

RATIFICATION, CHANGES, UNAUTHORIZED COMMITMENTS

INTRODUCTION

On occasion, a contractor has likely experienced a Government representative requesting a change to the work outlined in a construction contract. If the additional work requested is performed by a contractor, without a fully executed modification or change order to the contract outlining the additional or changed work to be performed, the Government may not be required to pay the contractor for such work. This can occur if the Government representative instructing the contractor to perform additional work does not have the authority to do so.

An “Unauthorized Commitment,” as described in FAR 1.602-3 “...means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.” While work performed under an Unauthorized Commitment can be construed as a Constructive Change, often a Formal Ratification is legally the only remedy available to a contractor in such situations. What does that mean?

WHAT DOES THIS MEAN?

A Constructive Change is a change made by the Government that does not necessarily comply with the “Changes” clause. (See FAR 43.104) Under this provision, a contractor must notify the Government of the change and the Government should then evaluate the change, plan for funding of the change, and issue a formal change order or modification to the contract. Alternatively, the Government can indicate its belief that no change has occurred and force the issue.

An Unauthorized Commitment occurs when a contractor is asked to perform tasks that are not within the scope of work or part of the contract. If a contractor (as directed) performs the work without receiving a fully executed change order, this work is considered to be at the contractor’s risk and payment is no longer guaranteed.

THE SOLUTION

A Formal Ratification, according to FAR provision 1.602-3, “...means the act of approving an Unauthorized Commitment by an official who has the authority to do so.” A Formal Ratification is frequently the only means by which an Unauthorized Commitment can be remedied. (Garrett, G. A. (2012), Unauthorized Commitments, Ratification, and Constructive Changes. *Contract Management, April* (2012), 30-39)

However, a Formal Ratification must be exercised by the head of the contracting activity involved, which is usually “an official at or above the level of an Assistant Secretary (or Deputy) of Defense or of the Army, Navy, or Air Force; and a contract board established by the Secretary concerned. (http://www.acq.osd.mil/dpap/dars/dfars/html/current/250_1.htm)

LESSONS LEARNED

The lessons to be learned from Unauthorized Commitments, Constructive Changes, and Formal Ratifications are that contractors need to know what constitutes the difference between, i.e. a Constructive Change, or Unauthorized Commitment, and how to avoid them. Contractors also need to be aware of possible remedies under those circumstances and how to collect in those situations.

A contractor should always be educated about which Government personnel, such as contracting officers, project leads, or technical representatives, are authorized to make changes to a contract, to issue change orders, or to change the work beyond the original scope in a given contract. Failure to do so can be disastrous.

CONCLUSION

Contractors must be aware that occasionally direction given by a Government representative may not be authorized. A Government representative may be unable to commit the Government to pay for additional or changed work, additional materials, or work that is not in a contractor's contract.

As stated above, if a contractor proceeds with the work without obtaining a change order or contract modification, it may not be able to recoup costs associated with the additional or changed work without a Ratification.

A Formal Ratification requires that *"the contractor submits a written request for payment within six months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment;"* and *"the approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures."* (See FAR 50.102-3(d)(1-2))

In the event of questionable Government direction, retaining the assistance of a consultant should be seriously considered to protect a contractor's interests properly and thoroughly. The experts at Excell Consulting International, Inc. stand ready to assist and evaluate your company's position and provide valuable and cost-effective guidance for your business.

In the end, you will be glad you made the call; by the way, it's FREE.

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