MODIFICATION OF A GOVERNMENT CONTRACT AWARDED FOLLOWING A COMPETITIVE PROCEDURE

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I. FOREWORD

Each year, the Government solicits millions of bids for procurement contracts, the total value of which is estimated in the billions of dollars.[1] On many occasions, a need arises to modify the terms of a contract after it had been signed.[2] From a pure contract law perspective, this type of change presents no difficulty, as long as the parties to the agreement consent thereto. A totally different situation arises, however, when the contract to be modified was awarded following a competitive bidding procedure. Whether and under what conditions an administrative agency is permitted to modify the terms of a contract executed following a competitive bidding procedure is the topic of this Article.

The resolution reached by the courts with respect to this dilemma constitutes a partial answer to the issue, and this author believes that a proper regulatory approach warrants a more complex regulatory regime. This Article

1. According to Federal Procurement Report FY 2006, the Federal Government itself solicited over three million bids that together totaled over $414 billion. Fed. Procurement Data Sys.—Next Generation, Federal Procurement Report FY 2006, Section III: Agency Views, Total Federal Snapshot Report, *available at* http://www.fpdsng.com/downloads/FPR_Reports/2006_fpr_section_III_agency_views.pdf [hereinafter Fed. Procurement Report].

2. In 2006, the Government effected 605,875 changes to contracts it had signed, worth an estimated value of approximately $215 billion. Fed. Procurement Report, *supra* note 1.

proposes to establish a "presumption of impermissibility," whereby subsequent modification of a procurement contract would not be permitted. Nevertheless, this presumption would be rebuttable in some situations, as will be seen below.

The legal dilemma created by subsequent modifications to a contract awarded by competitive bidding is discussed in the second part of this Article. The third part reviews the policy considerations underlying possible legal resolutions. The fourth part discusses the regulatory regime based on statutory regulations and actual case law. The fifth part proposes this author's alternative solution.

II. THE LEGAL DILEMMA

The need to modify terms of a procurement contract awarded following a competitive bidding procedure may derive from different motives with varying degrees of legitimacy. For example, a modification may become necessary due to a substantive change in circumstances where the original terms of the contract no longer meet the needs of the agency or the public, and therefore the objective of the contract cannot be implemented.[3] A hypothetical example of this kind of need is an equipment procurement contract where a discovery is made after the execution of the contract that all or part of the purchased equipment is no longer needed. Another example is a contract signed for the acquisition of software where it turns out that the software is outdated and no longer meets the needs of the agency.[4]

Sometimes, the change in circumstances results from an unforeseeable event. This could happen, for instance, when precious metals or antiquities are discovered while a highway is being paved. In this situation, the need to modify the existing contract is almost irrefutable. Likewise, subsequent budgetary constraints on the contracting agency may make a contract unfeasible unless modified. Or careless wording of the original contract also can call for modification where failing to modify the contract would frustrate the objective of the contract.[5] In these situations, failure to redefine the limits of the contract may prevent implementation of the entire contract.

Another possible motive for requesting a change to a contract may be a wish to extend the scope of an existing contract to acquire additional goods from the same contractor.[6] For instance, while constructing a school building, another story may need to be added. All of the preceding reasons for modifying existing procurement contracts are arguably legitimate to one degree or another, each dependent on individual circumstances.

3. John Cibinic Jr., Ralph C. Nash Jr. & James F. Nagle, Administration of Government Contracts 380 (4th ed. 2006).

4. *Id.*

5. On defective specification claims, see *id*. at 384. On correction of mistakes in procurement contracts, see FAR 50.302-2.

6. *See* Cibinic, Nash & Nagle, *supra* note 3, at 380.

However, there may be situations where the motive underlying the requested change clearly lacks any legitimacy. For instance, an amendment might be required due to indolence on the part of the agency official in enforcing the terms of a contract breached by a contractor, a fact that may lead to improving the terms of the contract in favor of the contractor. Another motive for modifying the terms of a contract could be the mere convenience of supplementing or expanding an existing contract without expending energy in processing new requests for proposals (RFPs). Or a situation could arise where a Contracting Officer (CO) conspires with a contractor so that both unlawfully benefit from a modification to the contract. These examples are only some of an infinite number of possible situations where parties to a contract may seek to change the terms of contract as initially defined.

Modification of a contract can take on many forms. A modification may be requested at the very start of a contract or later on, when the contract is already in advanced stages of implementation. With respect to the duration of a contract, modification may be requested to shorten or extend the life of the contract. Amendments may be made to designated delivery dates or to the quality or type of goods or services listed in the original contract. The changes may require an adjustment in price or may be made free of charge. The variations are infinite.

A noteworthy point to be made is that a contract modification does not always involve an explicit amendment to the contract. A modification can be an act of omission such as forbearance of the Government from enforcing a breach of contract by the contractor. This de facto forbearance constitutes implicit consent to a contractual modification, without the terms of the contract undergoing any type of alteration. This insight has practical significance because a modification by omission is much more difficult to pinpoint and regulate than an affirmative act of modifying contractual terms.

From a contract law perspective, the issue under discussion does not pose any problem because usually[7] a contract modification made in good faith by the parties, under circumstances not involving coercion or duress, will be legitimate.[8] Whether a specific modification constitutes the "execution" of a new contract or a "modification" of an existing one is irrelevant because the act is one of mutual consent. The legitimacy of a modification is only

7. It is debated whether parties to an originally immutable contract should be allowed to modify it at a later stage if they so wish. *See, e.g.*, Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*, 81 N.Y.U. L. Rev. 487, 487–88 (2006); Christine Jolles, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. Legal Stud. 203, 203–04 (1997).

8. *See, e.g.*, Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919) (Cardozo, J.) ("Those who make a contract, may unmake it."); *see also* Jolles, *supra* note 7, at 204–09 ("The prerogative of contractors to modify their original contract by mutual agreement is an article of faith for contract law. As between two competing expressions of consent—the original contract and the modification—the latter is chosen. . . . Courts and commentators have viewed only potentially coerced modifications as appropriate subjects of legal censure and have never questioned the basic premise that voluntary modifications should always be given effect.").

challenged after a competitively bid government contract is executed and the modification is made under normative conditions that would otherwise require another round of bids pursuant to full and open competition.[9] In such a case, allowing broad license to modify procurement contracts would undermine the whole idea behind the competitive bidding process, which provides equal opportunity for all participants, and would even violate the law. The aim of this Article is to propose a regulatory regime that would distinguish between permissible contract modifications and invalid ones.

Before presenting the resolutions reached by the courts and discussing whether they are sufficient, we will review the policy considerations from which the normative regulatory regime for this issue should be derived.

III. POLICY CONSIDERATIONS IN DEVELOPING THE APPROPRIATE REGULATORY REGIME

A critical examination of the existing legal regime begins by comparing the policies that favor lenient regulation and broad discretion to modify contracts against those policies that favor a stricter approach limiting COs' discretion to modify contracts.

A. *The Case for a Lenient Regulatory Regime*

There are a number of reasons that theoretically justify a lenient rule enabling the CO and the awardee (contractor) to modify a contract already executed between them under a broad variety of circumstances.

1. A Change Necessitated by the Circumstances

Numerous sets of circumstances exist that necessitate changes to existing contract terms. For example, significant new technological developments could require revisions to an agreement in the midst of a long-term project awarded to a contractor after a competitive bidding procedure. Another example may arise during the performance of a long-term contract for health, educational, or social services, where the needs or characteristics of the benefactors change, or the agency changes its policy with respect to the provision of such services. Another hypothetical example is the unexpected discovery of an archaeological site or a mineral quarry in the middle of paving a new highway. The discovery may require the route of the planned highway to be altered, and that could subsequently necessitate many other modifications to the duration of the contract period or the budget. Each of these examples involves contracts where essential adjustments must be made to conform to a new reality. The contracts in these cases must be amended in order to accommodate a new set of circumstances, as continuing the implementation of the

9. On the requirement of full and open competition through use of competitive procedures, see 10 U.S.C. § 2304(a) (2000) and 41 U.S.C. § 253(a) (2000).

original contract would not only be highly impractical but also clearly harmful to the public interest.

The common denominator weaving through the above examples is the fact that the new circumstances were impossible or difficult to anticipate from the start. There could be situations, however, where the need to amend a contract derives not from circumstances that were unforeseeable or outside the procuring agency's control, but from faulty assessments made by the contracting agency. One example is erroneous design estimates discovered in the middle of a construction project that necessitate more excavation than what is specified in the contract. Another example is a long-term contract for the supply of computerization work that fails to provide for changes in technology that were foreseeable at the time the bid was solicited. Or it may become clear that a few more classrooms are needed during the construction of a school, but the parties could have anticipated that need in advance.

Even though the Government's oversight caused the need for modifications in the previous examples, the modifications are not necessarily inappropriate under the circumstances. The mere fact that an agency was deficient in executing its job does not have real significance because in any case the public would have had to bear the extra costs inherent in the additional work despite the agency's oversight. Therefore, it can be argued that the legitimacy of the contract modification should be examined on its own merit with the future in mind.

However, the reason behind the need for the modification has a twofold significance. First, the concern that an oversight committed by the Government is perhaps intentional and not merely a mistake would affect how the requested modification is viewed. Thus, a modification of this sort requires a higher degree of inquiry on the part of the authorizing body to ensure that the modification resulted from an unintended error and not from an ulterior motive. Second, a request to change a contract as a result of oversight by government officials must take into account the question of whether allowing the modification would send the wrong message that "negligence pays." These considerations do not come into play if the modification results from circumstances that were unforeseeable during the competitive bidding process.

2. In Many Cases, a Subsequent Change to a Contract Is Economically Efficient

If the terms of a contract, as drafted, are discovered to be incompatible with the objective of the contract for any reason, then the Government has three options. The first is to cancel the contract and solicit new bids.[10] The second is to continue with the original contract without any amendments, even though the contract is no longer compatible with the Government's

10. *See* Krygosky Constr. Co. v. United States, 94 F.3d 1537, 1543–44 (Fed. Cir. 1996); Torncello v. United States, 681 F.2d 756, 771–72 (Fed. Cl. 1982); FAR 12.403; *see also* FAR 49.501-5; FAR 52.249-2 to 52.249-5 (providing for termination for convenience of the Government); Cibinic, Nash & Nagle, *supra* note 3, at 1049–68.

needs or objectives. The third option is to revise the contract in accordance with the new needs, so that it would most beneficially serve the Government's interests.[11]

From an economic standpoint, none of these options is ideal, and each comes with a price tag. The first option, canceling the contract, translates into a loss of time and significant delays in the implementation of the contract, involves high transaction costs in holding another competitive bidding procedure, and carries the risk that cancellation of the contract would bind the Government to pay compensation to the injured bidder.

The second option, continuing the contract without change, is apt to waste public funds, is likely to be inefficient, and carries the risk that the contract might not fulfill the Government's objectives and would require the solicitation of a new contract in order to complete or compensate for the failed one. The third option, revision of the contract, is also not necessarily efficient because it also involves transaction costs, there is no assurance that the change will lead to a more efficient contract, it could affect the public's trust in the contracting agency, and the change is made under circumstances where the Government is already beholden to the contractor.

Nevertheless, contract revision may prove to be the best of the three in many cases. This is the case, for example, when the requested change does not entail a heavy financial burden, when the modification is due to changed circumstances, when a new competitive bidding procedure would produce a predictable result, when the change clearly improves the Government's position as a party to the contract, or when the contract is complicated and a delay would entail serious penalties.

In other words, there are situations where, at least in the short term, adjusting the terms of a contract to the actual circumstances is more efficient than a new solicitation of bids or continuing to follow the original terms of the contract.

3. Subsequent Modification of a Contract Does Not Violate Equal Opportunity as Long as No Prior Conspiracy Exists

It is generally accepted that, under a competitive solicitation of bids, the Government must ensure that the competition process is fair and equal.[12] Any departure from this duty would risk liability. Nonetheless, a modification to the terms of a procurement contract occurs after the bidding procedure is concluded. The modification is made between the Government and the bidder who participated in the competitive bidding process on equal terms with the other bidders and who was awarded the contract based on its best offer.

11. *See* FAR 43.000-107; FAR 52.243-1 to 52.243-5 (Changes clause); *see also* Cibinic, Nash & Nagle, *supra* note 3, at 379–89.

12. Omer Dekel, *The Legal Theory of Competitive Bidding for Government Contracts*, 37 Pub. Cont. L.J. 237, 240 (2008); *see also* United States v. Brookridge Farm, Inc., 111 F.2d 461, 463 (10th Cir. 1940); Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance 11 (1990).

In other words, it can be argued that the duty to act fairly applies only to the precontract phase and not to the postaward phase. Therefore, as long as the modification did not result from some precontract conspiracy, a subsequent modification of its terms should not be perceived as violating a precontractual duty of ensuring equality.

4. Maintaining Administrative Officials' Trust in the Competitive Bidding Procedure

Restricting the power of the Government to make changes to a contract awarded after competitive bidding may cause feelings of frustration and dissatisfaction among agency officials. This feeling might translate into a conclusion that the competitive bidding mechanism does not enable the Government to act efficiently, and it may cause administrative officials to lose faith in the entire process. This lack of faith may serve as an incentive on their part to avoid using solicitations, and it may lead to a distrust of the competitive procedure altogether.

5. Practical Difficulties in Restricting the Government's Authority to Modify Contracts

An additional consideration supporting a lenient approach to the late modification of contracts is an institutional one. Contracts are usually modified far from the eyes of the public and the bidders who participated in the competitive process. Therefore, in order to enforce a restriction on modifying contracts, one would have to recognize the interest of the relevant parties, such as the other bidders or actual or potential business competitors of the awardee, in the manner in which the contract is implemented. Following this logic, the rights of the above parties to monitor the manner in which the contract is being implemented and to obtain information about the compensation rendered by the agency to the contractor would have to be recognized. This type of supervision is problematic, as it imposes a heavy bureaucratic burden on the agency, complicates the contract, and may infringe on trade secrets belonging to the contractor.

Another practical difficulty is that a large part of the changes made after the conclusion of a competitive bidding process is done by omission. As long as the modification does not require increased payments to the contractor, it may be achieved by simply disregarding the terms of the contract. For example, although the original contract may bind the contractor to specific delivery dates, the contract manager may disregard the fact that the actual delivery date was later than designated in the contract. Or, despite the fact that according to the original contract the contractor was obliged to supply a product of a certain quality, the contract administrator may ignore the inferior quality of the actual product supplied. Therefore, in theory, it may be argued that the very difficulty in enforcing a rigid arrangement justifies a lenient normative approach to contract modification.

6. Encouraging the Contractor to Recommend Improvements to the Contract

Professors Cibinic, Nash, and Nagle proffer another rationale supporting the idea that the CO be granted broad discretionary powers to modify the terms of a contract. According to them, because the contractor is in the best position to know the pitfalls of a contract and how to rectify them, the contractor should be encouraged to suggest improvements to the agency and the agency official should have the authority to adopt the recommendations.[13] In my opinion, this argument is not so simple. The premise that, in most cases, the contractor knows best how to improve the existing terms of a contract is acceptable, but considering that the contractor has a legitimate interest in maximizing his own profits, one can expect that his recommendations would be slightly tilted in his favor and not always consistent with the interests of the agency. Furthermore, encouraging and opening the door to this type of initiative may lead to a dangerous incentive that might tarnish the integrity of the process, violate the principles of equal opportunity and fair competition, and in the long run even undermine the efficiency of the entire competitive bidding process.

B. *The Case for a Stricter Regulatory Regime*

In contrast to the considerations supporting a lenient normative regime, there are considerations that justify a stricter approach to modification of procurement contracts. This approach would offer the CO a relatively narrow scope of discretion in approving modifications.

1. Paving the Way for Corruption and Abuse

Conferring broad discretionary powers on the CO to modify the terms of a contract signed following a competitive bidding procedure may lead to corruption and abuse. Broad discretionary power can lead to collusion among individual bidders and administrative officials even prior to submission of the bids, which allows a bidder to submit the most attractive bid, be awarded the contract, and mutually "improve" the terms after some time to benefit the contractor. Corruption also may be committed subsequent to the award of a contract, wherein the awardee and the CO conspire to have the CO "improve" the terms of the contract in return for "compensation" from the awardee.

Furthermore, even if we disregard the corruption component for a moment, a concern still remains that broad discretionary powers to modify a contract might be abused due to indolence or conservatism on the part of the CO. Thus, instead of soliciting new bids when the existing contract ends or when the contract only meets some of the Government's needs, conservatism

13. Cibinic, Nash & Nagle, *supra* note 3, at 380.

and unwillingness to make the effort might compel the officer to choose the "easier" but not necessarily appropriate option of modifying the existing contract.

The concern that broad powers conferred on the CO to modify contracts may be abused is heightened by the fact that "adjustments" and modifications to the original agreement are usually made with a lack of transparency, away from the eyes of the losing bidders, far from the eyes of the public, and without documentation. This means that during negotiations between the agency official and the awardee to determine modifications to the contract terms, the official is in a serious principal-agent problem and the negotiations conducted between the parties are exposed to possible corruption and manipulation, and may damage the appearance of justice.[14]

2. Concern That the Principles of Equal Opportunity and Fair Competition and the Reliance Interest Would Be Impaired

Subsequent modification of a contract, even if well-founded, can endanger the principles of equal opportunity and fair competition. Equal opportunity mandates that each candidate be afforded an equal opportunity to compete for the economic benefits that will be derived from contracting with the procurement agency.[15] Granting an additional economic benefit to the awardee absent a competitive process and without affording the same opportunity to the other bidders violates those other bidders' rights to an equal opportunity and fair competition process.[16] Therefore, the other bidders can argue that if they had known from the start that the terms of contract would be different than those in the prime contract, they would have submitted different bids accordingly.

Furthermore, potential bidders who did not participate at all in the process could claim that the subsequent modification of the contract impaired their right to equal opportunity and fair competition because if they had been aware from the beginning of these new terms, they too might have chosen to submit bids. Thus, even though the modification of a contract is a process effected after the bidding process has been concluded, it can still retroactively impair the prior solicitation procedure and lead to claims that it violates the principles of equal opportunity and fair competition, which form the basis for the entire procurement process.

14. Sue Arrowsmith, who discussed the issue of whether holding negotiations with the awardee of a competitive bidding procedure is permissible under the English procurement regulations, claims that if negotiations with the top bidder are not successful, "the only option for the purchaser is to commence a new award procedure." Sue Arrowsmith, The Law of Public and Utilites Procurement 250 (1996).

15. Dekel, *supra* note 12, at 246–48.

16. *See id.*

3. A Problematic Message Sent to Bidders, Agency Officials, and the General Public

A broad license to subsequently change contract terms conveys a problematic message to the bidding public, government agencies, and the general public. The message to bidders is that the main goal is to win the bidding process because the awardee can subsequently "improve" on the terms of the contract. An intelligent bidder will assume that after the contract has been executed, the CO would rather modify the existing contract than conduct a whole new solicitation procedure. This type of thinking among bidders in a competitive bidding process would harm the process itself and would be truly destructive in the long run.

Broad acceptance of the possibility of subsequent changes to contracts also sends the wrong message to the agency itself because it can be construed that even if the agency was negligent in its design of the solicitation documents and the procurement contract—and as a result a contract is executed that does not meet the exact needs of the Government—the contract can later be modified and adjusted to meet the exact needs of the Government. This type of message reinforces the sense that careful drafting in the preparation of the solicitation documents and the contract is not necessary, which harms the efficiency of the whole contractual process.

Conferring broad discretionary power on the Government to modify the terms of a contract that it signs following a competitive procedure also sends the wrong message to the general public. If amendments can be subsequently negotiated between the awardee and the CO without necessarily remaining faithful to the terms of the solicitation, then the message conveyed is that the only role of the procurement process is to select an entity with which to sign a contract. The public's faith in the competitive bidding process and in the Government would be shattered, and serious bidders may be prevented from participating in public competitive bidding procedures.

4. Skepticism About the Economic Efficiency of a Subsequent Modification

Notwithstanding the discussion, *supra*, Part III.A.2, a subsequent change to a contract is not always economically efficient for a number of reasons. First, it is hard to evaluate the effectiveness of a modification because the modification is made without a competitive procedure. In the absence of competition, it is difficult to assess whether the modification of contract terms is effective or whether the extra product or service could have been procured for a cheaper price. Second, the need or desire to modify a contract frequently occurs at a stage when the Government is already dependent on the contractor and is "captive" to him or her. In negotiating any modification with the contractor, the Government is in a weak position. Third, in light of the problematic message conveyed by a subsequent modification of a contract to bidders, potential bidders, agency officials, and the general public, even if

the modification is beneficial in the short term, it can potentially harm the efficacy of the competitive bidding procedure in the long run. Public faith in the procedure is undermined. Thus, despite the fact that there are some economic advantages to be gained by allowing modifications to contracts under given circumstances, it is hard to determine whether they outweigh these disadvantages.

5. The Modification Constitutes a New Contract Without a Competitive Bidding Procedure

Modification of a procurement contract may create technical problems, especially where the possibility for modification or the apparatus for effecting the modification has not been defined in the contract itself or where the modification deviates from the mechanism defined in the contract. Under these circumstances, it may be argued that the modification constitutes a new contract that was unlawfully made without a new solicitation for full and open competition. As previously stated, from a contractual standpoint, it makes no difference whether the modification of the contract constitutes a new contract or a change to an existing contract because a change made upon mutual consent is valid.[17] However, when the Government is under a statutory duty to hold a competitive bidding process, this question can take on overwhelming importance. If the modification is perceived as an act carried out within the framework of the prime contract (executed following a competitive bidding procedure), then theoretically there is no need for a new solicitation process. However, if the modification deviates from the scope of the original contract and constitutes a new contract, then theoretically the modification cannot be effected without a new competitive procedure.[18]

6. "Slippery Slope": Negotiations Interfering with the Actual Bidding Process

Allowing the CO flexibility in the negotiation of the terms of the contract raises a concern that negotiations would not be held after the completion of the bidding process but rather begin during the competitive bidding stage itself. Thus, where it becomes clear to the CO during the bidding process that there is justification to modify the terms of the contract for any reason (such as change of circumstances, budgetary constraints, careless wording), it is preferable for the CO to conduct negotiations about the modification before a bidder is selected. The reasonable assumption is that the bidder's readiness to meet the demands of the Government would be greater before the bidding process is concluded. Therefore, the agency has a clear incentive to "finalize" the details of the modification prior to announcing the awarded bid—namely, during the tender stage itself. This incentive can create a situation where even

17. *See, e.g.*, Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 381 (N.Y. 1919) (Cardozo, J.) ("Those who make a contract, may unmake it."); *see also* Jolles, *supra* note 7, at 204–09.

18. Arrowsmith, *supra* note 14, at 250.

before the announcement of the winning bid, the bidder will be pressured by the Government to "improve" its offer as a condition to being awarded the contract. Clearly, this is not a desired outcome.

In summary, recognizing the power of a CO to change the terms of a contract with the successful bidder creates a conflict between the interests that this type of recognition is intended to serve (such as an instant solution to unforeseeable circumstances) and the interests that may be harmed as a result of such recognition (such as integrity, fair competition, and equal opportunity).[19] We will now analyze how this issue has been handled by legislation and the judiciary.

IV. THE LAW

The Competition in Contracting Act of 1984 (CICA) imposes on the Federal Government a duty to procure services and goods by a competitive process.[20] However, CICA does not establish what the law is if the parties wish to insert changes into the completed contract.[21] According to the procurement regulations of the Federal Government, the party authorized to modify the terms of a contract between the agency and awardee is the CO.[22] The regulations set out the procedure by which the CO may act, the documents that must be completed, etc.,[23] but provide poor guidance as to the circumstances under which such modifications are to be deemed legitimate. Thus, the regulations provide that the fact that a contractor incurs losses in carrying out the contract is not a sufficient reason to allow modification of the contract, and that discretion in this matter is given to the CO in accordance with the facts of the situation.[24]

One example of where a CO may make legitimate modifications relates to a situation where failure to modify a contract will cause the contractor to suffer such losses as to be unable to complete the project or supply the product, with the result that national security may be threatened.[25] Another example relates to a situation where the contractor suffers a loss as a result of an act committed by the administrative body itself.[26] A third example is a contract

19. *See* Vito Auricchio, *The Problem of Discrimination and Anti-competitive Behaviour in the Execution Phase of Public Contracts*, 7 Pub. Procurement L. Rev. 113, 124 (1998).

20. "[A]n executive agency in conducting a procurement for property or services—(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the Federal Acquisition Regulation." 41 U.S.C. § 253(a)(1)(A) (2000).

21. AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993); Cardinal Maint. Serv. v. United States, 63 Fed. Cl. 98, 106 (2004).

22. "Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government." FAR 43.102(a).

23. FAR 43.101(a)(1).

24. FAR 50.301.

25. FAR 50.302-1(a).

26. FAR 50.302-1(b).

in which an error is made.[27] The regulations place special emphasis on the procedure for approving each modification to the contract in order to prevent abuse of this authority.[28] In conclusion, these limited situations provide insufficient guidelines on how to exercise discretion and how to decide when a specific modification is legitimate or not.

The contract itself is another source empowering the CO to make modifications because the procurement regulations require that a government contract contain a Changes clause granting the CO discretion to introduce unilateral changes, as long as the modification falls "within the general scope of the contract."[29] The text of the Changes clause provides that the contractor may not protest the modification and may only request proper compensation for the change made.[30] If the monetary demand exceeds the appropriate amount as evaluated by the agency, and the parties are unsuccessful in resolving this issue, the dispute resolution mechanism as laid down in the contract will govern its resolution.[31] In any case, the contractor has no choice but to implement the modification requested by the agency even if the parties disagree on the price owed to the contractor for the modification.[32] Even in this case, the Changes clause does not contain any instruction as to when a modification of a contract is legitimate and proper and when it is not.

Due to the ambiguity of the regulations, the courts have developed case law[33] in an attempt to define the situations in which a modification of a procurement contract is legitimate. The case law developed along two separate parallel tracks. The first track involved lawsuits filed by contractors who refused to make modifications to contracts already executed with them. Such contractors argued that the attempt by the agency to force them to make these changes constituted a breach of contract.[34] The second, more expansive track evolved from lawsuits filed by potential bidders or bidders who had lost the competition. These bidders challenged the authority's decision to change the terms of contract with the awardee, arguing

27. FAR 50.302-2. The regulations state a number of examples of mistakes that can justify a modification to a contract.

28. FAR 50.303, 50.304.

29. See the general guidelines set forth in FAR 43.205 and the language of the clauses that must be included in the contract between the authority and the contractor in FAR subsections 52.243-1 through 52.243-6. For reference to this as a Changes clause, see *AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

30. FAR 52.243-1(e).

31. *Id.*

32. *Id.*

33. The issue of legitimacy of a modification to a procurement contract was developed by rulings in two separate court systems. The first is the U.S. Court of Federal Claims, which is authorized, *inter alia*, to hear cases of infringement of the duty to hold a competitive bidding procedure established in CICA. The second is the Comptroller General, who acts by virtue of the Competition in Contracting Act.

34. For a more comprehensive review of these types of cases, see Cibinic, Nash & Nagle, *supra* note 3, at 382–85.

that by making such changes, the contracting agency infringed upon the duty imposed on it by CICA to award procurement contracts through "full and open competition."[35]

In both situations, the courts began their deliberations under the premise that a modification to the terms of a contract executed following a competitive bidding procedure was legitimate if it fell within the "scope of the contract" and was not considered legitimate if it departed from such scope.[36] Thus, one could argue that if the modification falls outside the scope of the contract, a new bidding procedure is required, and forcing the contractor to make the changes would constitute a breach of the contract. The compelling question at this point is: How does one determine if a modification falls within the scope of the contract? To answer this question, courts have developed two largely overlapping tests.

The first test, evolved from the lawsuits filed by contractors who refused to make the changes that the Government was trying to impose on them, is "the cardinal change doctrine," whereby an authority is not permitted to compel a contractor to make a cardinal or material change to a contract.[37] A cardinal or material change is construed to occur "when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for."[38] To determine if a change is cardinal, the courts compare the original contract and the modified contract and examine, *inter alia*, to what extent the modification alters the nature and type of work required from the contractor, to what extent the modification alters the period of performance of the prime contract, and to what extent the change alters the budgetary framework of the original contract.[39]

35. For a comprehensive review of these types of cases, see *id*. at 385–89.

36. *Id*.

37. George E. Powell Jr., *The Cardinal Change Doctrine and Its Application to Government Construction Contracts*, 24 Pub. Cont. L.J. 377, 378 (1995).

38. AT&T Commc'ns, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cl. 1993) (quoting Allied Materials & Equip. v. United States, 569 F.2d 562, 563–64 (Ct. Cl. 1978)); *see also* Mgmt. Solutions & Sys., Inc. v. United States, 75 Fed. Cl. 820, 830 (2007); Gen. Dynamics Corp. v. United States, 585 F.2d 457, 462 (Ct. Cl. 1978); Powell, *supra* note 38, at 378.

39. In weighing the propriety of a modification, we look to whether there is a material difference between the modified contract and the prime contract that was originally competed .... In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified.... We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred... or whether the modification is of a nature which potential offerors would reasonably have anticipated under the Changes clause.

Neil. R. Gross & Co., Comp. Gen. B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212, at 2–3 (citations omitted); *see also AT&T Commc'ns, Inc.*, 1 F.3d at 1205; *Mgmt. Solutions*, 75 Fed. Cl. at 830–31; *Cardinal Maint. Serv.*, 63 Fed. Cl. at 106. However, it is important to note that a study of the dozens of judicial decisions given over the years on this issue leads to the conclusion that it is not possible to draw a clear line to distinguish between legitimate and illegitimate changes, and in the end great importance is attached to the circumstances on a case-by-case basis.

The second test evolved from lawsuits by potential bidders who challenged the modifications later inserted into contracts by the authority. This test examines whether the modification is one that a reasonable bidder could have foreseen.[40] The assumption is likely that a modification that a reasonable bidder could have foreseen in the solicitation stages would have been taken into account when the bid was submitted, and thus its realization does not infringe upon the free competition aspect of the process. On the other hand, a modification that a reasonable bidder could not have foreseen departs from the scope of the competition and therefore departs from the scope of the prime contract as well.

In the final analysis, the two tests overlap almost entirely, and the principal distinction between them is the perspective.[41] The first test focuses on the contractor and examines whether a requested change departs from the scope of the contract, thereby breaching the contract. The second test focuses on the disappointed bidder and examines whether the requested change deviates from the expectations of a reasonable bidder, thereby requiring a whole new solicitation process.

The main difficulty I see in the courts' approach is its tendency to uphold the general rule that the CO is vested with the authority and discretion to modify the terms of a contract executed following a competitive process, subject mainly to two exceptions that greatly overlap, as previously mentioned: that the change should not be material and that the change should not depart from what a reasonable bidder could have foreseen. In my opinion, an opposite rule should be established, under which a late change to a procurement contract would be impermissible and inappropriate. Nonetheless, the CO would have discretionary authority to deviate from the rule given a broad range of considerations, even beyond those provided by the courts. In other words, I propose to reverse the present presumption from a "presumption of allowance" to a "presumption of impermissibility."

V. A REGULATORY PROPOSAL: A REBUTTABLE PRESUMPTION

The question of when the Government may alter the terms of a contract made after a competitive bidding procedure is complex. It is impossible to draw a sharp distinction between a permissible modification and one that is prohibited. Similarly, other than in extreme cases (such as changes deriving

40. "A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract's changes clause." *AT&T Commc'ns, Inc.*, 1 F.3d at 1205; *see also Mgmt. Solutions*, 75 Fed. Cl. at 831; HDM Corp. v. United States, 69 Fed. Cl. 243, 257 (2005); CW Gov't Travel v. United States, 61 Fed. Cl. 559, 574 (2004). For many examples of the application of this test, see Cibinic, Nash & Nagle, *supra* note 3, at 383–91.

41. "The cardinal change doctrine asks whether a modification exceeds the scope of the contract's Changes clause; this case asks whether the modification is within the scope of the competition conducted to achieve the original contract. In application, these questions overlap." *AT&T*

from corrupt motives), it is hard to point to cases where modifications can never be made. Usually, to answer the question of whether it is appropriate to allow the change, one must balance a variety of considerations and weigh the outcomes.[42]

For a modification to be legitimate, the CO must strike a balance between the three objectives of the competitive bidding process—protecting the integrity of the procurement process, economic efficiency, and ensuring equal opportunity[43]—as they present themselves in each case. The CO must act in a manner that causes the least harm to these objectives. However, the CO's ability to strike an appropriate balance between the different objectives of the solicitation process is uncertain. This uncertainty derives mainly from an institutional conflict of interest facing the CO, making him more likely to choose short-term economic considerations over other considerations.[44] The CO's main concern is to protect public funds and the Government's interest in procuring the best and most appropriate item or service at the lowest price or best value. Thus, the concern is that this interest would be given more weight. This might bias the CO towards this *modus operandi* over others, such as not permitting the change or terminating the contract and conducting a new competitive procedure, even in cases where, objectively, the modification is not appropriate.

A further concern in granting broad discretionary power to a CO stems from the fact that a modification to the terms of a contract is generally made behind closed doors and is not, by nature, a transparent process. This reduces the possibilities for supervising the modification decision and at the same time increases the concern over administrative abuse.

In light of this concern, it is appropriate to establish a presumption whereby subsequent modification to a procurement contract executed after competitive bidding is prohibited. However, this premise is not necessarily the end point. In specific circumstances, the presumption of impermissibility can be rebutted, and license can be given to make the requested modification. The burden to prove that those circumstances exist would be on the party requesting the modification.

The confirmation or rebuttal of the proposed presumption against modification should be guided by several considerations and criteria, but three points should be mentioned. First, some of the considerations are consistent with or similar to considerations that the courts also have raised, but unlike the courts' considerations, these can be supplemented with others that

Commc'ns Inc., 1 F.3d at 1205. See also *Cardinal Maint. Serv.*, 63 Fed. Cl. at 106, where the court noted that in order to decide whether the requested change violates CICA (the second test), an analogy should be drawn to the cardinal change doctrine (the first test).

42. See, for example, the list of considerations in *Neil R. Gross & Co.*, 90-1 CPD ¶ 212, at 2–3.

43. Dekel, *supra* note 12, at 240.

44. *Id.* at 264.

I believe should be weighed by the CO. Second, considerations are related such that one consideration is sometimes the "reverse side of the coin" to another. Third, the list of considerations below cannot, and should not, be all-inclusive, and even a balancing of these considerations may vary from case to case depending on its particular circumstances.

The following are considerations that I believe are appropriate to take into account when making a decision about the legitimacy of a modification to a contract signed after a competitive procedure.

A. *A Modification Permitted by the Prime Contract as Opposed to a Change That Departs from the Prime Contract*

A material consideration that must be taken into account by the CO is whether a modification to the terms of a contract is made in accordance with the mechanism provided in the contract and in accordance with a Changes clause, or whether it falls outside the contractual framework. Government contracts usually contain a Changes clause, which serves as the normative source governing the requested modification.[45] However, as explained below, the manner in which this clause is drafted is also significant.

Naturally, the more compatible a modification is with the Changes clause, the easier it is to effect. There are a number of reasons for this. First, when a Changes clause is embedded in the original contract, each potential bidder can, at the solicitation stage, anticipate the possibility of the contract being modified in the future and take this into account in submitting the bid. Under these conditions, the potential infringement of equal opportunity and the expectation interest of the bidders is smaller. Second, concerns over the possibility of an inefficient modification also are reduced under these conditions because if the Changes clause is properly drafted, the economic ramifications can be included in the original contract. Third, where the change mechanism is anchored in the original contract, there is no difficulty in seeing an alteration as part of that original contract rather than the execution of a new contract, so any alleged infringement of the principle of public and open competition is weaker. Nonetheless, even if a Changes clause can reduce the problematic aspects of subsequent changes to the contract, problems still might arise in the construction of the allowable modification, the amount of payment owed to the contractor for the modification, the limits of the permissible change, etc. Also, even if the modification is made in accordance with a mechanism designed in the original solicitation documents, the concern of corruption or abuse is not altogether neutralized.

According to Professor Arrowsmith, as long as the contract itself allows the Government to change the terms of the contract unilaterally, this poses no

45. Cibinic, Nash & Nagle, *supra* note 3, at 379.

problem.[46] However, if the contract stipulates that any extension thereof requires the consent of both parties, this is mostly inappropriate and the change should be regarded as a new contract.[47] In my opinion, the distinction on which Arrowsmith bases her view is problematic because allowing only the Government the option to change contract terms is not without its problems. First, the CO still has the power to abuse the Changes clause in order to give unlawful benefits to the contractor. Second, the contractor may have an incentive to give a kickback or bribe to the CO to persuade the CO to exercise the clause in the most beneficial manner for the contractor. Third, nothing guarantees that the way the option is exercised is the most effective. Fourth, inserting this option into the solicitation documents may become a substitute for proper advanced planning because the architect of the contract may assume that any oversight in the contract could be remedied at any time by exercising the Changes clause.[48]

Consequently, another distinction is required. The appropriate distinction should be between an expansive approach that allows the CO broad discretion in making further modifications to the contract and a narrow approach that sets out clear conditions and guidelines on how modifications should be achieved, and relates to defined aspects of the contract. Exercising the first type of option, a broad approach, is not much different from contractual change that has no basis in the solicitation documents. It constitutes a broad discretionary power without practical boundaries and limitations and permits the CO to effect a wide range of alterations to the terms of a contract. While these changes might not require the contractor's consent (and can even be seen as part of the original contract rather than a new one), it is hard to see how an unwilling contractor can be forced to make changes or work for compensation when the change is unacceptable to the contractor. So, too, the option can be abused by offering unlawful benefits to the contractor. Therefore, it is appropriate to judge a broad option to change the terms of a contract in terms similar to modifications made without any contractual basis.

The second option is a narrow approach that confers limited discretion on the CO as to how, under what conditions, and when to modify a contract. Discretion can be more easily monitored by an outside body, and there is less concern that the option will be abused, that the principle of equality and fair competition will be violated, and that the efficacy of the contract might suffer. Therefore, when it comes to the exercise of a limited option, there is, in general, justification to treat a modification as an exercise of a mechanism

46. Arrowsmith, *supra* note 14, at 121. However, Professor Arrowsmith restricts this conclusion to incidents where renewal of contracts occurs after the customary practice. *Id.* The most obvious example of this type of contract is provided by insurance contracts or lease agreements.

47. *See id.*

48. Nonetheless, as previously stated, the exercise of an option fixed in the contract will cause less harm to the principle of equal opportunity than a change that is not mentioned in the original contract.

established in the original contract and as part of the implementation of the contract.

B. *Foreseeability of the Need for Changes by Agency Officials and Bidders*

Another test to consider is whether the need for a change is due to circumstances that could not have been anticipated by the contract's architects or whether it is due to defective drafting of the solicitation documents or contract. When the modification is motivated by circumstances that were unforeseeable by the drafting agency, the tendency should be to permit subsequent modification. While it is indeed appropriate that the main considerations for approving a change focus on future effects, too much leniency in this matter may send a wrong message such that the original solicitation and contract documents are not too important because they can be rectified and amended at any time.

The foreseeability test also applies to bidders, and it is one of the main criteria that courts apply to decide the legitimacy of a modification.[49] Thus, if a reasonable bidder could have anticipated a reasonable chance that a need for modification would arise, it is reasonable to assume that the possibility of change would be somehow reflected in both the bid and the decision to compete in the bidding process in the first place. Therefore, it can be argued that under these types of situations, approval of the modification does not cause material harm to the principles of equality and fair competition. On the other hand, when the requested change departs from what a reasonable bidder could have anticipated, approval of the change would inflict serious damage to the principles of equality and fair competition.

C. *Impact of a Change on Fair Competition and Equal Opportunity*

As previously noted, one of the main problems in approving a subsequent change to a contract is its effect on the principles of fair competition and equal opportunity. Allowing a modification may give rise to claims that if it had been known that the terms of the contract (as stated in the solicitation documents) would be modifiable in the future, the bidders who competed in the process might have submitted better bids, and potential bidders who chose not to participate in the solicitation process under its original conditions might have otherwise chosen to compete. Thus, the CO should consider whether the inclusion of the modification in the original terms of the contract would have changed the nature of the competition in the competitive bidding process, in terms of the bidders who competed, the nature of their bids, and

49. *See, e.g.*, Makro Janitorial Servs., Inc., Comp Gen. B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39, at 3; MCI Telecomms. Corp., Comp. Gen. B-276659, Sept. 29, 1997, 97-2 CPD ¶ 90, at 8; Am. Air Filter Co., Comp. Gen. B-188408, June 19, 1978, 78-1 CPD ¶ 443, at 9–10.

the results of the competitive bidding. If the answer is in the affirmative, the tendency should be to deny the requested modification.

D. *A Change Made Close to the Time of Contracting versus a Later Change*

An additional factor that should be taken into account is the time of the change. The more time that has elapsed since the signing of the contract, the stronger the case for allowing a modification.[50] Several reasons support this position. First, when a request to change the terms of a contract is made close to the signing of the contract, the chances that the modification is due to causes that the Government could not have anticipated are slight. Second, in situations of this type, the chances of some kind of collusion between the awardee and an individual in the agency are greater. Third, because implementation of the contract has not yet started or is in its early stages, it is far more practical to solicit new bids through a new competitive procedure.

However, if the modification is requested at a later stage of contract implementation, a stronger presumption exists that the change was due to a need that was unforeseeable by the Government. Also, the risk of collusion between the contractor and an agency official is smaller (even though collusion could also occur after the project was awarded), and the possibility of cancelling the contract and solicit new bids is less practical. Thus, the tendency to approve modifications to the terms of a contract closer to the actual date of signing should be weaker than the tendency to approve such modifications after the implementation of the contract has already been underway for some time.

E. *Language of the Contract and Solicitation Documents*

As stated previously, a clear and explicit Changes clause will be accorded serious weight in the decision to approve a modification. The language of the contract also can serve as a litmus test for the legitimacy of the modification in other, less obvious situations. Thus, in cases where the language of the contract explicitly or implicitly refers to a possibility of a future modification of its terms in such a way that a reasonable bidder would be able to assess that such a possibility might materialize, support exists to allow the modification.[51] On the other hand, in cases where the contract does not expressly or implicitly refer to a future alteration of its terms, where it contains provisions that do

50. The Comptroller General has also criticized changes made immediately after the solicitation process has concluded. *See* United Tel. Co. of the Nw., Comp. Gen. B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374, at 7–8; Midland Maint., Inc., Comp. Gen. B-184247, Aug. 5, 1976, 76-2 CPD ¶ 127, at 3–4; A & J Mfg. Co., Comp. Gen. B-178163, May 10, 1974, 74-1 CPD ¶ 240 at 3.

51. Examples of situations in which the Comptroller General has recommended that change is acceptable based on the language of the contract or solicitation documents include *Eng'g & Prof'l Servs., Inc.*, Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD ¶ 24, at 6; *Paragon Sys., Inc.*, Comp. Gen. B-284694.2, July 5, 2000, 2000 CPD ¶ 114, at 5; and *Nat'l Data Corp.*, Comp. Gen. B-207340, Sept. 13, 1982, 82-2 CPD ¶ 222, at 5.

not support the option to make changes, or where the requested modification is a clear departure from what the contract allows, the requested modification should probably be rejected.[52] The main reasons for this are that a reasonable bidder would not have been able to foresee the change, or if approved, the modification would infringe on fair competition or equal opportunity.

F. *The Scope of the Requested Change*

An additional criterion to be considered is the scope of the modification requested in terms of its economic value, duration, and other aspects. The greater the departure of the modification from the scope of the prime contract, the lesser the tendency will be to approve the request, and vice versa. However, there are examples where requests for small changes by the contractor could have far-reaching implications.[53] Hence, this criterion is not hard and fast, and may require more investigation. The initial assumption should be that the modification to the contract remains secondary to the original contract. If the modification is so material as to take center stage while the prime contract becomes secondary, then the tendency should be to disallow the modification and to require the solicitation of new bids.

G. *The Relationship Between the Prime Contract and the Requested Change*

Another factor to consider in determining the legitimacy of a requested modification is the relationship between the prime contract and the requested change. Where the modification is a clear and necessary extension of the prime contract, and it is possible to clearly demonstrate the connection between the prime contract and the modification, then the modification should be viewed as part of the same contract. However, if the extension can stand alone, or if it lacks a clear and direct connection with the prime contract, it should be appropriate to view it as a separate contract or an illegitimate extension of the scope of the prime contract. For example, when the original contract is for the supply of a computer network and the requested modification is to upgrade the system, a substantive relationship can be drawn from the prime contract to the requested

52. The Comptroller General has recommended rejection of the modifications if the solicitation documents or language of the contract do not permit modification. *See*, *e.g.*, Poly-Pac. Techs., Inc., Comp. Gen. B-296029, June 1, 2005, 2005 CPD ¶ 105, at 5–6; Sprint Commc'ns Co., Comp. Gen. B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60, at 11; Avtron Mfg., Inc., 67 Comp. Gen. 404, 88-1 CPD ¶ 458, at 5 (1988).

53. See, for example, *Webcraft Packaging, Div. of Beatrice Foods Co.*, Comp. Gen. B-194087, Aug. 14, 1979, 79-2 CPD ¶ 120, at 10–11, in which the Comptroller General refused to recommend a modification to a printing contract allowing the awardee to use a different type of paper than was specified in the contract. The solicitation documents specified one type of paper that was difficult to obtain. The Comptroller General found that it was reasonable to assume that many other potential bidders would have competed had the other type of paper been specified. *See also* Marvin J. Perry & Assocs., Comp. Gen. B-277684, B-277685, 1997 U.S. Comp. Gen. LEXIS 375, at *8 (C.G. Nov. 4, 1997) ("[I]f quotes had been obtained . . . on the basis of ash rather than red oak furniture . . . a different vendor may well have been selected.").

modification.[54] On the other hand, if the prime contract is for the supply of a computer network, and the requested change is for the supply of furnishings for the system components or for more computers, the connection appears much weaker and it would be harder to justify its inclusion in the same contract.

H. *Subordination of the Requested Change to the Duty to Solicit Bids If It Were to Stand Alone*

Another criterion to be applied in the decision-making process is whether the requested change would require a new solicitation of bids if it stood alone. In cases where the answer is in the negative, it may be argued that the infringement on fair competition and the principle of equal opportunity following the approval of such modification is minimal because theoretically the modification request could be converted into a separate and independent contract with the contractor without breaching the statutory duty to hold a competitive process. For example, if the change is a response to an urgent situation, then a separate contract could be executed with the same contractor without the need for a new procurement procedure.[55] In this type of situation, it is difficult to demonstrate why the modification should not be granted.

I. *A "Must Have" or "Nice to Have" Modification*

A further factor to consider in deciding whether to grant a change to a procurement contract is the degree to which the change is needed in order to implement the contract. Does the modification exceed what is actually needed, or does it serve as a pretext to expand the contract beyond what is necessary? If the change can potentially improve the terms of the contract, but the contract also can be implemented without it, then the requested modification should be called into question. It is another story, however, if the objective of the contract cannot be achieved at all without the modification. For instance, consider a contract for the acquisition of a technological system that at any time could be overtaken by a more modern and upgraded version. In this case, upgrading the existing system is likely to improve its performance, but the importance of the upgrade to implementing the goals of the contract is not obvious.

In a similar context, a distinction should be made between a nonessential contract, whose failure can be absorbed, and an essential contract, whose failure could carry serious ramifications for the Government or the public in general. In the former case, it is doubtful whether there exists justification to approve changes to the terms of the contract. In the latter case, the need for the contract to be successfully implemented should prevail over the considerations of fair competition, equal opportunity, and economic efficiency.

54. This is discussed in Cibinic, Nash & Nagle, *supra* note 3, at 380, as one of the primary purposes served by Changes clauses.

55. *See* FAR 6.302 (defining situations in which the Government must hold full and open competition).

J. *Efficiency of the Modification*

It is important that the CO examine whether the requested change is efficient in terms of both its contribution to the implementation of the contract and its cost-efficient use of public funds. The CO must consider the most efficient course of action under the circumstances, either by changing the existing contract or by terminating the contract and initiating a new solicitation of bids. To determine the efficiency of and need for the modification, one can use supplementary tests such as a directive set forth by the European Union, by which an expansion of a contract is permitted "when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities, or when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion."[56]

K. *Existence of a Reasonable Alternative to the Existing Contractor*

Can contracts for extra goods or services be awarded to an entity other than the present contractor? If so, it is preferable to take this route rather than to expand the scope of a contract with an existing contractor. This position is based on several reasons. First, foreknowledge by the contractor that no economic benefit is to be gained from modifications to the terms of the contract will minimize the incentive to demand such changes as well as the incentive to create situations that would require modifications to the contract. Moreover, under certain circumstances, the contractor might be better off absorbing the additional costs in making the changes without demanding full compensation if this can prevent the introduction of a new contractor into the deal. Also, the present contractor could bear some fault for contributing to the creation of the need for a modification. In such cases, there is likely to be little justification for granting the benefit of a change to the contractor. Third, splitting the contract among different contractors would allay the concern of an appearance of favoritism in approving the modification. Fourth, because the modification grants an additional benefit without a solicitation process, splitting the contract would contribute to a more just distribution of public funds. And fifth, dividing the contract between two contractors may sometimes be more efficient due to the competitive atmosphere that would ensue.

L. *The Type of Contract*

The degree to which a change is legitimate can be influenced by the type of contract for which it is requested. If the contract is complex or for a long term or enters into unchartered contractual territory, then a more forgiving attitude can be taken considering the possibility that not all aspects involved in its implementation could have been considered or anticipated by its archi-

56. Council Directive 2004/18/EC, 2004 O.J. (L 134) 114, 136–37 (EU), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF.

tects. On the other hand, if the contract is simple or commonly used, there is less justification to allow its alteration and there is a good likelihood that the need for change is due to defective draftsmanship or improper considerations exercised in its drafting. Therefore, while the former case enables a more lenient tendency in permitting the modification, the latter case encourages the tendency to reject the modification.[57]

M. *The Motive Behind the Modification*

Understandably, the final criterion to be implemented as part of the process in deciding whether to approve a contract modification is whether the need for the modification arises out of improper motives such as an intent to offer a contractor financial benefits or a desire to avoid a new solicitation procedure due to laziness or inflexibility. Clearly, if it is suspected that the modification is not essential to the successful implementation of the contract or that it derives from improper motives, it should not be permitted.

A clear-cut case where a change to a contract is illegitimate is one where the modification is requested as part of a conspiracy between the contractor and a government official. The most serious case is where collusion existed prior to the submission of bids, with a view to give the awardee unlawful benefits to improve its situation. This type of scheme also can take place during the contractual stage. It is obvious that this type of collusion constitutes corruption, dishonesty, and lack of economic efficiency, and deserves only one course of action—disqualification.

This litmus test can have a more decisive impact on the resolution of the legitimacy of a change request than any of the other criteria mentioned above. If a discovery is made that a request for modification is due to corrupt or improper motives,[58] the request for modification should be dismissed without exception.

VI. CONCLUSION

This Article suggests that regulating the modification of a contract executed following a solicitation process is difficult. This difficulty stems from the tension existing between opposing considerations and interests. On one hand, there is the recognition that changes of this kind sometimes might be

57. *See, e.g.*, Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978). This case discussed a contract for the acquisition of nuclear submarines. As a result of the changes introduced into the contract, its costs were greatly increased and construction was substantially delayed. *Id.* at 461. Nonetheless, the court granted the modification as the change was within the scope of the contract and held that in a contract for the acquisition of sophisticated technological products such as nuclear submarines, the contractor should expect that the work will not be exactly as planned. *Id.* at 463.

58. Corruption and improper motives do not always overlap. For example, a government agency could be interested in benefiting a certain contractor as compensation for a loss that was absorbed in another contract. In this hypothetical, the decision is not relevant to the contract, but it is not clear if it would be corruption.

necessary or even essential to the successful implementation of a contract. On the other hand, there is a concern that broad recognition of the CO's authority to make such changes would pave the way to corruption, infringe on free competition, and frustrate the whole purpose behind statutory and regulatory procurement procedures. The daily recurrence of this issue in the operations of government procurement underscores the importance of adopting regulations that reconcile the conflicting considerations and interests.

The current regime focuses on comparing the original contract and the amended contract (following the change) and examining the scope of the requested change, the difference between these two contracts, and whether the change departs from the scope of the competition held within the solicitation process. This approach is insufficient for two major reasons: first, because its underlying presumption is that modifying the terms of a contract is permissible and poses no problem and, second, because it only provides a partial list of considerations.

The alternative approach proposed in this Article is divided into two parts. First, it establishes as a rule that modifications to the terms of a contract executed following a solicitation process are impermissible, unless the CO can point to circumstances justifying an exception to this rule. Second, it expands the range of criteria that the CO can consider in deciding whether to grant an exception to the first rule. Thus, beyond the considerations listed by the court, it is proposed to allow the CO also to take into account the necessity of the modification, its efficiency, the possibility of implementing the change with another contractor, whether the modification is subject to the duty to hold a competitive bidding process, and the type of contract in question. This would be done in recognition of the fact that the list of considerations that the CO may take into account, and the weight attributable to each and every consideration, cannot be predetermined because they depend on the particular circumstances of each case.