

Government Contracts Blog

Posted at 8:36 AM on February 17, 2010 by Sheppard Mullin

But You Promised!

Ten Simple Steps for Avoiding the "Apparent Authority" Trap

In our claims practice, we frequently represent clients seeking compensation for constructive changes. One of the most common obstacles to recovery arises where the Government employee who ordered the additional or changed work lacked the authority to do so. Invariably, the Government's first line of defense in these cases is the well-established principle that the Government is not bound by the unauthorized conduct of its agents. Although there are certain narrow exceptions to this general rule, the absence of actual express authority can make it significantly more difficult to recover for a constructive change.

Our experience suggests that the following steps help avoid the apparent authority trap:

1. Do remember that the Government is bound only by the authorized conduct of its agents. Promises or representations that exceed a Government employee's authority will not bind the Government, regardless of whether that Government employee appeared to have the requisite authority.
2. Do know your Contracting Officer and the limits on his or her authority. Most Contracting Officers have a warrant that identifies their agency and any monetary limits on their authority. If you do not know the scope of a Government employee's authority, do not hesitate to ask.
3. Do not assume that a Government employee is a Contracting Officer, or otherwise has the authority to bind the Government, simply by virtue of his or her position. The fact that a Government employee has an impressive title or rank, or appears to be a superior of the Contracting Officer, does not mean that he or she has contract authority.
4. Do remember that the Contracting Officer is the only individual authorized to issue orders under the Changes Clause. Other Government employees, including program managers, inspectors, technical personnel, and negotiators, generally do not have the authority to order changes, waive requirements, or settle claims.
5. Do not rely on verbal orders or representations. Request that all instructions, orders, or directives be made in writing and signed by the Contracting Officer.

6. Do carefully review any documents designating a Government employee as an authorized representative of the Contracting Officer. It is critical to understand the scope and limitations of each representative's authority.
7. Do not assume that a Government employee who has been delegated the authority to issue orders under a contract has the same authority as the Contracting Officer. In many cases, ordering officers do not have the authority to issue change orders or add funds to a contract.
8. Do remember that Government employees, including Contracting Officers, rarely have the authority to waive the requirements of applicable statutes or regulations and never have the authority to order that you engage in illegal conduct. If a Government employee directs or requests that you perform illegal conduct, contact your counsel immediately.
9. Do not assume that you lack a remedy if you learn, after the fact, that your personnel have performed additional or changed work at the direction of a Government employee who lacked the express authority to order that work. Depending upon the facts, you may be able to support a claim based on the doctrines of ratification and/or implied authority.
10. Do not expect to play by the same rules as the Government. Unlike the Government, a contractor can and usually will be bound by the conduct of personnel with apparent authority. As a practical matter, this means that contractors must carefully monitor their personnel and refrain from engaging in conduct that could lead the Government to believe that an individual has more authority than he or she actually possesses.

Authored by:

[Keith Szeliga](#)

(202) 218-0003

kszeliga@sheppardmullin.com