



FEDERAL CONTRACTS



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Emergency Procurement

While the national press has reported a number of stories questioning the award and pricing of various federal contracts for hurricane-related cleanup and reconstruction, there has been considerably less coverage of the problems faced by contractors in doing business with the federal government under the difficult conditions that followed the devastation.

This article focuses on one of the issues that may confront contractors during emergencies that prevent “business as usual”—the need to make sure a federal official has the authority to represent the government in a particular contract transaction.

Know Your Contracting Officer: Contracting with the Federal Government in Times of Natural Disaster and Other Emergencies

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[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.¹

Payments on Katrina Contract Halted after Billing Questions²

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In the immediate aftermath of a natural disaster or other emergency situation, a contractor's desire to help the government mitigate threats to life and property

¹*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

²Charles A. Babcock, *Payments on Katrina Contract Halted After Billing Questions*, WASHINGTON POST, Nov. 17, 2005, at D2. This article concerned a contractor who experienced a government suspension of payments on at least \$80 million in contracts for supplies and services to assist in caring for first responders and victims of Hurricane Katrina. The reported reasons for suspension of the payments included an allegation that the contractor was paid almost \$5 million for work performed prior to the effective date of an authorized written contract with the government.

will on occasion make it difficult, if not impossible, to address all contract formalities in advance. In some instances, it may be discovered later that the government officials requesting goods and services and directing the disaster response lacked actual authority to bind the government in the transaction.

Whether an official has the actual authority to bind the government to a given transaction can be a difficult issue. Ordinarily, if an official is later discovered to lack authority, the private party will be without an enforceable remedy despite its good-faith reliance upon the government's representations. Even under the most compelling and urgent circumstances, such as the immediate response to a natural disaster, anyone doing business with the government will be wise to follow the admonition from the *Merrill* decision noted above.

This article discusses some situations in which a government official's lack of authority can work harsh results, as illustrated by recent court and administrative decisions. The article also sets forth some approaches and practice points that may be used to avoid or mitigate such harsh results.

First, let's consider some "hypothetical" situations in which the issue of authority may arise. Place yourself in either of the following situations:

- You are the owner of a building supply store. Following an earthquake that has leveled most of the buildings in your town and left the area without power, you are relieved to find that your store is intact and has not been looted. The commander of the local Army National Guard unit arrives and requests that you turn over all of the electrical generators and the building materials that you have in stock. Under the circumstances, you want to cooperate and assist the authorities in responding to the disaster and proceed to open your warehouse. The unit commander provides you with an inventory of all he has taken and assures you that you will be contacted concerning payment. Several months pass by and, although life has begun to return to normal, no one from the state or federal government has contacted you. You are able to contact a number of National Guard officials but, although they are quite sympathetic, all state that they have no knowledge of this matter and are unable to assist you.

- You are the franchisee/operator of a motel not far from the shore. Following a record-breaking hurricane, you return to find that, apart from a loss of utility service, many fallen palm trees blocking the driveway, and a quite a few broken windows, your business is in good shape. As you are counting your blessings, an official from the Federal Emergency Management Agency arrives and advises you that he wants to use your motel as a base of operations and living quarters for the staff that is moving in to oversee recovery operations. He provides you with a two-page "access" agreement which provides that the government will make initial repairs to the motel (e.g., removing trees from the driveway and replacing windows) and pay a daily rate for use of the facility. You are happy to help with the disaster recovery effort and sign the access agreement on the spot. Despite your objections, a contractor hired by the government has moved all of the debris from your property onto the property of your irate neighbor. Further, all of the replacement windows the government's contractor installed do not match and many are smaller than the window opening, permitting rain and insects to enter the building. On top of that, the electrical utility

company advises you that the temporary generators the government used for electricity overloaded the existing wiring, which will now have to be replaced before the utility will reinitiate service.

It does not require much imagination to conceive of many other emergency or disaster-related scenarios where transactions entered into in good faith by a private individual or business are challenged later by the government on the basis that the government representative(s) involved lacked the requisite authority to bind the government.

The doctrines of apparent authority³ and promissory estoppel⁴ that apply in private-sector operations generally are unavailable to bind the government.⁵ Rather, a company that seeks to enforce an agreement with the government normally must be prepared to prove that the official with whom it dealt had actual authority.⁶ Typically, this means proving that the official was appointed as a contracting officer ("CO") by the head of the government agency.⁷ Although there are procedures available to recover payment for unauthorized transactions (i.e., transactions entered into by a government official who lacks actual authority), these procedures are time-consuming, subject to a wide degree of government discretion, and often unsuccessful.

Recent Court Decisions Underscore the Requirement that Government Officials Must Possess Actual Authority

Several recent decisions underscore the "actual authority" requirement and the harsh results that can follow, even in an emergency situation, when this requirement is not met.

In 2004, the U.S. Court of Federal Claims handed down the decision in *Dureiko v. United States*.⁸ In late August of 1992, Hurricane Andrew slammed into Florida and Southern Louisiana, devastating the Florida town of Homestead, and reducing the Pine Isle Mobile Home Park to a heap of debris. Soon after, Joseph Du-

³ The doctrine of apparent authority allows a third party to hold a principal liable for the unauthorized acts of its agent. For the doctrine of apparent authority to apply, the third party must reasonably believe that the agent has actual authority based on the third party's dealings with the principal. See BLACK'S LAW DICTIONARY 128 (7th ed. 1999).

⁴ The doctrine of promissory estoppel allows for the enforcement of an otherwise unenforceable promise. For this doctrine to apply, the promisee must have actually relied on the promise to her detriment, the promisee's reliance should have reasonably been foreseen by the promisor, and enforcement of the promise must be necessary to prevent injustice. See *id.* at 571.

⁵ See *Merrill*, 332 U.S. at 384; see also *McAfee v. United States*, 46 Fed. Cl. 428, 436-37 (2000) (Assistant U.S. Attorney lacked actual authority to forgive Farm Services Administration loans).

⁶ See *Merrill*, 332 U.S. at 384.

⁷ See Federal Acquisition Regulation ("FAR") Subpart 1.6. Usually a contractor can determine whether the government official has actual authority by viewing a contracting officer's warrant or a contracting officer representative's letter of appointment. During an emergency or other situation in which the government is trying to procure goods and services on an urgent basis, however, it can be difficult to obtain confirmation of the official's authority in a timely manner. This problem is only complicated further by the outages of cellular and land-line phone services that may occur during a natural disaster.

⁸ 62 Fed. Cl. 340 (2004).

reiko, owner of Pine Isle, was contacted by FEMA. FEMA sought to contract with Dureiko to allow for the temporary installation of emergency housing on the grounds of Pine Isle. As partial payment, an Army Corps of Engineers official agreed to remove debris from Mr. Dureiko's park using rubber-soled equipment, and also agreed to restore the park to pre-hurricane condition. While Mr. Dureiko dutifully performed his part of the agreement, the Corps' subcontractor removed the debris, but also proceeded to destroy roads, driveways, patios, vegetation, topsoil, underground utilities, and other park infrastructure in the process. Citing the Army Corps of Engineers official's lack of authority, the Court of Federal Claims found that there was no enforceable agreement beyond the initial debris removal work actually performed. As a result, Mr. Dureiko had no remedy for the second "disaster" visited on his property.

A similar result occurred in the recent decision by the U.S. Court of Appeals for the Federal Circuit in *Flexfab, LLC v. United States*.⁹ Flexfab, a subcontractor to Capital City, attempted to arrange for direct payment from the government under a Defense Logistics Agency ("DLA") prime contract for the supply of air-duct hose. Flexfab indicated to certain government officials prior to award that it would not enter into the subcontract with Capital City unless the government agreed to pay Flexfab directly. Capital City, DLA's small business specialist, and an employee at Defense Finance and Accounting Service ("DFAS") all were aware of Flexfab's requirement that it receive direct payments. Yet, the prime contract did not provide for payment directly to Flexfab and DLA proceeded to pay by electronic funds transfer to Capital City. Flexfab was never paid by Capital City, and subsequently filed suit against the government. The Federal Circuit affirmed the Court of Federal Claims' decision that Flexfab was unable to establish that any government official with actual authority had agreed to bind the government to the payment arrangement, thus precluding recovery.

Although the courts and contract appeals boards will, on occasion, find that a government official who is not formally appointed as a contracting officer possessed the requisite authority, these instances are exceptional and require a strong showing that the official in fact exercised actual authority. For instance, in the recent Court of Federal Claims case of *Advanced Team Concepts, Inc. v. United States*,¹⁰ the court found implied actual authority in a case of relatively egregious government conduct. In *Advanced Team Concepts*, a Ms. Lee was the first director of the Leadership Development Center ("LDC"), a management training center that provided educational services to the Immigration and Naturalization Service. Although not a contracting officer, Director Lee was authorized to schedule, hire, and pay teachers to conduct LDC training sessions. Director Lee scheduled Advanced Team Concepts, Inc. ("ATC"), a management consulting firm, to teach several LDC courses. In November 2003, Director Lee retired and was replaced by Lyle Langton. Langton terminated all of ATC's remaining classes, giving them instead to Giraffe Consultants, former-Director Lee's new firm. Stretching to help ATC and possibly punish the government, the Court of Federal Claims looked at Director

Lee's authorized scheduling, hiring, and paying of invoices to find that the authority to bind the government was central to the director's duties, thereby giving rise to implied actual authority and allowing ATC to recover its costs of teaching the LDC courses.

The earlier decision of the Department of Interior Board of Contract Appeals in *Houston Helicopters, Inc.*,¹¹ also provides some insight into the limited circumstances in which actual authority will be found even though a particular government official did not hold a contracting warrant or other grant of express authority. In *Houston Helicopters*, a government dispatcher who was not a contracting officer ordered a contractor to deploy its helicopter from Arizona to Alaska, pursuant to an existing interagency contract, in order for the helicopter to assist in fighting a large, wide-spread forest fire. The contractor was concerned that its helicopter lacked equipment normally required under the contract to operate in Alaska and, although he complied with the directions to deploy the helicopter, he made several inquiries and attempted to confirm that the equipment requirement had been waived.

The dispatcher reported the circumstances to his supervisor, who confirmed that the equipment requirements had been waived. Once the helicopter arrived in Alaska, however, the government representatives on-site advised the contractor that it had to install the equipment in order for the helicopter to operate. The contractor was unable to locate, install, and obtain Federal Aviation Administration approval in time for the helicopter to be used in the fire-fighting operation, and the government later refused to pay the contractor, arguing that the dispatcher lacked authority to enter into the contract or to waive the equipment requirements.

Under these circumstances, the Interior Board of Contract Appeals found that the dispatcher had implied actual authority to enter into the contract. The board relied extensively on the unique terms of the contract, which provided that the dispatcher was the official who ordinarily would direct contractors to deploy their aircraft in support of firefighting operations.

What Private Contractors Can Do to Avoid or Mitigate a Government Official's Lack of Actual Authority

In the event that a contractor is faced with a request or demand for goods or services from a government official without the benefit of an existing schedule or other contract, there are measures that the contractor can take to reduce the risk of an unauthorized transaction. These measures include:

- **When in doubt, confirm the government official's actual authority.** It is never inappropriate to ask a government official to confirm that he or she has actual authority to bind the government to a transaction. If approached by a government representative seeking goods or services, you should inquire whether he or she has contracting authority, and specifically ask for the official's or CO's warrant or letter of appointment.

- **Create a record.** If a government official is unable to provide adequate confirmation of his or her authority, ask for the identity of the CO or office that normally supports their operations. By contacting the CO, following up in writing, and providing copies of all correspon-

⁹ No. 05-5018 (Fed. Cir., Sept. 27, 2005) (84 FCR 341).

¹⁰ No. 02-197 (Ct. Fed. Cl., Sept. 28, 2005) (84 FCR 369).

¹¹ IBCA No. 3186, 96-1 BCA ¶ 28,172 (1996).

dence and contract documents to the CO, you may be able to establish that the CO's authority is "imputed" to that official or that the CO has ratified or otherwise approved the transaction.

Of course, it is preferable entirely to avoid the problems presented when a government representative's authority to enter into an arrangement is in doubt. The best approach is to simply enter into valid contracts with the government prior to an emergency arising. Contractors that are interested in providing goods and services that are likely to be needed in the event of an emergency are well-advised to investigate available government contracts before a natural disaster or similar contingency occurs. For example, a number of General Services Administration ("GSA") schedule contracts and other government-wide acquisition contracts ("GWAC") and indefinite delivery – indefinite quantity contracts provide current contracting opportunities.¹² By obtaining such a contract prior to a disaster or emergency, a contractor will be able to establish critical terms, conditions, and prices in a calmer setting than is likely to exist in the throes of an emergency response.

Under these circumstances, the chances that the government officials who negotiate the contracts lack actual contracting authority are greatly reduced. Once these contracts are in place, government agencies such as FEMA, the U.S. Army Corps of Engineers, and, where authorized, state and local government agencies, may simply place delivery or task orders against the existing contracts for goods and services needed to respond to the emergency.

In addition, companies interested in providing such goods and services can contact government agencies, such as FEMA, to determine whether there are any subcontracting opportunities with companies that have already contracted with the government to provide such emergency goods and services as needed.

What to Do 'After the Fact' if the Government Refuses to Pay on the Basis That the Contract Was Unauthorized

The measures available prior to entering into a potentially unauthorized transaction with the government do not address every emergency situation and are largely within the government's, rather than the contractor's, control. In the event a contractor later discovers that the government representative lacked actual authority, there are several remedies available, although each presents a number of challenges to an "innocent" contractor seeking timely payment for goods and services it provided to the government. These remedies include:

■ **Formal ratification of unauthorized commitments.** In appropriate cases, formal ratification by the government can result in approval of the transaction and payment for goods and services rendered. The Federal Acquisition Regulation permits a CO, in some instances, affirmatively to ratify unauthorized commitments en-

tered into by the government.¹³ However, requirements for formal ratification may be difficult to satisfy, such as showing that the government agency had adequate funds available both at the time of the unauthorized commitment and at the time of ratification. Moreover, the original contract price may be subject to adjustment if the CO determines that the original price was not "fair and reasonable." In any event, obtaining formal ratification may be very time-consuming and is outside of the contractor's control.

■ **Implied ratification.** Courts or boards of contract appeals may find implied ratification where a CO permits performance of all or part of the unauthorized contract with actual or constructive knowledge of its unauthorized nature.¹⁴ Under some circumstances, it can be difficult to prove that a contracting officer had full knowledge of the facts surrounding a potentially unauthorized commitment. Moreover, in order to assert this remedy effectively, a contractor may have to resort to time-consuming and expensive litigation.

■ **Equitable estoppel.** In very limited circumstances, the contractor may be able to show that the government is equitably estopped from denying payment. This doctrine can be used to bind the government where government officials knew there was no authorized contract in place and acted or otherwise induced the contractor to perform, intending that the contractor rely on the government's words or actions. In addition, the contractor must be ignorant of the actual state of the contract, and must rely detrimentally on the government's conduct.¹⁵

■ **Extraordinary contractual relief.** Where operational urgency precludes compliance with normal contracting procedures, extraordinary contractual relief under Pub. L. No. 85-804 may allow for formalization of informal commitments.¹⁶ By executive order, authority to grant extraordinary contractual relief has been delegated to the heads of several government agencies, including FEMA and the Defense Department.¹⁷ However, the process for obtaining this relief places substantial burdens on the contractor, including a requirement to make a formal submission to a contracting officer, who must conduct a thorough investigation. A submission to an agency contract adjustment board also may be required.

Conclusion

Lack of contractual authority and formal contract coverage can pose some of the most serious problems a contractor can face when providing goods and services to the government under urgent or emergency circumstances. A contractor that fails to confirm the authority of the government representatives with whom it is dealing may be unable to recover payment or may face cumbersome agency ratification procedures or litigation. Because the burden is on the contractor to establish the

¹³ FAR 1.602-3.

¹⁴ *Houston Helicopters*, *supra*, 96-1 BCA at 140,615-616.

¹⁵ *Id.*; see also *Lockheed Shipbldg & Constr. Co.*, ASBCA No. 11,246 at 53,553-557, *aff'd on recons.*, 75-2 BCA ¶ 11,566 (1975) (Government estopped from denying payment of settlement agreement relating to shipbuilding claims).

¹⁶ FAR Part 50; *Vec-Tor, Inc.*, ASBCA Nos. 25807, 26128, 85-1 BCA ¶ 17,755 at 88,676 (1984) (noting that "[o]perational urgency may be grounds for formalization of informal commitments under P.L. 85-804," but further noting that board lacked jurisdiction to grant extraordinary contractual relief).

¹⁷ E.O. 10789, November 14, 1958.

¹² Detailed information about current contracting opportunities is available on the Internet at www.fedbizops.gov, which is the federal government's single point-of-entry for all contracting opportunities over \$25,000. Detailed information on opportunities for GSA Schedule contracts is available at www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8202&contentType=GSA_OVERVIEW.

authority of the supposed CO, a contractor should take all necessary measures to ensure that authority is present when drafting, modifying, updating, or extending a contract with the federal government. In order to mitigate the harsh results that arise when the government questions the authority of its agents and representatives, contractors should be familiar with all of the measures to address the “authority problem” before, during, and after an emergency develops.

This article deals with only one of the many important issues that must be addressed in entering into any contract with the government, particularly under urgent or emergency circumstances. Other important matters include establishing the terms and conditions

that will apply to the contract, establishing contract price and a delivery or performance schedule, and ensuring that the contract contains a statement of work or performance specifications that completely and accurately describe the services or products to be supplied. A contractor’s ability to address these sorts of issues can be severely challenged under the circumstances following a natural disaster or emergency. Identifying and resolving these problems at an early stage of the procurement, however, will best ensure that both the government and its citizens receive the services and supplies they urgently need in the aftermath of a disaster, and that the contractors that fulfill those needs are treated fairly.