FACILITIES ENGINEERING COMMAND (NAVFAC) AWARDED A CONTRACT¹ TO NOVA GROUP/TUTOR-SALIBA (NTS), A JOINT VENTURE, TO DESIGN AND BUILD A NEW SHIP REPAIR WHARF (KNOWN AS “PIER B”) AT THE PUGET SOUND NAVAL SHIPYARD AND INTERMEDIATE MAINTENANCE FACILITY IN BREMERTON, WASHINGTON.

The contract contained a “Liquidated Damages” clause that required NTS to design and complete construction of Pier B within 1,345 calendar days. The clause imposed liquidated damages of \$35,475 per day for each day construction extended beyond the 1,345 days.

The contract also contained *Federal Acquisition Regulation (FAR) 52.243-4*, “Changes”—the standard “Changes” clause for fixed-price construction contracts. The Changes clause states:

Any other written or oral order (which...includes direction, instruction, interpretation, or determination) from the contracting officer that causes a change shall be treated as a change order under this clause... [N]o adjustment for any change [based on action other than a written change order]...shall be made for any costs incurred more than 20 days before the contractor gives written notice [of the basis for the adjustment].²

Under the contract, NTS was granted the authority and responsibility to:

Determine the method of analyzing the environmental forces that would affect the pier’s piles and their global stability, and

Design the pier to withstand these forces.

NTS subcontracted these two contract requirements to KPFF Consulting. KPFF analyzed the environmental forces and the global stability of NTS’ design of Pier B’s piles³ using the American Concrete Institute’s (ACI) *Building Code Requirements for Structural Concrete*,⁴ and determined that NTS’ design met the contract’s requirements.

NTS submitted four Pier B designs, and NAVFAC replied with 382 design review comments—none of which dealt with the global stability of the piles or KPFF’s decision to use the ACI *Building Code* for analyzing the forces on the piles. NAVFAC approved NTS’ design on November 12, 2009, including the structural design and the global stability assessment of the piles.

In mid-February 2010, engineering consulting firm BergerABAM reviewed NTS’ design for the wharf and had concerns, which it raised with NAVFAC. On March 8, 2010 (more than five months after design approval), NAVFAC’s construction manager questioned whether NTS’ design met the performance design load requirements that were outlined in the original request for proposals (RFP):

Based on the attached BergerABAM correspondence dated 12 February 2010, the Navy has concerns that the final approved design, relying heavily upon a SAP 2000 [computer design program] model with



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respect to the performance design loads, may not be in conformance with the RFP when considering global stability and the observed out of tolerance piles.⁵

In the February 12, 2010, correspondence mentioned by NAVFAC's construction manager, BergerABAM questioned NTS' design based on a different analytical method to determine performance design load:

The design approach did not include a check for overall stability of [the wharf] for load combinations based on the RFP provisions.... KPFF maintains the evaluation of ACI 318-05 Section 10.13.6a demonstrates the pier satisfies side sway buckling under gravity load condition. However, this particular provision is based on results from an analytical model, which is susceptible to the accuracy of the input properties of geometry and structural characteristics of the physical system. Consequently, BergerABAM contends Chapter 10.13.6c is the more appropriate provision because the geometric properties can be verified, are more apparent, and are directly related to Euler buckling (global instability). With this evaluation, it appears to satisfy properties generally associated with good engineering practice only under favorable conditions of structural properties.⁶

In short, the government contended that KPFF's failure to consider global stability under a second paragraph of the ACI *Building Code* resulted in a design that did not meet the solicitation requirements.

Upon receipt of the letter, NTS immediately stopped construction and evaluated its design and KPFF's analysis—despite the previous government approval of the design. Although not directed to stop work, NTS determined that the risk of facing "extensive additional corrective construction work" if the design was flawed outweighed the costs of stopping work. NTS believed that "no reasonably prudent contractor would continue with critical construction in the face of such a notice from the Navy."

KPFF hired an independent third-party designer to review its approved design during the "stop work" period. The designer concluded that the design method was appropriate, and the design complied with the solicitation requirements. NTS and KPFF also participated in meetings with the U.S. government and "furnished detailed reports substantiating NTS's original design." NTS later alleged that the government "knew that NTS had stopped performing critical [Pier B] construction work" during this review of the government-approved design.

On May 27, 2010, the government sent NTS a second BergerABAM memorandum concluding that the design of the pier "adequately addressed global stability issues," finding that it was "technically sufficient." NTS resumed work the same day, and attempted to offset the delay resulting from the stop work "by accelerating the remaining construction work, adding manpower and equipment, and providing for 'significant levels of overtime.'" According to NTS, the "decreased efficiency and the resulting constructive

acceleration necessitated by the work stoppage" required NTS to incur "increased costs to meet the project deadline." At this time, NTS believed the government observed, encouraged, and approved the acceleration and overtime. In a July 21, 2010, letter, the government expressed concern about, and reminded NTS of, the construction completion deadline.

NTS formally notified the government of its intent to issue a request for equitable adjustment (REA) to the contract price by letter dated September 3, 2010:

REA # 14. GLOBAL STABILITY ISSUES, PIER B

The government issued Serial No. 0106, dated March 8, 2010, advising of BergerABAM's concerns that the final approved design may not be in conformance with the RFP. The government requested that [KPFF] provide analytical models for both CLE [contingency-level earthquake] liquefied and non-liquefied conditions. In addition, detailed example calculations for battered piles were requested. The concern that the design was not in conformance with the RFP required all work on Pier B to be stopped until these issues were resolved. This delay impacted all Pier B work for several months and has required NTS to accelerate the falsework operation to mitigate the delay to the construction schedule.⁷

After receipt of the notification of the REA, the government, by letter dated November 12, 2010, again expressed its concern over NTS completing construction as scheduled. On April 1, 2011, NTS

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quantified the REA amount at \$1,881,900, plus interest, and argued that it incurred the increased costs because of the delay in construction caused by the government’s challenge to the pier design. On February 5, 2013, the government denied the request, finding that “the government did not stop NTS’ work from March 8, 2010, to May 27, 2010.”

NTS requested a contracting officer’s final decision, which it received September 4, 2014. The government denied NTS’ claim, finding:

NTS had failed to provide written notice “before implementing the stated changes to accelerate the work...until 11 months after the costs were incurred,” in violation of FAR 52.243-4’s 20-day notice requirement.⁸

NTS appealed the final decision to the Court of Federal Claims. The case is noted as *Nova Group/Tutor-Saliba v. United States*, 125 Fed. Cl. 469 (2016).

The positions on appeal were simple. NTS claimed:

[The government] constructively changed its contract by questioning its design compliance with the RFP during a critical phase of construction, resulting in a work stoppage followed by accelerated construction to meet the contract deadline.⁹

Under the Changes clause at FAR 52.243-4, a “constructive change” occurs when a contracting officer’s action or omission has the same effect as a formal change order.

The government asked the Court to dismiss the case because “NTS’ failure to give timely written notice of the claim as required by FAR 52.243-4” barred NTS from receiving an equitable adjustment under the Changes clause. The government argued:

[Written notice] allows the government to clarify and/or reverse any incorrect or misunderstood direction and allows the government the ability to execute the correct contractual processes and mitigate cost and/or impacts.... [The notice also permits the government to account for] what amounts it might be on the hook for, so that it will not be surprised by money claims later.¹⁰

The Court provided a clear and concise description of the elements a contractor has to prove in order to establish that a constructive change occurred. Specifically, a plaintiff must show that both of the following occurred:

That it performed work beyond the contract requirements, and

That the additional work was ordered—expressly or impliedly—by the government.

The Court found NTS adequately alleged that the March 8, 2010, letter (questioning the previously approved design) caused the stop work, constructively changing the performance period and requiring an acceleration of performance. The Court concluded that NTS’ allegations were sufficient to survive a motion to dismiss the constructive change claim.

The Court rejected the government’s argument that NTS’ failure to provide written notice of the constructive change within 20 days of incurring additional costs—as required by the Changes clause—barred its claim. Citing the Federal Circuit’s decision in *K-Con Bldg. Sys. v. United States*,¹¹ the Court noted:

[E]xtenuating circumstances such as the government’s actual or imputed notice of circumstances giving rise to the claim “have weighed against strict enforcement of the time limit” imposed by FAR 52.243-4.¹²

According to the *K-Con* decision:

[A] severe and narrow application of the notice requirements [of the Changes clause]...would be out of tune with the language and purpose of the notice provisions, as well as with this Court’s wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the government is quite aware of the operative facts.¹³

Thus, the Court concluded:

[An] exception to strict enforcement of the 20-day notice requirement [exists] where the contracting officer is on notice of the circumstances giving rise to the claim.¹⁴

In this case, the Court found that the government likely knew of the circumstances leading to the constructive change (i.e., the stop work and the later acceleration of performance), and as such, the Court had

The main gate at the Puget Sound Naval Shipyard. Photo credit: NAVSEA, U.S. Navy.



no trouble finding that the exception to the Changes clause's 20-day notice requirement applied:

The government "issued the March 8, 2010, letter raising design issues five months after the government had approved NTS' design"¹⁵;

The government "knew that NTS had stopped performing critical Pier B construction work"¹⁶; and

The government "observed and approved the significant extra work during acceleration."¹⁷

The Court stated:

It would have been strange for the government not to have known of a work stoppage for over two months followed by acceleration prompted by the government's warnings about schedule slippage.¹⁸

Given the government's knowledge, the failure to provide the 20-day notice required by the Changes clause did not bar NTS' constructive change claim for an equitable adjustment. In short, NTS' failure to tell the government what it already knew did not prevent the later claim for an equitable adjustment.

The exception is consistent with the government's rationale for the notice requirement. Even without formal notice from NTS, the government possessed actual knowledge of the stop work and acceleration. This actual knowledge allowed the government to:

"[C]larify and/or reverse any incorrect or misunderstood direction," and

"[E]xecute the correct contractual processes and mitigate cost and/or impacts."¹⁹

Therefore, the government was not prejudiced by the late notice, even under its own rationale for the purpose of the notice.

The *Nova Group/Tutor-Saliba* case illustrates a fundamental principle of government contracts law: A failure to comply with the notice requirement of FAR 52.243-4—or, for that matter, the notice require-

ments of any other Changes clause—does not necessarily forfeit an otherwise meritorious claim. If a contractor can show that the government had knowledge of the basis of the claim, a court or board will permit recovery, in large part because the lack of notice did not prejudice the government. Despite this principle, NTS faced the risk of dismissal (and additional litigation costs) by failing to provide the notice contemplated by FAR 52.243-4. As often preached here in this column, reading and following the contract terms can protect against risk and save money. However, thanks to the exception discussed in *Nova Group/Tutor-Saliba*, all is not lost when a formal notice is overlooked or delayed.

The *Nova Group/Tutor-Saliba* case also provides an example of an important principle concerning constructive change claims: Even where the government does not issue a formal change order, a contractor is entitled to recovery of increased performance costs when the action or omission of an authorized government official has the effect of a change order.

In *Nova Group/Tutor-Saliba*, the government did not:

Issue a formal stop work order,

Otherwise formally change the performance schedule, or

Formally direct accelerated performance.

However, the following actions by the government had the same effect as a change order:

Sending a letter questioning the adequacy of the previously approved design—The government constructively directed NTS to stop work and confirm its design as the only reasonable course.

Insisting that NTS maintain the original completion date—The government constructively directed NTS to accelerate performance to meet the original completion date due to the delays caused by the work stoppage the government had also constructively directed.

The "constructive change doctrine" states that a contractor may have a valid claim for

compensation for increased costs caused by formal changes in the manner, method, or scope of work where no formal change order has been issued. In *Nova Group/Tutor-Saliba*, the constructive change doctrine treats the actions of the government as formal change orders and permits recovery of the additional costs incurred by NTS as a result of these actions.

Contractors should consider this alternative path to an equitable adjustment when the government's actions or omissions caused increased costs—even in the absence of a formal change order. **CM**

ENDNOTES

1. Contract No. N44255-08-C-6000.
2. FAR 52.243-4(b) and (d).
3. I.e., the structures that would anchor the foundation of the raised pier platform to the ground.
4. An international consensus-based standard that establishes the minimum requirements for the materials, design, and detailing of structural concrete buildings and other structures. Of relevance to the Pier B design, the code addresses "design and construction [of concrete structures] for strength, serviceability, and durability; [and] load combinations, load factors, and strength reduction factors," among other factors. (See, generally, www.concrete.org.)
5. As quoted in *Nova Group/Tutor-Saliba v. United States*, 125 Fed. Cl. 469 (2016).
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. *K-Con Bldg. Sys. v. United States*, 778 F.3d 1000, 1010 (Fed. Cir. 2015).
12. *Nova Group/Tutor-Saliba* (see note 5), citing *K-Con* (*ibid.*).
13. *K-Con*, *op cit.*, as quoted within *Nova Group/Tutor-Saliba* (see note 5).
14. *Nova Group/Tutor-Saliba* (see note 5).
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. As argued by the government as its rationale for dismissal of the case before the Court.