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Contract Corner: Change Management in Commercial Contracts (Part 2)

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In our earlier Contract Corner post, we discussed the need for change management provisions to reduce the risk of costly renegotiations that could otherwise arise from changes that occur over the life of the long-term commercial agreement. Among those contractual provisions, we discussed the need to define mandatory changes and allocate responsibility for the costs associated with changes. In Part 2 of our series, we discuss below the procedural mechanisms for managing change.

Change Management Procedures

In addition to classifying changes and allocating costs, outsourcing agreements and other long-term service agreements should include a defined set of procedures for documenting and implementing changes. Change management procedures can vary depending on the specific scope of services and how the parties choose to manage changes, but, at a minimum, agreements should address the following key procedural issues:

- **Mandatory Changes**. For circumstances that necessitate a mandatory change—such as a change in applicable laws or other time-sensitive business requirements—the change management procedures should require service providers to begin implementing the change on a schedule that allows adequate time for the customers to meet these requirements. This may mean that service providers prepare documentation on an expedited basis in parallel with the service provider's implementation of the change.
- **Emergency Changes**. Depending on the nature of the services, customers should consider providing for the ability of the customer to unilaterally make temporary changes to the services if required to respond to emergencies (where failure to make the change would, for example, have a detrimental effect on the customer's business or public safety).
- **Permissive Changes**. For non-mandatory changes—such as requests by customers for new services—service providers are not typically required to commence implementation of the change until the parties fully document the change. However, change management procedures should provide a schedule for customers to submit change requests and for service providers to prepare a written response detailing the expected impact of the change to the agreement, including additional fees.
- **Disputes**. Because changes often bring increased costs and responsibilities, change management is an area ripe for dispute; customers naturally want service providers to absorb the cost of changes, while service providers will seek to pass through those cost increases to customers—either directly or in the form of a fee increase. To avoid delays from such disputes, customers should ensure that any pending dispute over a change, including whether a change is mandatory or regarding the cost of the change, does not impact or delay the service provider's obligation to implement the change. Parties may also consider specifying separate dispute resolution procedures specific to the fee modifications associated with changes to assure completion of changes in a timely fashion.

Making the Change

In addition to specifying how and when changes must be implemented, change management procedures should also specify the format of the change documentation. Not all changes will require the same level of detail. For operational changes that are not expected to have an adverse effect on the quality or timeliness of the services or to impact the fees, a less formal change management documentation process may be appropriate—such as documentation of the parties' agreement through e-mail exchange. For more significant changes, change management procedures should specify the use of a written change order executed by the parties. For changes that impact the terms of the agreement, a formal amendment executed by the parties is typically used to enact the change.

It is a best practice to define a form of change order in advance so that all of the critical substantive issues around substantive changes are properly accounted for and documented. Change order forms typically include, at a minimum, a detailed description of the proposed change, including the applicable conditions requiring the change and a statement of the financial impact of the change. Change orders may also include fields specific to the nature of the services where the parties expect an impact from changes—such as impact to timelines, budgets, or target costs.