

CONSTRUCTIVE CHANGES AND THE NOTICE REQUIREMENT

Court Recognizes that Government's Actual Knowledge of Changes Fulfills Notice Requirement

INTRODUCTION

A Government agency's typical first line of defense when refuting contractor claims stemming from **Constructive Changes** is to argue that the contractor did not meet the 20-day **notice requirement** under the Changes clause. For decades, Excell Consulting has been tearing down this line of defense and navigating contractors around the notice requirement by arguing a specific principle. In fact, contractors should be aware that the U.S. Court of Federal Claims recently solidified the validity of this principle in its recent decision in the case of [*Nova Group/Tutor-Saliba v. United States*](#), 125 Fed.Cl. 468 (2016) ("NTS"). The NTS case is still good law today.

Jack Horan, JD published a spot-on summary of the NTS case in the November 2016 issue of Contract Management Magazine, entitled: [*The Constructive Change Doctrine – an Important Exception to the Changes Clause's Notice Requirements for Equitable Adjustment*](#), Cont. Mgmt., Nov. 2016 at 16-19. A careful review of both the article and the court opinion will provide a fundamental understanding of how the legal principles at play in the NTS case may apply to any given contractual scenario involving the Constructive Change doctrine.

THE NTS CONTRACT

The issues encountered on the NTS contract began when the government questioned whether the contractor's design was correct – **five months after design approval**. On May 2, 2008, the U.S. Naval Facilities Engineering Command ("NAVFAC") awarded a contract to Nova Group/Tutor-Saliba ("NTS") to design and build a new ship repair wharf (called "Pier B") at the Puget Sound Naval Shipyard in Bremerton, Washington.

The period of performance was set at 1,345 days, beyond which Liquidated Damages were assessable at the rate of \$35,475 per day.

NTS had the contractual responsibility to determine the method of analyzing the environmental forces that would affect Pier B's piles and their stability, and to design the pier to withstand these factors.

NAVFAC approved the NTS design on November 12, 2009, including the structural design and global stability assessment of the piles. **Five months after design approval**, NAVFAC's construction manager questioned whether NTS's design met the performance design load requirements (which had already been approved). NAVFAC asserted that NTS erroneously relied on the wrong section of the industry standard ACI Building Code in its design and analysis.

NTS, believing that “no reasonably prudent contractor would continue with critical construction”¹ in light of NAVFAC’s notice, work stopped on the project to assess whether its design was indeed in error.

Third-party evaluations found the design to be adequate under the specifications, and more than **three months after** NTS stopped work, NAVFAC issued a letter deeming the design to be adequate. Indeed, NTS resumed work the same day, and unilaterally attempted to offset the stop work delay by “accelerating the remaining construction work, adding manpower and equipment, and providing for significant levels of overtime.”

As expected, this acceleration caused additional costs to be incurred and, coincidentally, NAVFAC officials observed, encouraged, and approved the acceleration and overtime. In fact, NAVFAC reminded NTS on several occasions that it was contractually concerned about NTS meeting the original completion date.

Importantly, the contract contained the clause FAR 52.243-4 “Changes” pertaining to firm fixed-price contracts, which includes a standard 20-day “written notice” requirement:

[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].

Almost a year after NTS resumed work on Pier 8, it submitted a Request for Equitable Adjustment (REA) in the amount of \$1,881,900 for costs stemming from the stop work and resulting acceleration concerning the above matter.

The government denied NTS’s request, **stating that NAVFAC never issued a stop work order,** asserting that NTS unilaterally decided to stop its work unnecessarily. NTS reasserted its claim, asking for a Contracting Officer’s (“CO”) final decision on the matter. The government responded by again denying the claim, citing that NTS “failed to provide written notice before implementing the stated changes to accelerate work...until 11 months after the costs were incurred.”²

NTS appealed the final decision to the Court of Federal Claims, asking the court to resolve two questions: (1) whether a “constructive Change” occurred when the Contracting Officer’s action or omission had the same effect as a formal Change Order, and (2) whether NTS’s failure to give notice of the Constructive Change within 20 days barred NTS from receiving and equitable adjustment under the Changes Clause.

CONSTRUCTIVE CHANGE

The Court examined the elements that must be met in order to find a Constructive Change:

1. That the contractor performed work beyond the contractual requirements, and
2. That the additional work was ordered – expressly or impliedly – by the government.

The Court found that NAVFAC’s letter questioning NTS’s design was enough to cause the stop-work, thereby constructively changing the period of performance and resulting acceleration.

NOTICE REQUIREMENT UNDER THE CHANGES CLAUSE

The Court ultimately rejected NAVFAC’s argument that NTS’s failure to provide notice of the Constructive Change within 20 days of incurring additional costs barred its claim. The Court noted that exceptions to this notice requirement were carved out by previous courts, citing the rule established in *K-Con Bldg. Sys. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015):

Extenuating 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.

The crux of this exception is that the Contracting Officer is “**on notice**” of the **circumstances giving rise to the contractor’s claim**, to the extent that the CO can make informed decisions regarding same, and allows the CO to “clarify and/or reverse any incorrect or misunderstood direction,” and “execute the correct contractual processes and mitigate costs and/or impacts.”

This is also known informally as the “**Constructive Notice**” doctrine – **a rule that Excell has been successfully arguing for its clients since 1983, who have never been hung up on a strict 20-day notice requirement**. In other words, the rule holds that if the government actually had knowledge or should have known of the circumstances that caused the contractor to incur additional costs, then the 20-day written notice requirement is **not enforceable, and may not preclude the contractor’s ability to recover those additional costs**.

In NTS’s case, the court found that the CO had “constructive notice” of the acceleration because the CO issued the letter questioning NTS’s design, the government knew that NTS had stopped work on the project, and the government “**observed and approved the significant extra work during acceleration.**”

In short, even though NTS did not provide timely written notice of the acceleration, NAVFAC possessed **Actual Knowledge** of the stop work and acceleration. Therefore, the Court allowed NTS’s case to move forward.

CONCLUSION

The NTS opinion is one of many court-issued examples of the applicability of the Constructive Changes doctrine. Additionally, the Actual Notice doctrine utilized by the Court is applicable to any contractual scenario where a notice requirement exists and the Government actually knew or should have known of the Changes or other factual scenarios surrounding a contract clause that leads to recovery of a contractor’s costs. By utilizing these same legal and contractual principles, with a consultant’s guidance, contractors will be well equipped to **navigate around “notice**

requirement” roadblocks put up by the government. The NTS case gives contractors **a roadmap to follow that will assuredly lead to recovery of additional incurred costs.**

To that end, Excell suggests that contractors “fill the bucket” of incurred costs along the way. That is to say, set up your accounting system to track out-of-scope (and other) costs as you go. This will facilitate recovery of your costs when the time comes to submit, as opposed to trying to forensically assess what the costs were looking back after the fact. In essence, contractors need to position themselves with an AUTOBIOGRAPHY of events and not a BIOGRAPHY of events (i.e. an after the fact rendition of events) to succeed.

¹ [Nova Group/Tutor-Saliba v. United States](#), 125 Fed.Cl. at 471.

² *Id.*

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