

# GOVERNMENT CONTRACT CHANGES

**Protecting Your Bottom Line**

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Brian Tully McLaughlin

**crowell**  **moring**

# Overview

- **What are “changes” to government contracts?**
- **How do lawyers think about changes?**
- **How does this affect me?**

# Overview

**Administration of Changes**

**Basic Changes**

**Constructive Changes**

**Documentation of Changes**

# Administration of Changes

- The “Changes” Clause
- Formal Modifications
  - Mutual Agreement / “Bilateral”
  - Unilateral changes by the Government
- “Continue to Work” Provision

# CHANGES

**Administration of Changes**

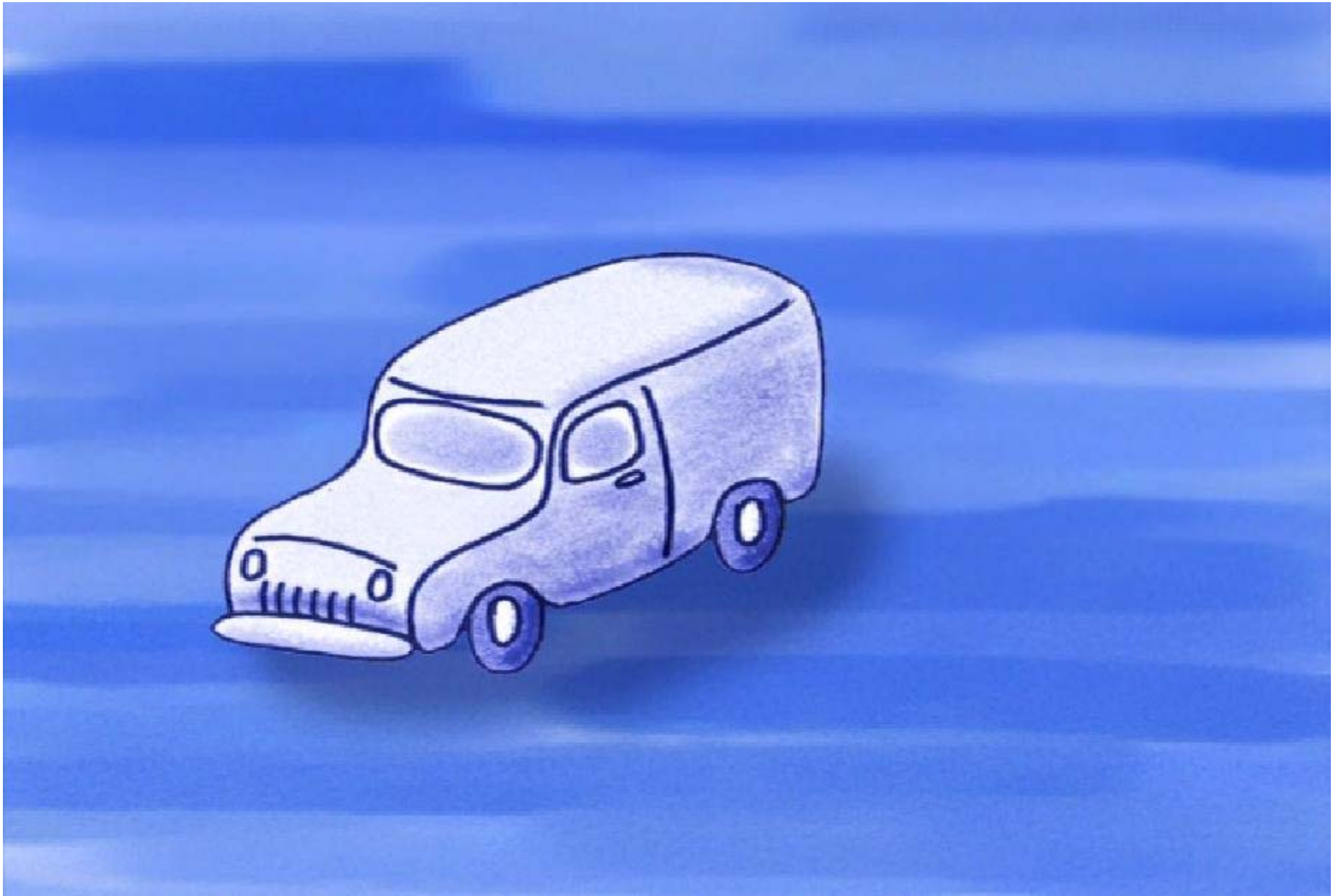
**Basic Changes**

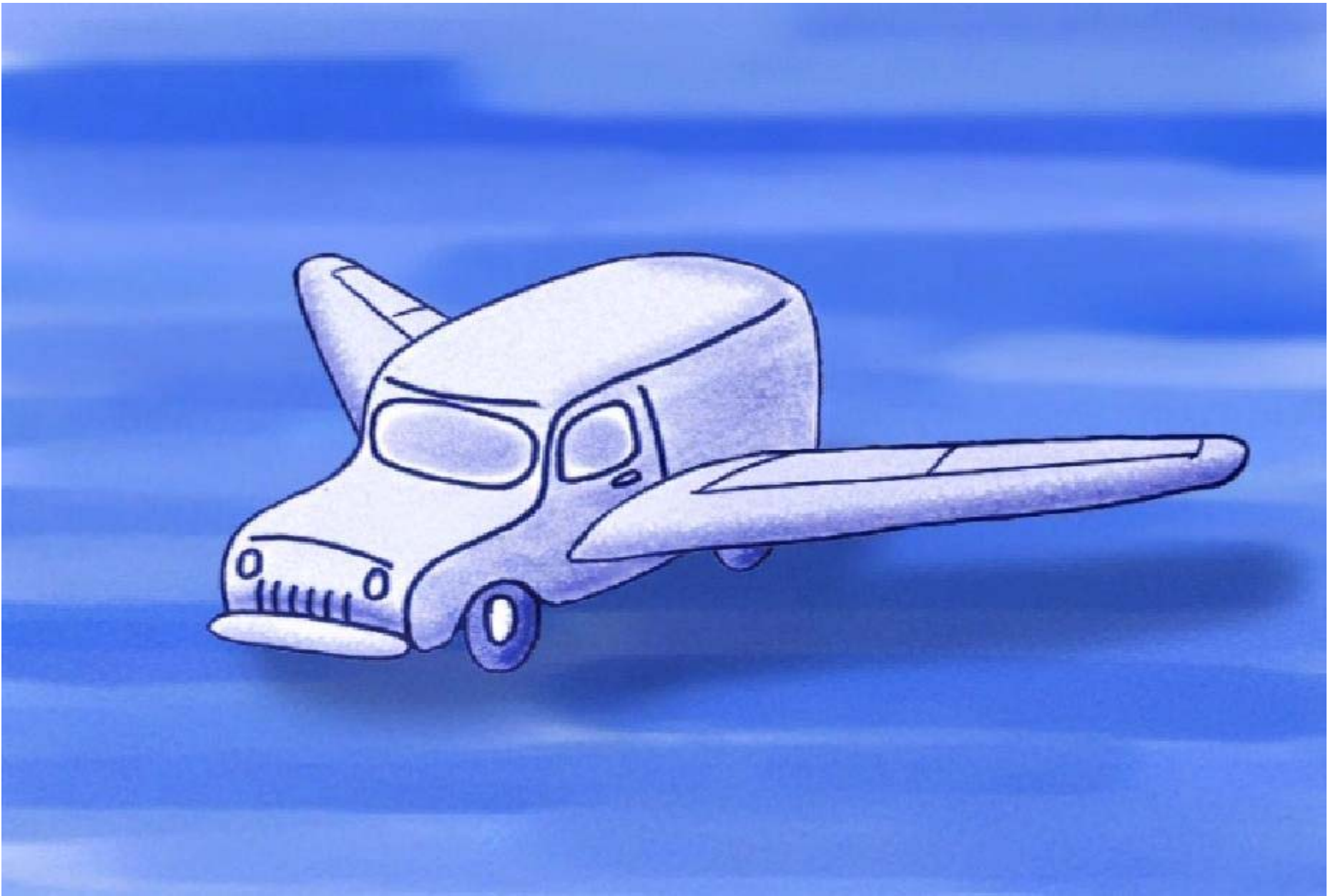
**Constructive Changes**

**Documentation of Changes**

# Basic Changes

- Changes clause allows changes “within the general scope” of the contract
- Does not allow a “cardinal change”







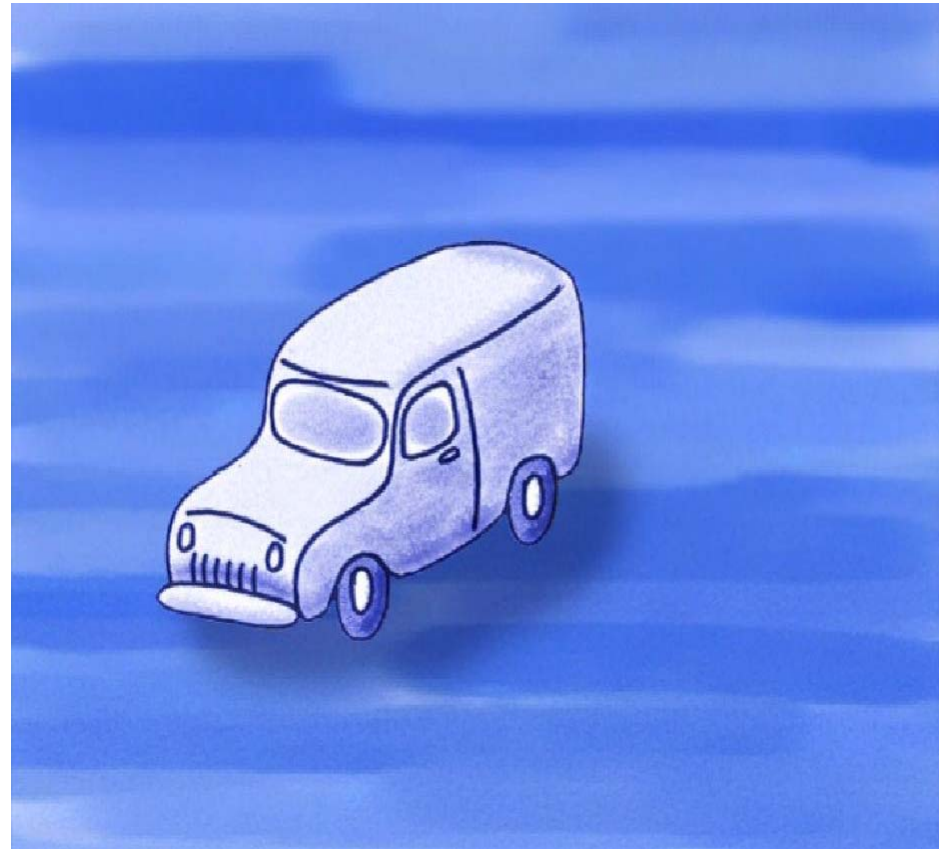
# Basic Changes

- Change a truck to a car?

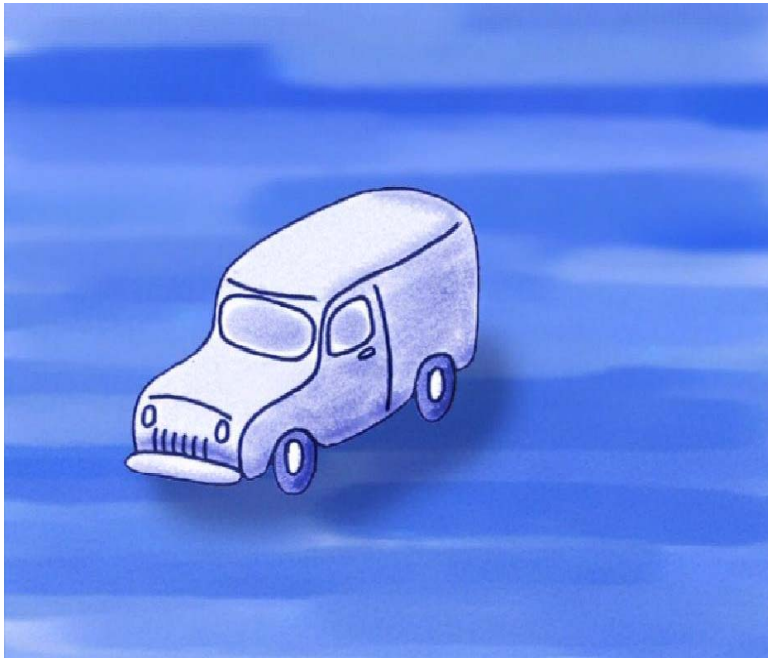


# Basic Changes

- Change the truck's diesel engine to a gasoline engine?
- *American Air Filter Co. (GAO)*



# Basic Changes



- Change from round headlights to square?



# Basic Changes

- Understand that you do not have to accept changes beyond the “general scope” of the contract
- Advise your contract administrator / legal department where changes are substantial

# CHANGES

**Administration of Changes**

**Basic Changes**

**Constructive Changes**

**Documentation of Changes**

# Constructive Changes

- Where the government changes the contract but won't admit it
- You must learn to spot these changes

# Constructive Changes

- To protect the company's interests it is critical to:
  - Identify the Change Promptly
  - Put the Government on notice
  - Demand money and time

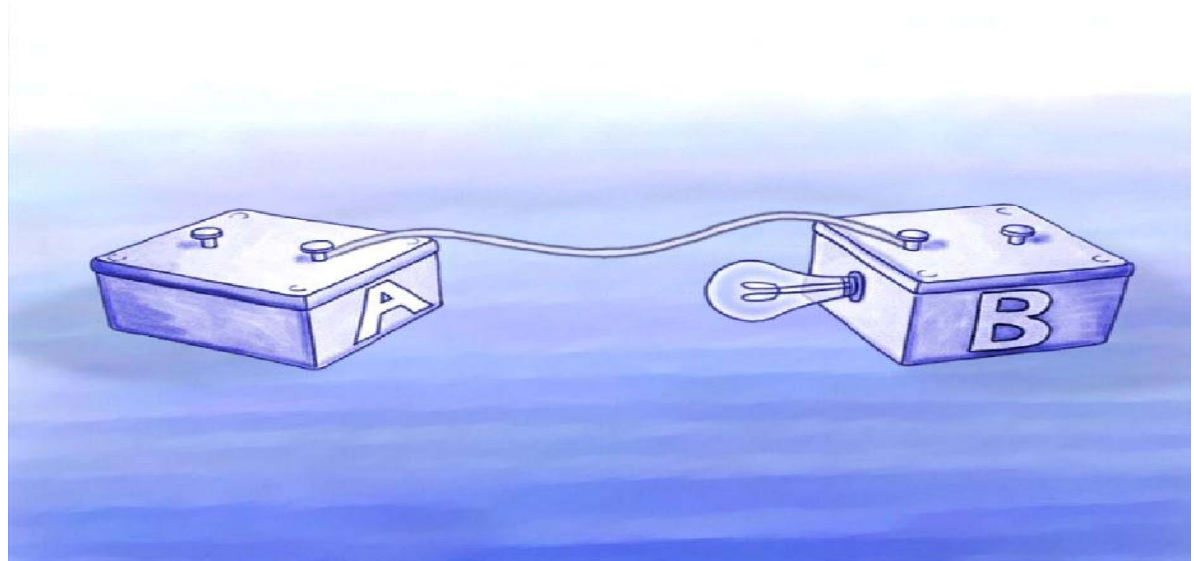
# Constructive Changes

- Four Basic Types:
  - Changes to Express Contract Terms
  - Defective Specifications
  - Interference
  - Failure to Cooperate

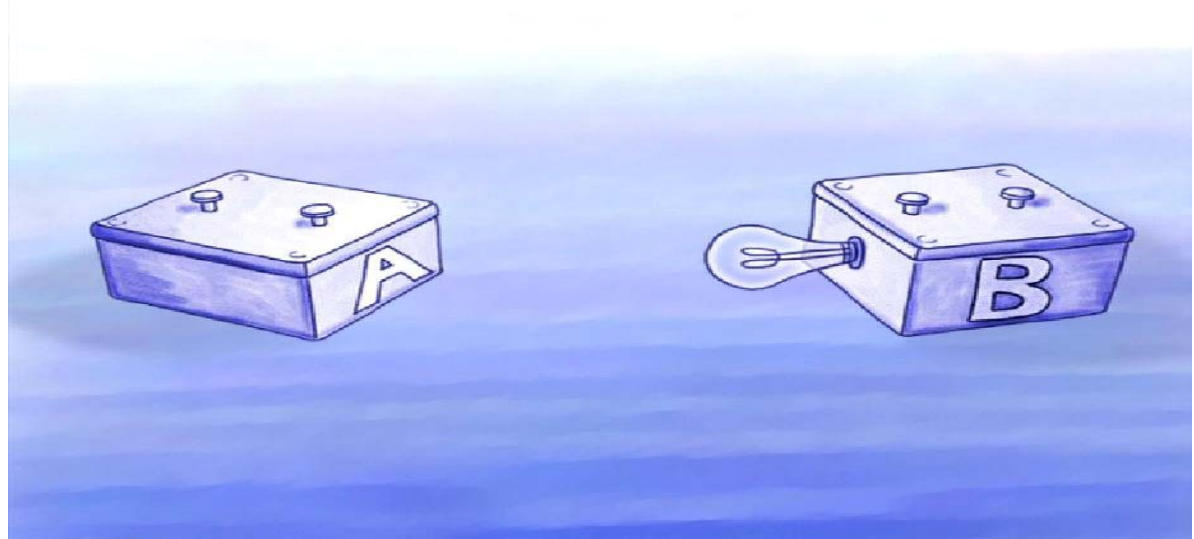


# Changes to Express Contract Terms

- Government says contract requires Box A and Box B connection



- You say it doesn't



# Changes to Express Contract Terms

- Is the Contract Clear?
- Remember:
  - Specifications
  - Drawings
  - Industry Standards
  - MIL-SPECS
  - Other referenced documents

# Changes to Express Contract Terms

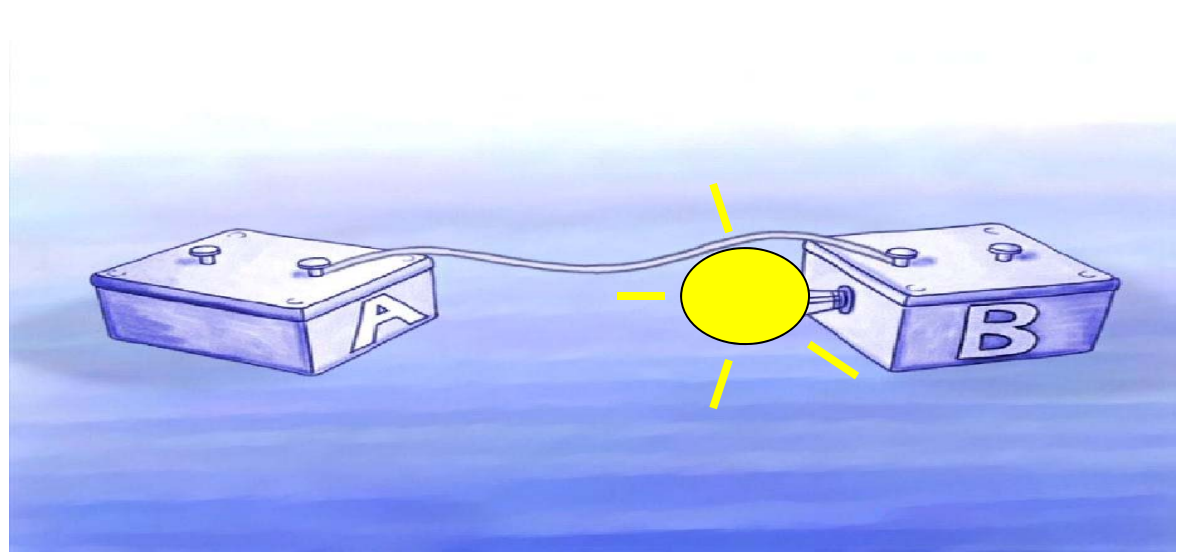
- Duty to inquire if there is an ambiguity
  - Be thorough when reviewing the bid package
- Don't just rely on the “order of precedence” clause in the contract

# Defective Specifications

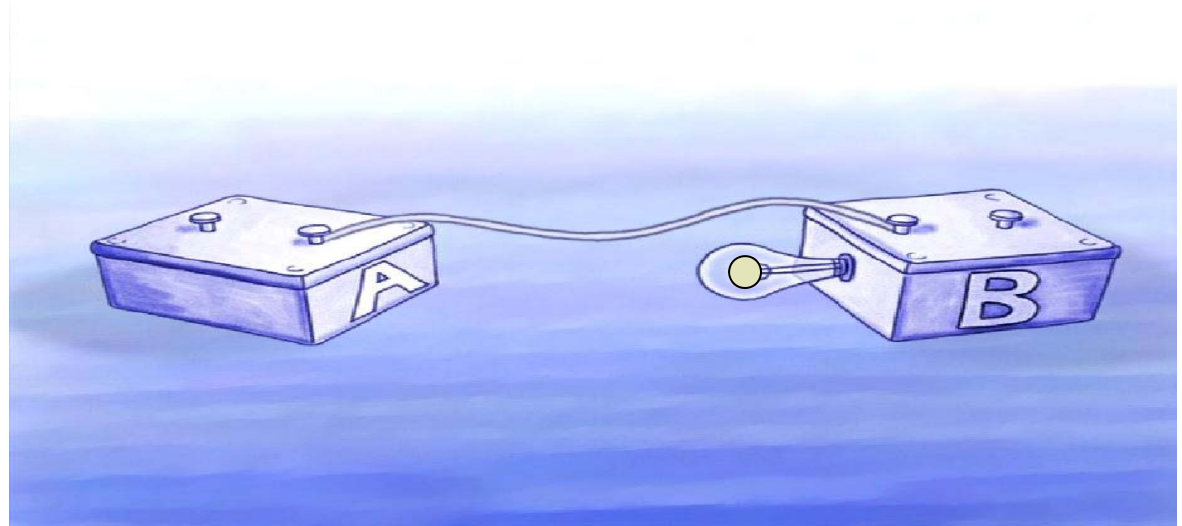
- Government specs tell exactly how to build the product (“Design Specs”)
- Government design does not work

# Defective Specifications

- Gov't Spec: connect Box A to B and it will give 10kw of power



- Reality: gives only 5kw



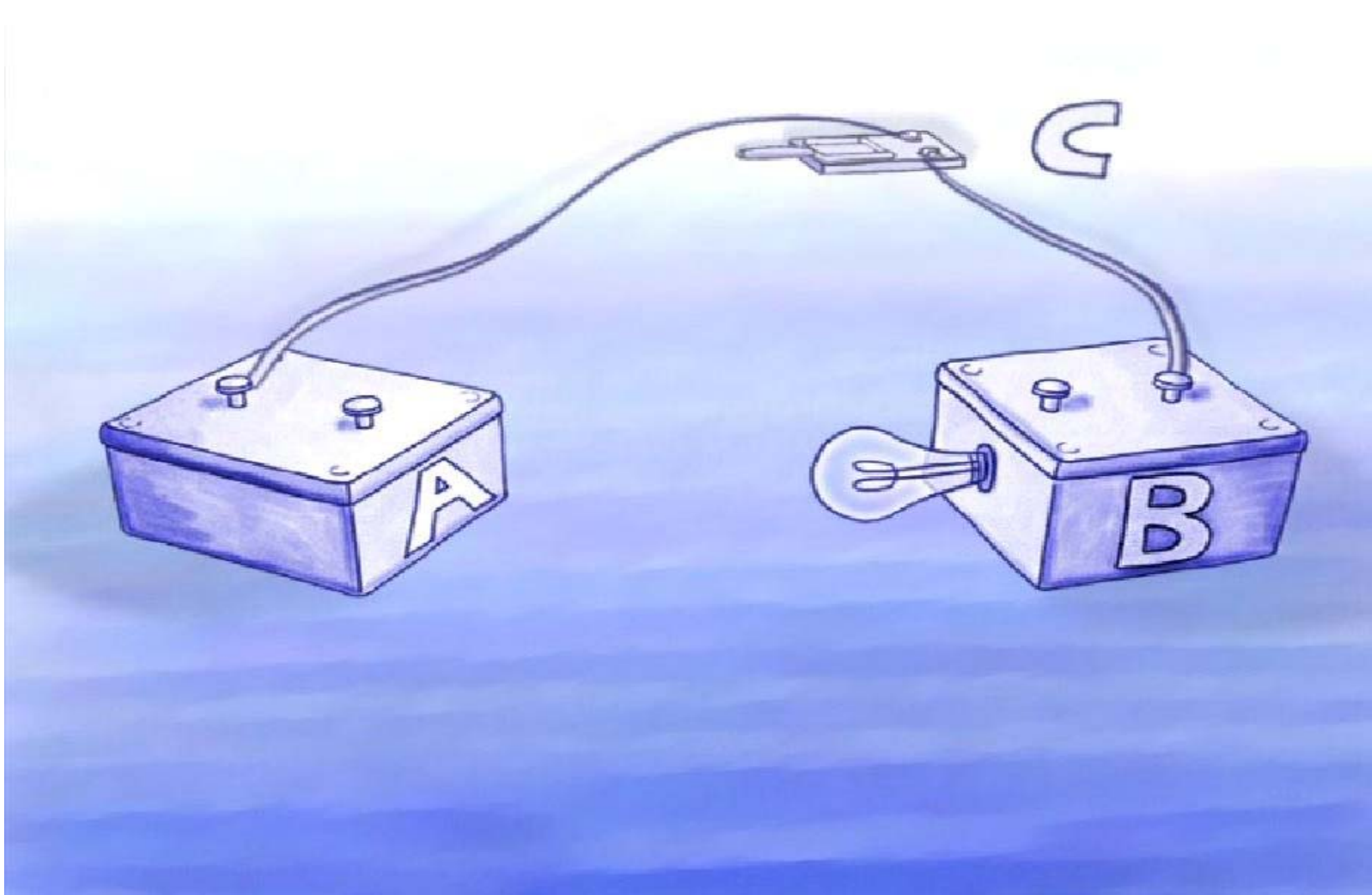
# Defective Specifications

- Government bears the risk that its specifications are defective, not the Contractor
- Note: Contractor can't have known this was a problem before bidding

# Defective Specifications

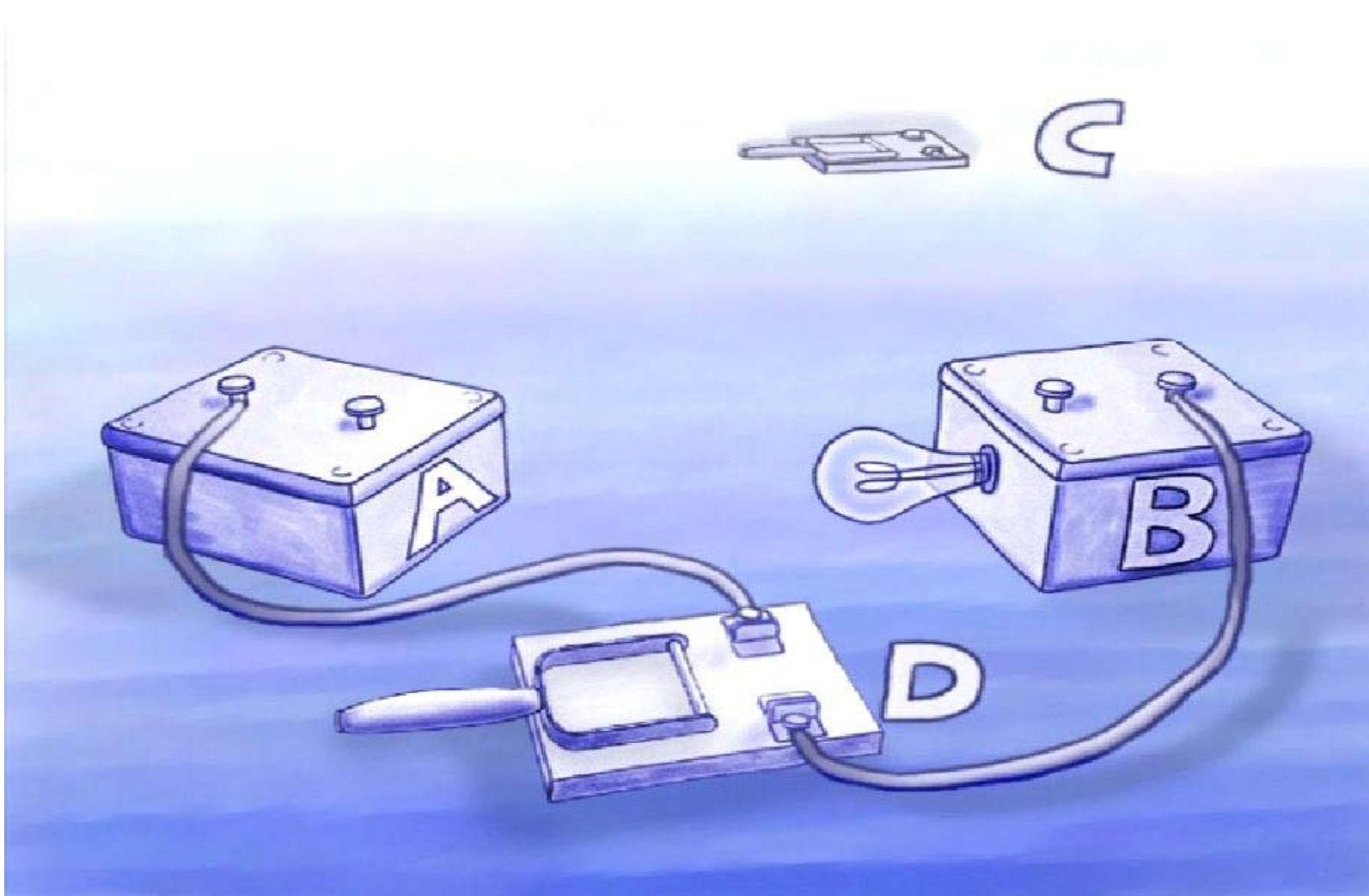
- What about your own improvements to government design specifications?

# Government Specification:





# Your Improvement:



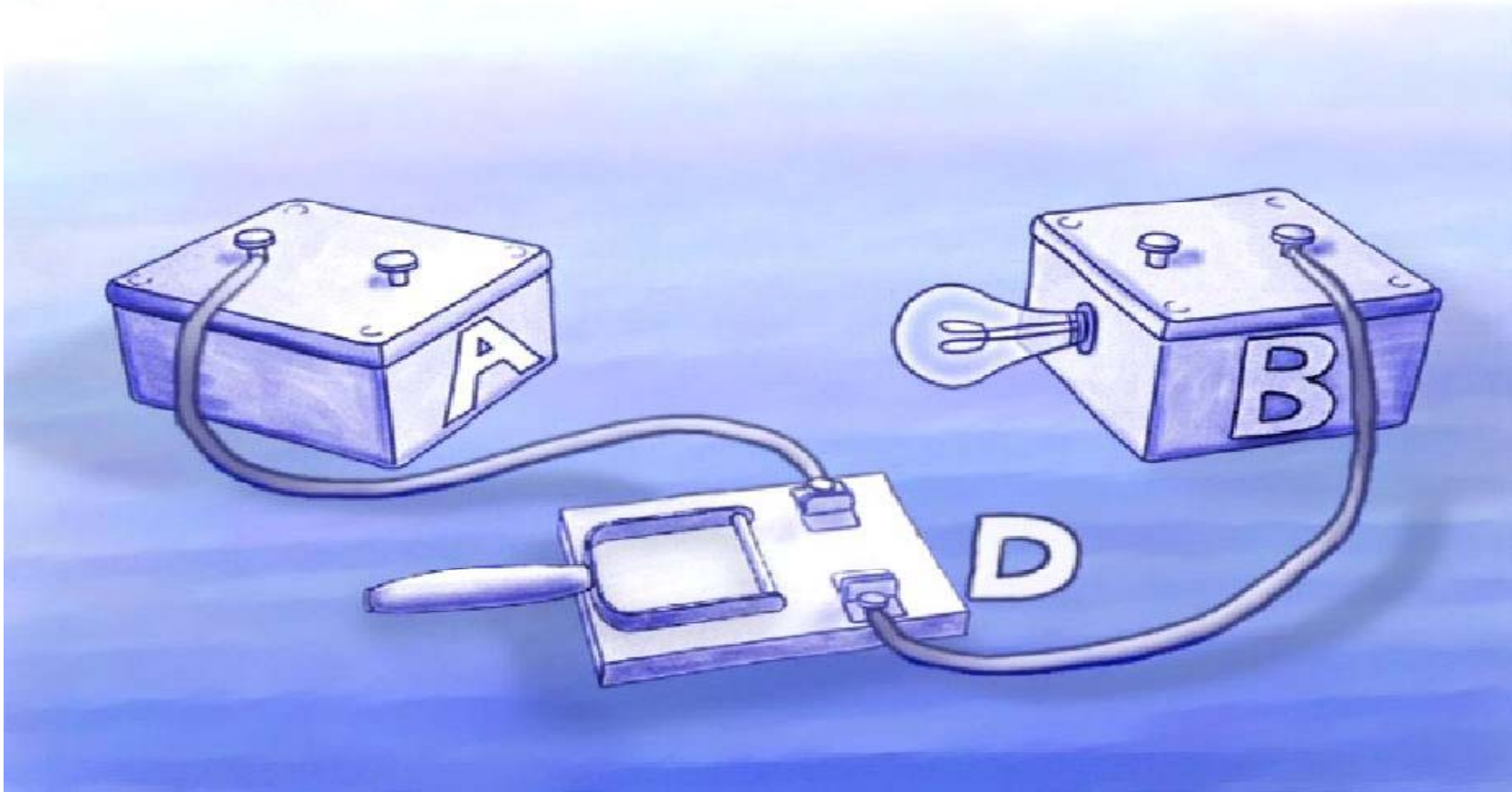
# Defective Specifications

- Before making changes to government specs (even improvements):
  - Notify the government
  - Get permission
- Potential for sharing the savings under a Value Engineering clause

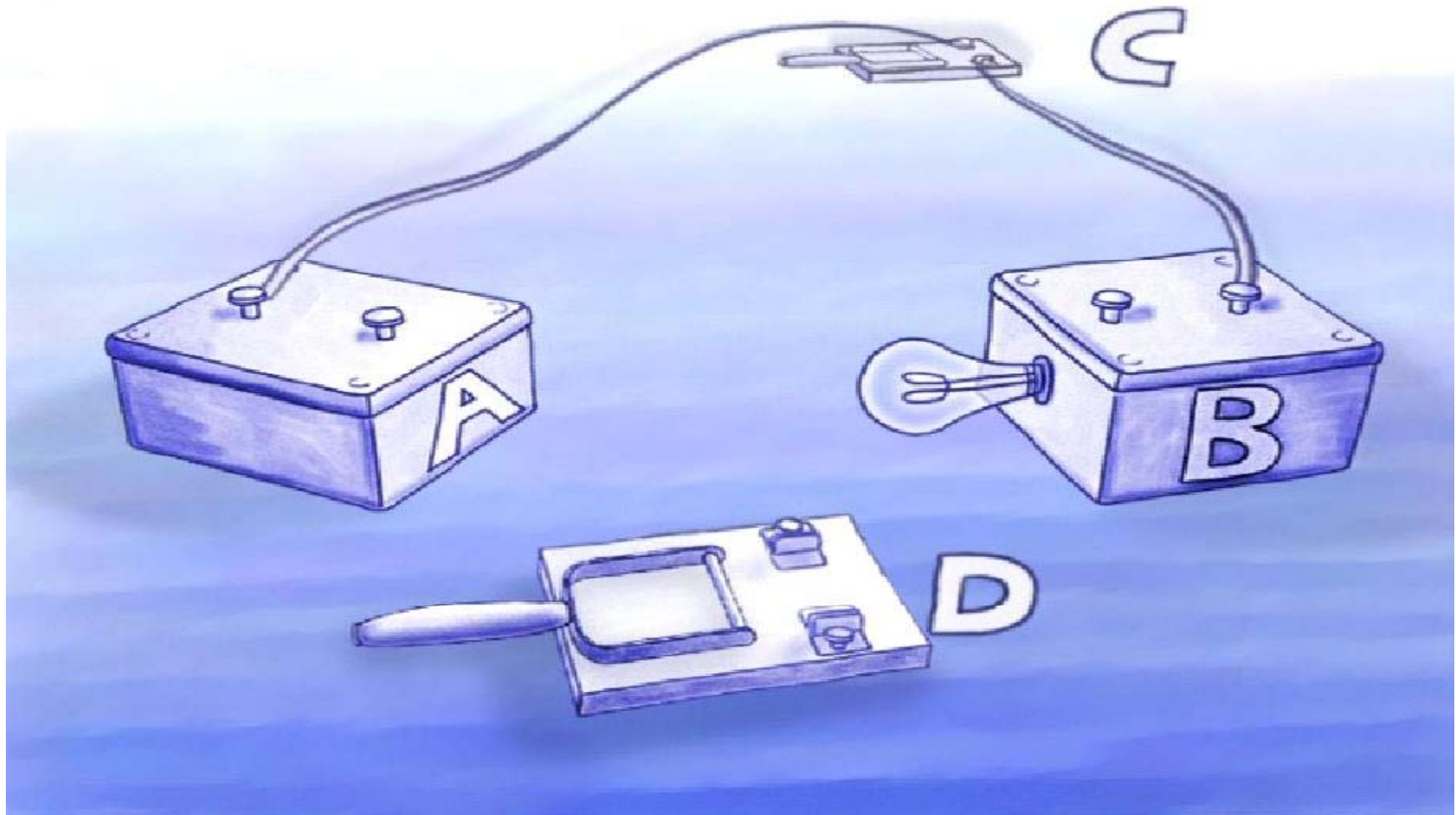
# Interference

- Where the government's actions interfere with your ability to perform the contract
- May occur where there are design specs or where there are performance specs

Your plan / the “better” way:



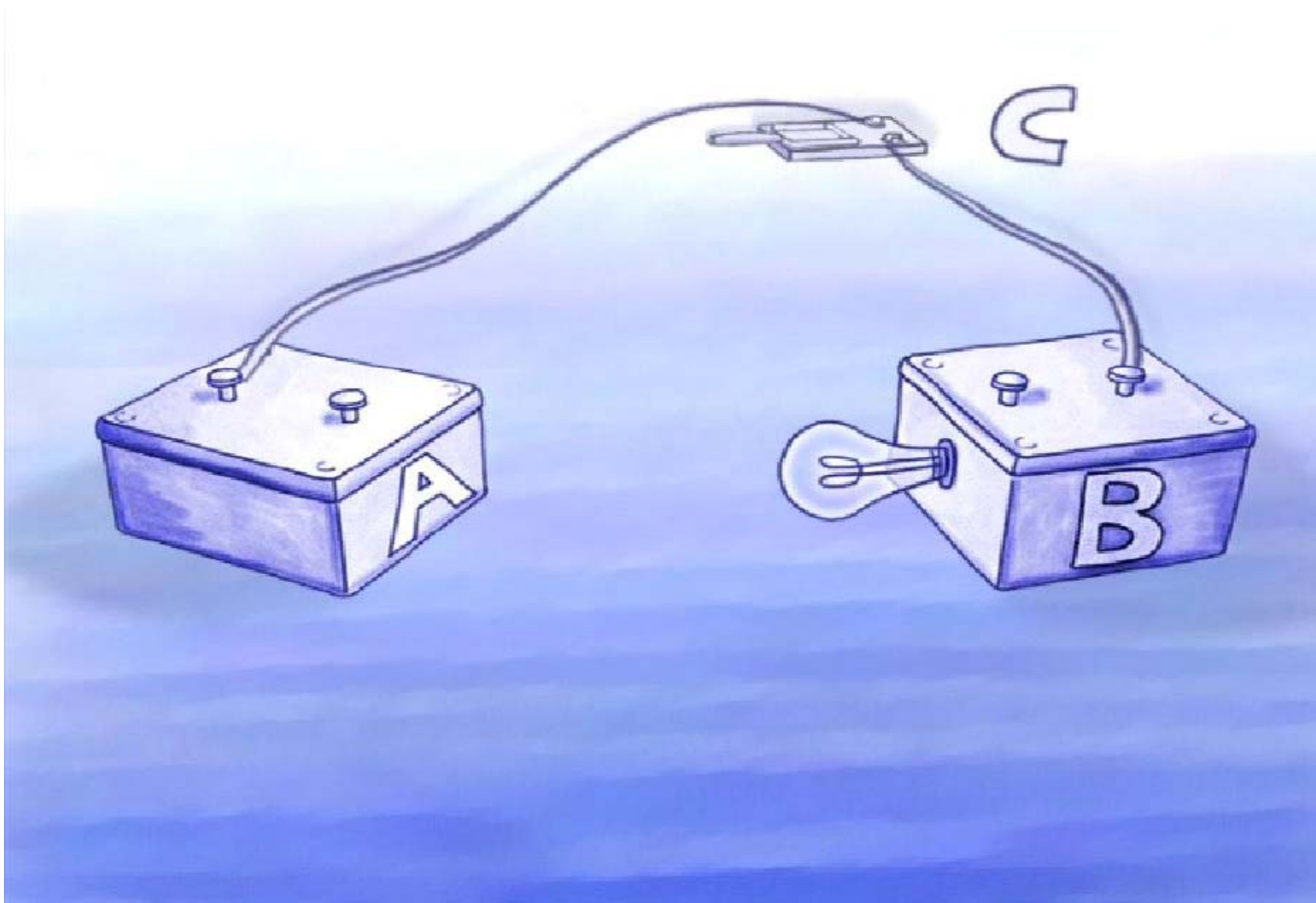
# COTR's Demand:



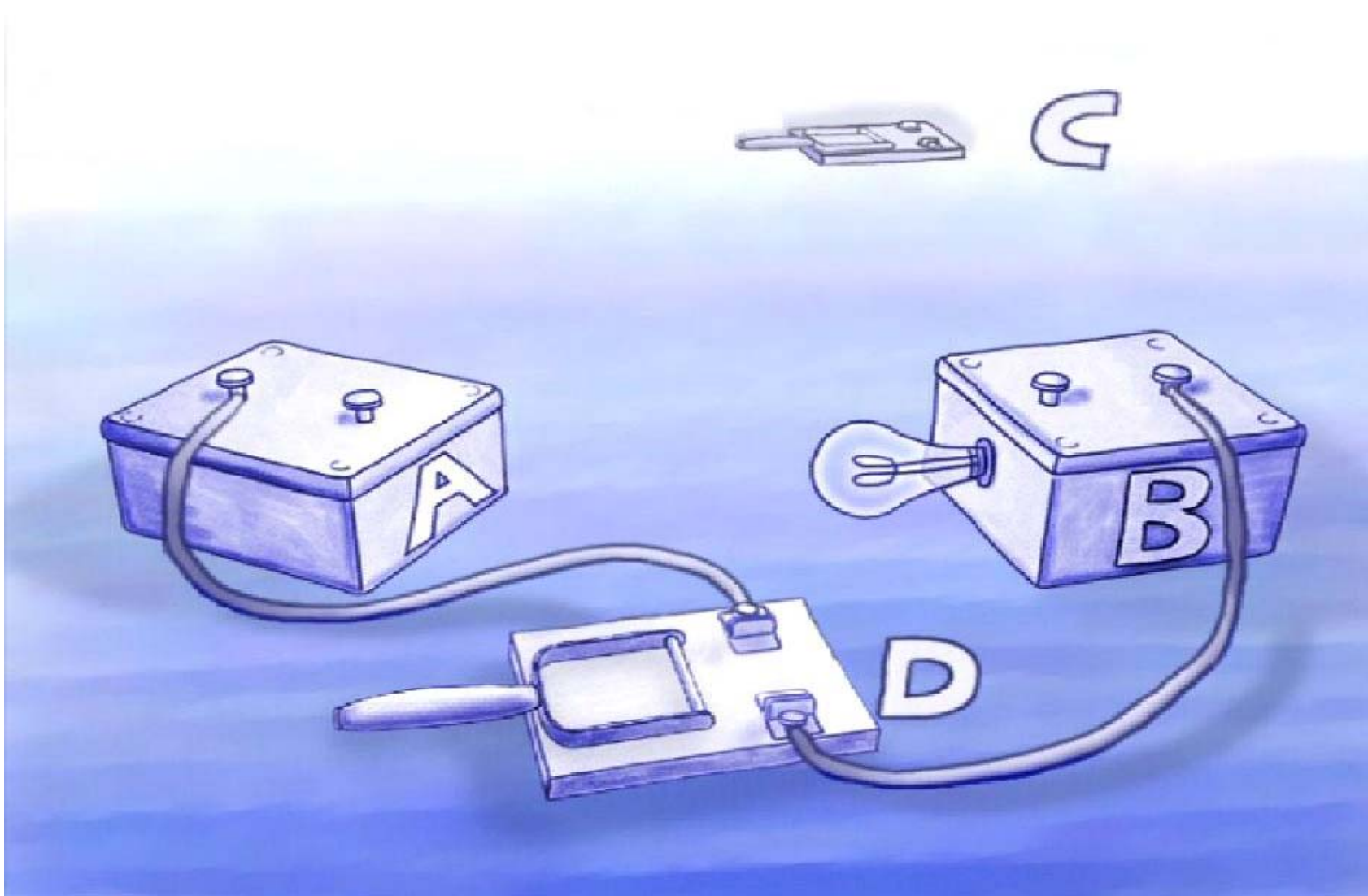
# Interference

- When the government oversteps its authority and demands something you are not required to do:
  - Do not just quietly follow the COTR instruction
  - Tell the government its demand is a change to your plan
  - Tell the government you will incur extra cost

Reverse the situation—You plan the “worse” option:



- COTR Suggestion – the “better” way:





# Interference

## Some Considerations:

- Does your design conform to the contract requirement as written?
- Will the change cost you money?

# Interference

## Remember:

- You are obligated to comply with the contract specifications.
- You are NOT obligated to make every possible improvement to the product.

# Interference

Other common types of interference:

- Overinspection
- Disruption of work
- Failure to reasonably respond

# Failure to Cooperate

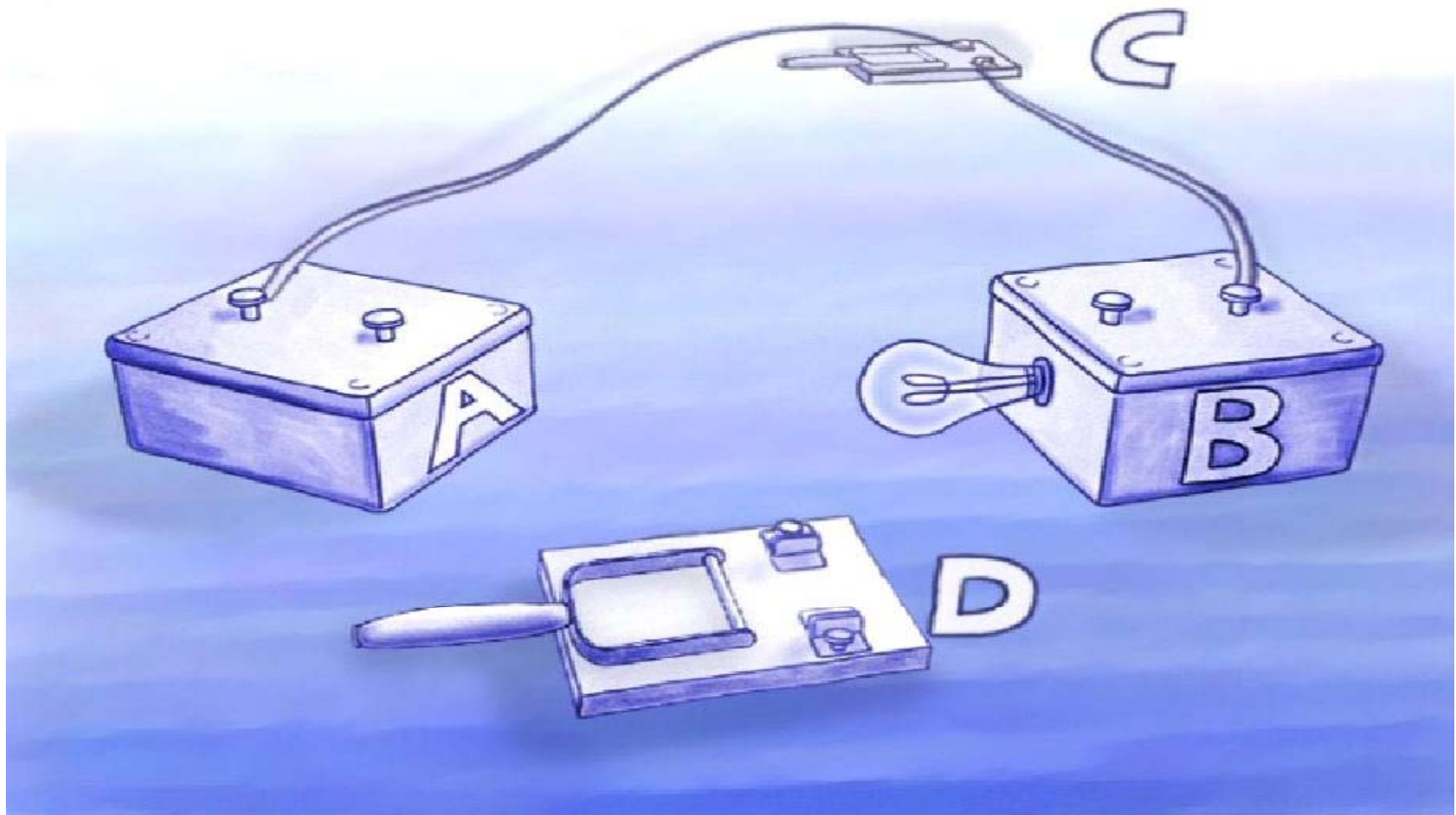
Some common examples:

- Not disclosing relevant information
- Not providing promised facilities
- Hindrance by other contractors
- GFP / GFE / GFM

# Constructive Acceleration

- Where you deserve more time to complete performance, but the government won't allow it
- Generally occurs in conjunction with other changes

# COTR's Demand:



**GOVERNMENT CONTRACT  
CHANGES**

**Administration of Changes**

**Basic Changes**

**Constructive Changes**

**Documentation of Changes**

# Documentation of Changes

- When you first identify a change to the contract – focus on both external and internal documentation



# Documentation of Changes

## **First Steps: External Documentation**

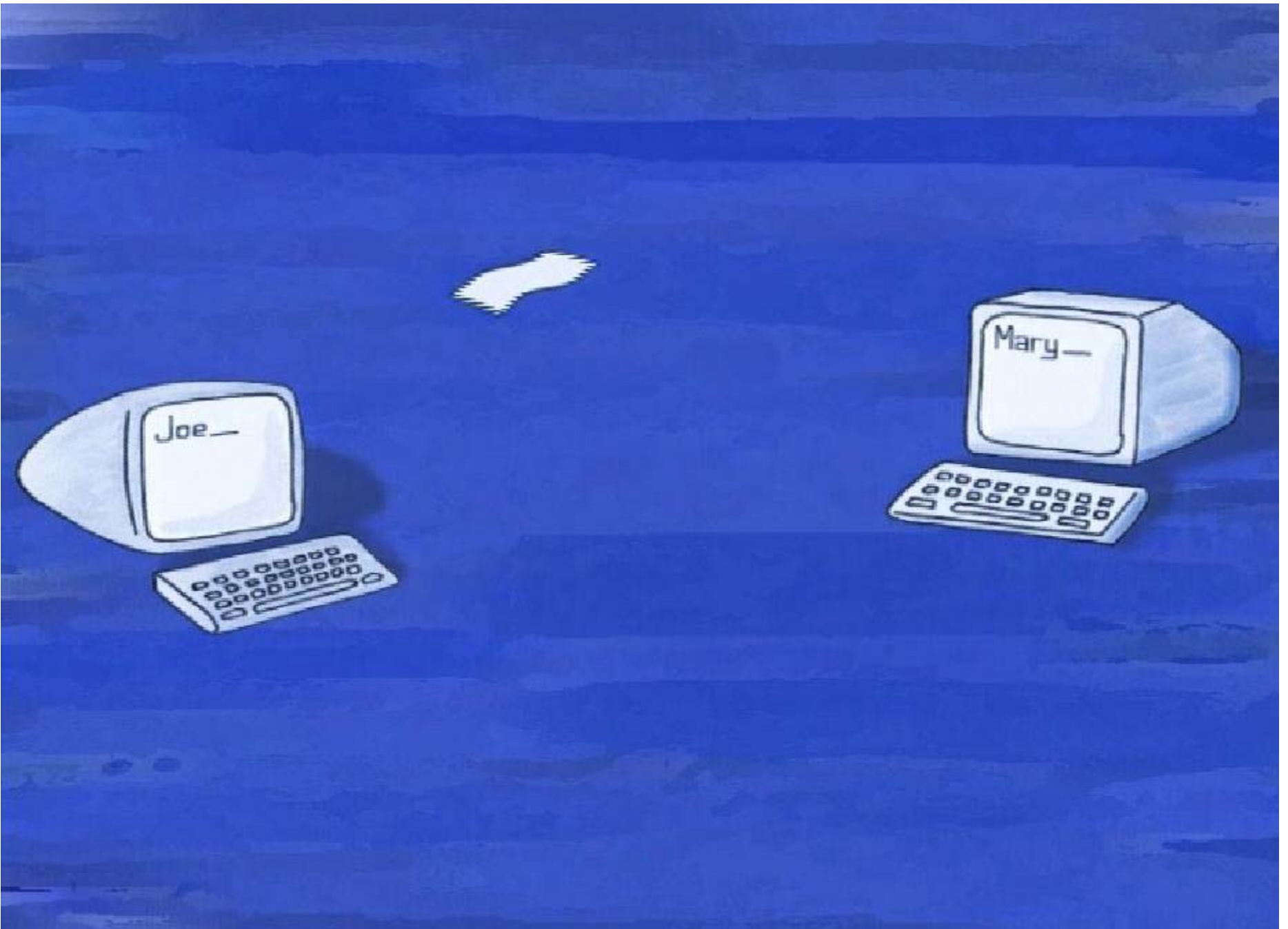
- Timely notify CO of the company's position regarding the change
- “Notification of Changes” clauses
- Critical to keep your Contract Administrator involved and up to date
- Make it clear you are not volunteering to do the extra work

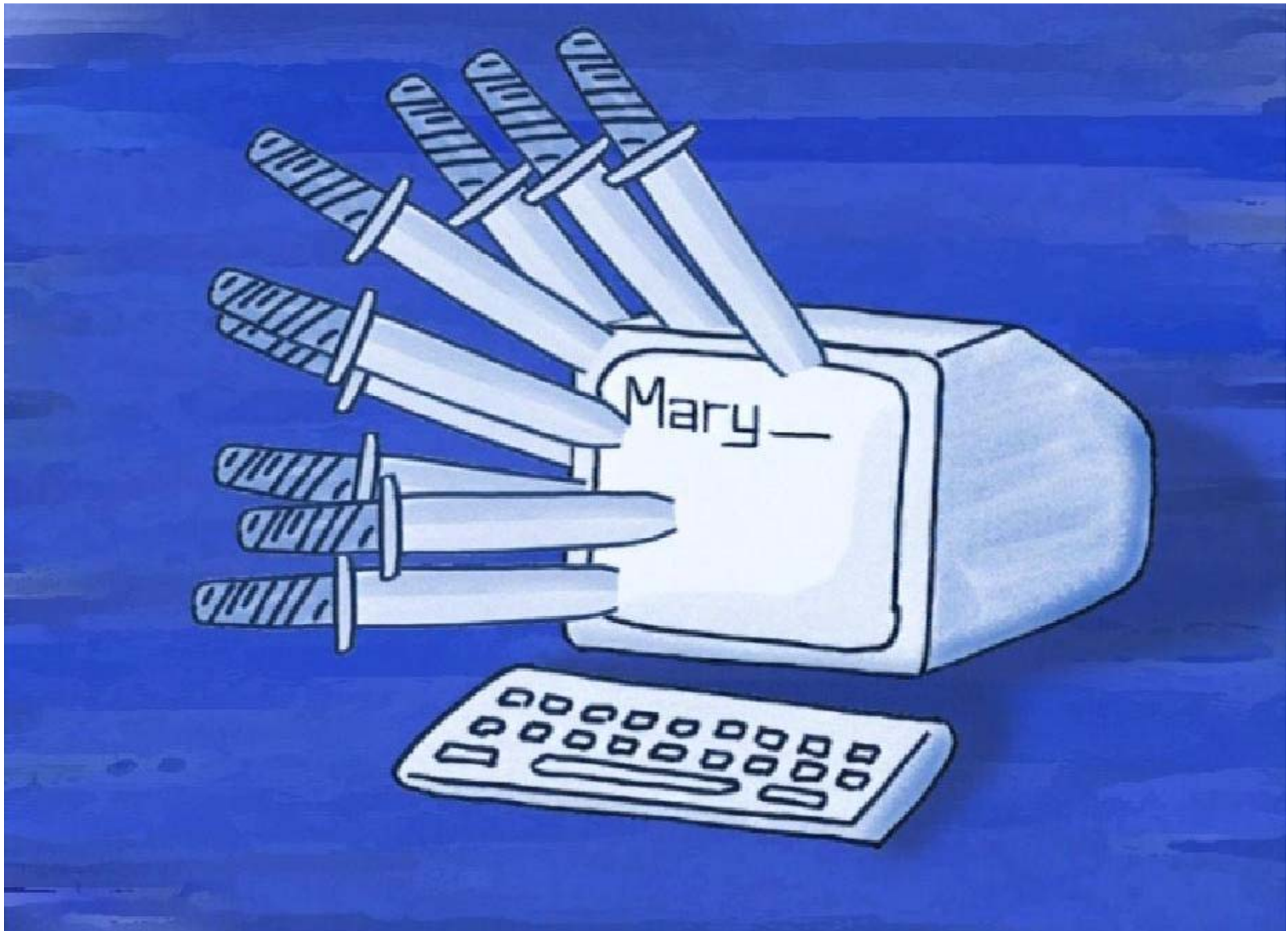
# Documentation of Changes

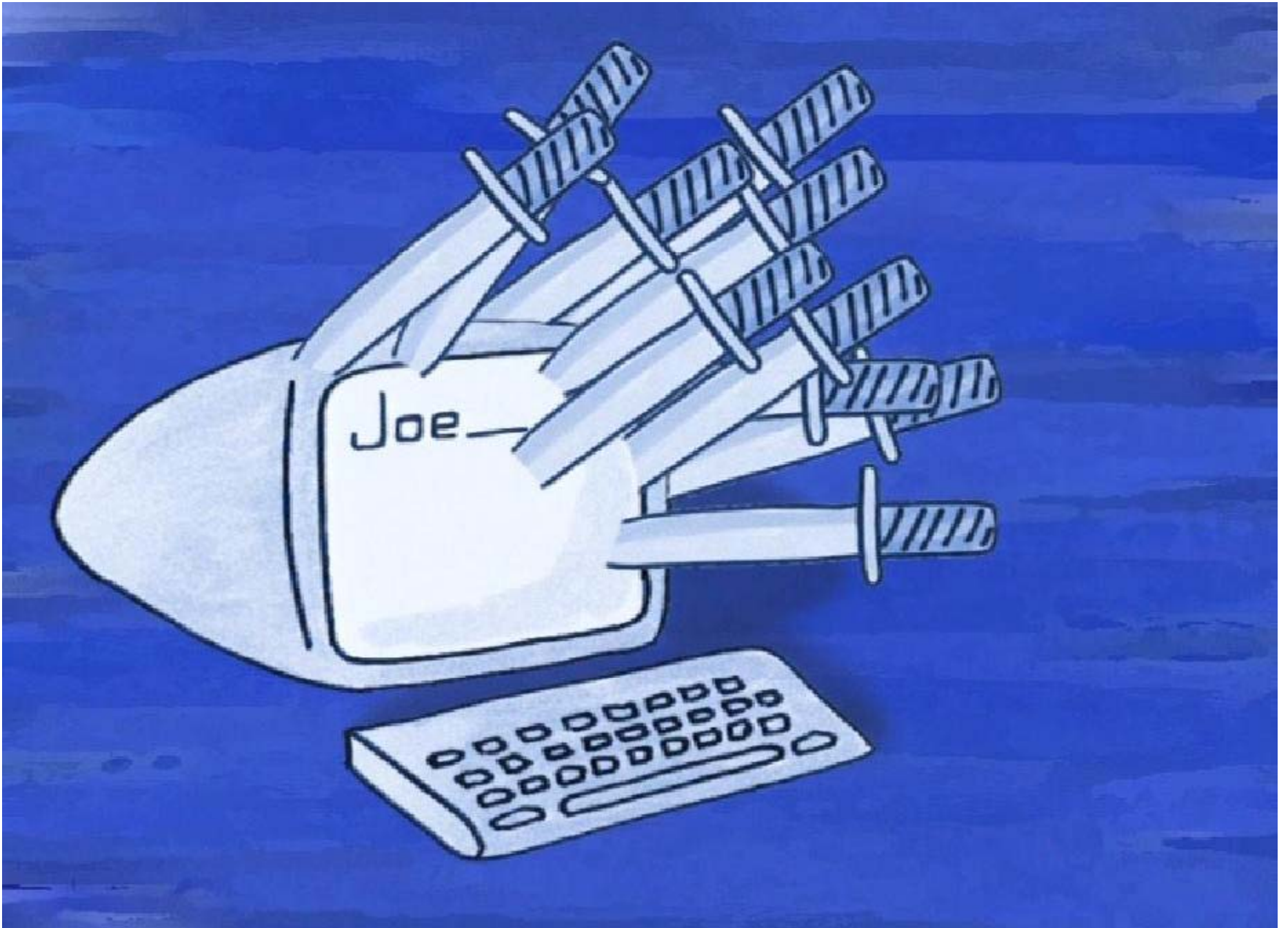
## **First Steps: Internal Documentation**

- Can be just as important as the external communications
- Your communications may be part of the record in court









# Documentation of Changes

## Internal Documentation

- Avoid backstabbing communications
- Record government actions
- Inform the contract administrator promptly
  - timely notice to government
  - advantages to filing a claim early (even if all the costs of the change are not yet incurred)

# Documentation of Changes

## Documentation Generally

- The more timely and complete, the more likely the company will recover
- Protecting your right to recover is not always easy, but it is important



# Documentation of Changes

## Preparing for a Claim

- The Contract Requirements
- Government Actions / Omissions
- Additional Work
- Increased Costs

# Documentation of Changes

## **Government Actions / Omissions**

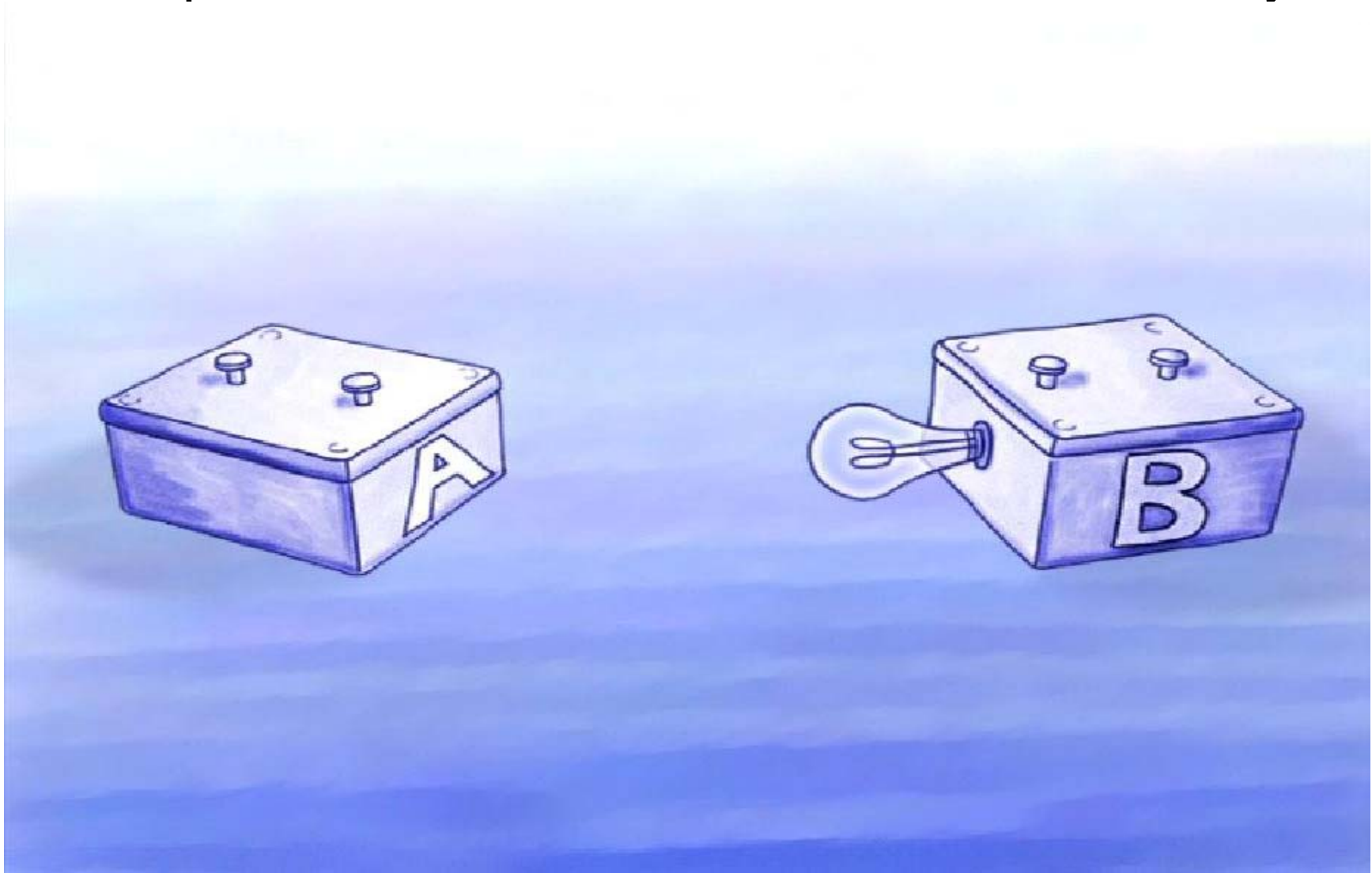
- Many ways to do this
  - Internal memos, email, daily logs, etc.
- Contemporaneous records
- Records of timely notice to government

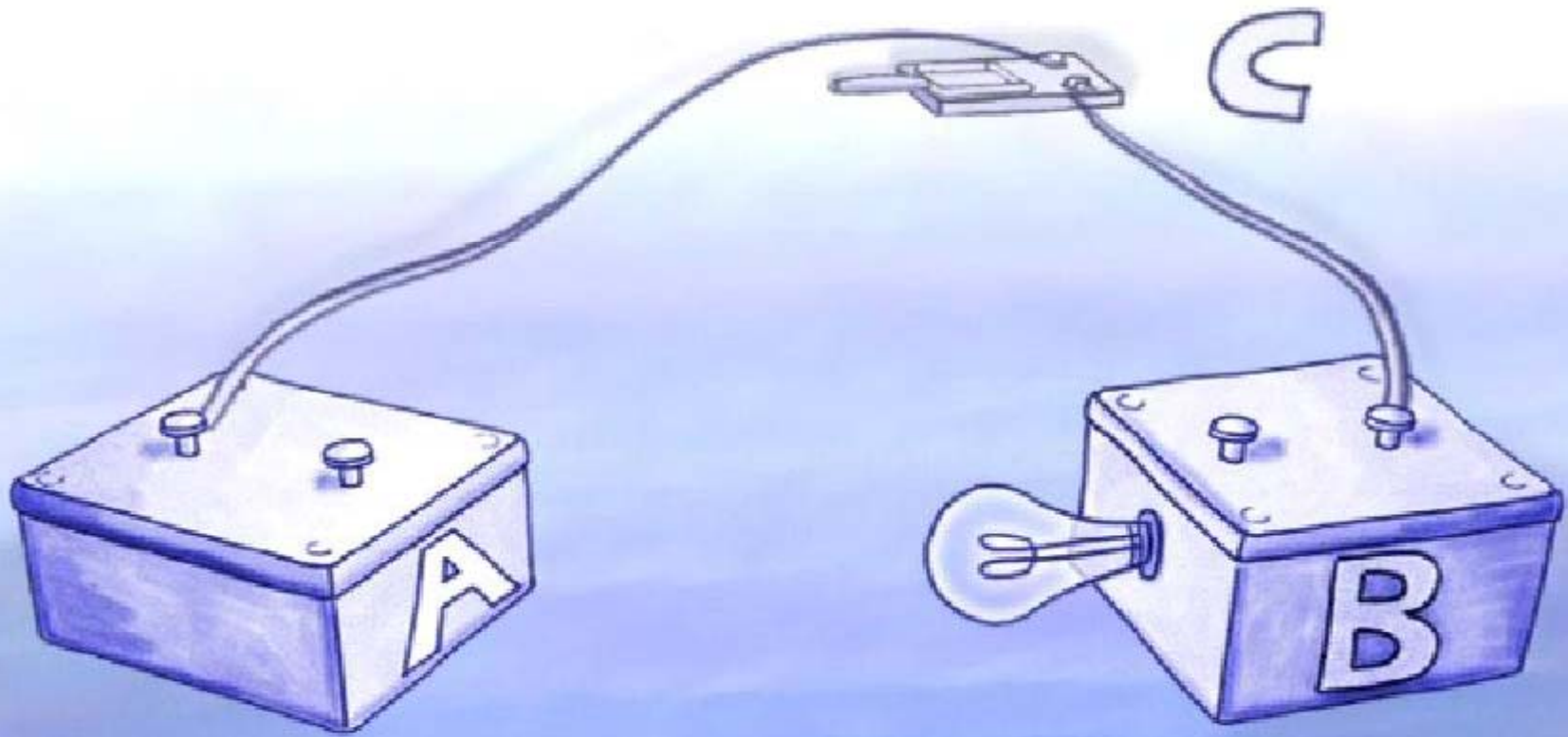
# **Documentation of Changes**

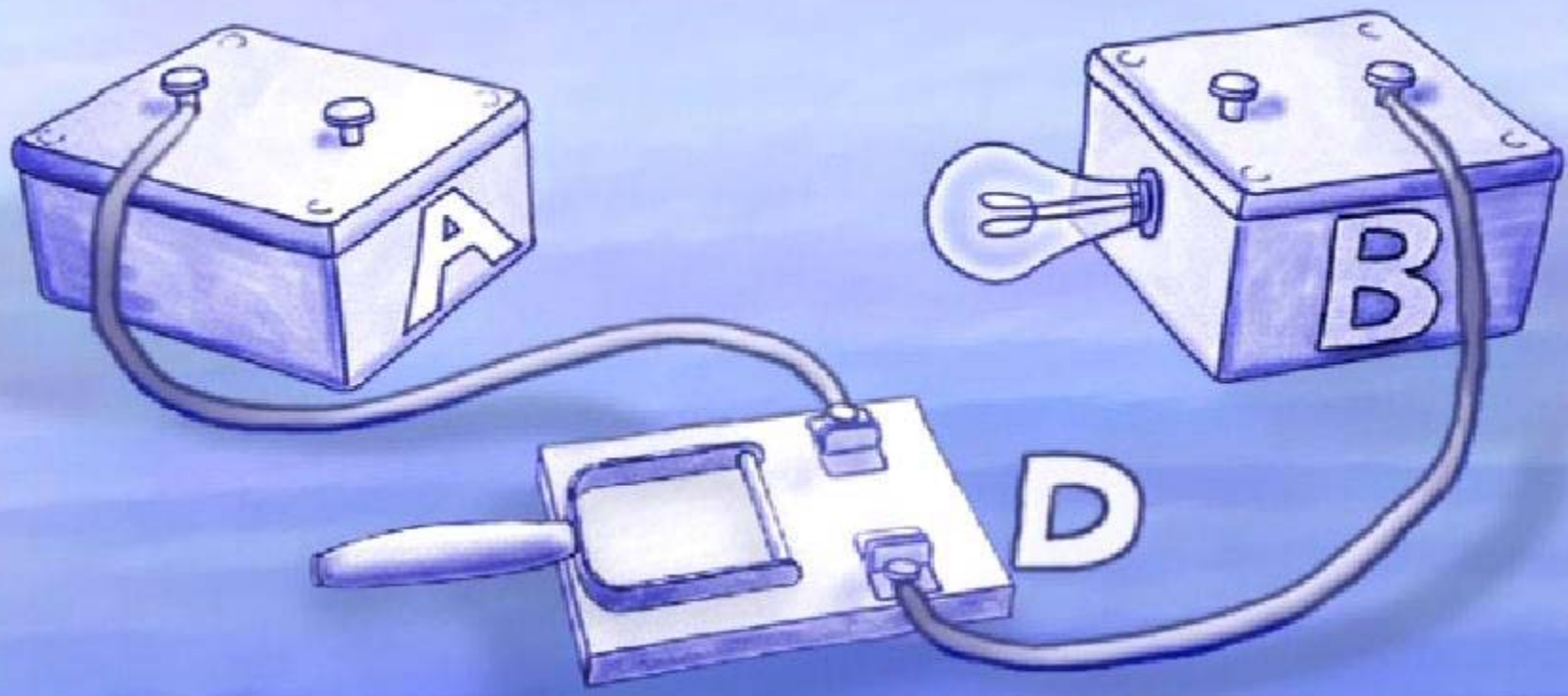
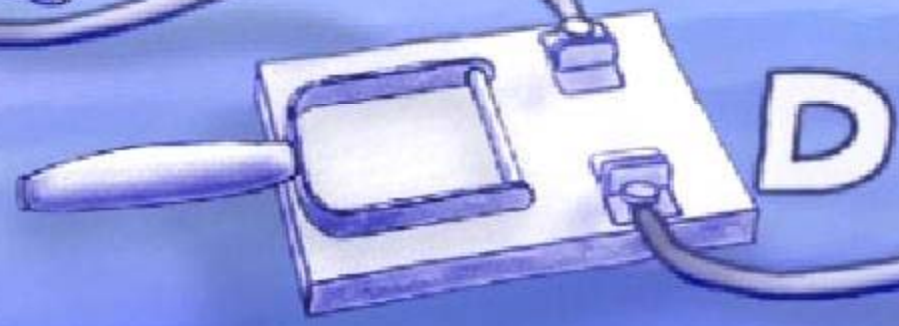
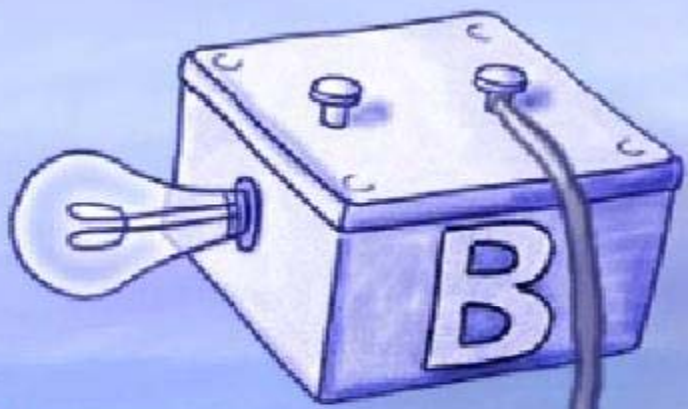
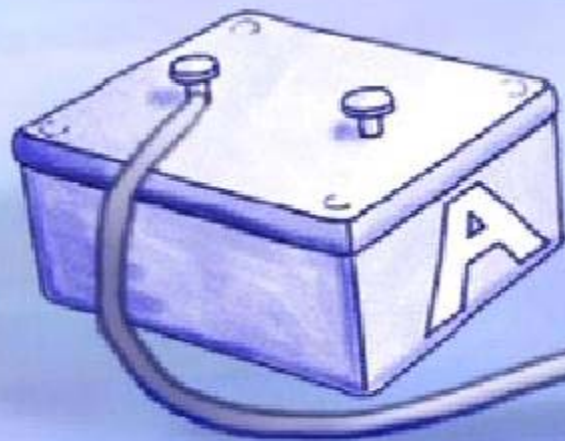
## **Types of Increased Work / Costs**

- Direct Effects
- Indirect Effects

Example: “Connect box A and box B electrically.”







# Documentation of Changes

## Direct Effects

- Labor / Overhead
- Material
- Subcontractor Costs
- Rework
- Other Costs

# Documentation of Changes

## Indirect Effects

- Delays
- Constructive Acceleration
- Disruption



# **Documentation of Changes**

## **Direct Effects and Indirect Effects**

# Documentation of Changes

## Tracking the Added Work

- For added work, you must take steps to identify and track:
  - Nature
  - Timing
  - Extent
- Creating internal records through memos, email, logs, diaries, etc.

# Documentation of Changes

## Tracking the Costs

- Change Order Accounting Clauses
  - apply to formal changes
  
- Constructive Changes are harder to track
  - often late recognition
  - consider charge numbers once identified
  - estimates may be needed
  
- KEY = Early identification and coordination

# **GOVERNMENT CONTRACT CHANGES**

# GOVERNMENT CONTRACT CHANGES

- **DO** check and compare all documents included or incorporated by reference in the solicitation.
- **DON'T** assume the “order of precedence” clause means you don't have to worry about lower-precedence documents.

# GOVERNMENT CONTRACT CHANGES

- **DO** ask the government to clarify any ambiguity or conflict in the solicitation documents.
- **DON'T** assume you will get paid for any work you didn't price in your bid.

# GOVERNMENT CONTRACT CHANGES

- **DO** be on the lookout for changes outside the “general scope.”
- **DON'T** confuse “outside the scope,” or extra work, with “outside the general scope.”

# GOVERNMENT CONTRACT CHANGES

- **DO** communicate with your contract administrator during performance, early and often.
- **DON'T** assume the contract administrator can clean it up later if it becomes a problem.



# GOVERNMENT CONTRACT CHANGES

- **DO** give notice of government action or inaction that causes extra work or delay.
- **DON'T** assume the government will agree with you if you decide to bring it up later.

# GOVERNMENT CONTRACT CHANGES

- **DO** be responsive to government requests and direction.
- **DON'T** volunteer to do it for free or assume it will be a “no cost” exercise.

# GOVERNMENT CONTRACT CHANGES

- **DO** communicate your position to the government.
- **DON'T** assume the government doesn't like to get something for nothing.

# GOVERNMENT CONTRACT CHANGES

- **DO** make a record of government responsibility for extra costs or delay.
- **DON'T** write memos blaming others in the company.

# GOVERNMENT CONTRACT CHANGES

- **DO** ask the government if it wants a product improvement.
- **DON'T** include the improvement without telling the government and then expect the government to pay for it.

# GOVERNMENT CONTRACT CHANGES

- **DO** understand that changes impact the company's profitability.
- **DON'T** assume that any given change is insignificant or inconsequential.

# GOVERNMENT CONTRACT CHANGES

- **DO** promptly document the nature, timing, and extent of changed work.
- **DON'T** delay or assume that someone else will prepare this documentation for you.

# GOVERNMENT CONTRACT CHANGES

- **DO** identify all additional work required to implement the change.
- **DON'T** overlook the indirect effects.



# GOVERNMENT CONTRACT CHANGES

- **DO** check with your contract administrator regarding any contractual change order accounting requirements.
- **DON'T** assume the company's accounting system will automatically identify and track the cost of changed work.

# GOVERNMENT CONTRACT CHANGES

