
UNAUTHORIZED COMMITMENTS

What constitutes unauthorized commitments and what impact can it have on a contractor and can you recover?

INTRODUCTION

As defined under [FAR 1.602-3\(a\)](#), Unauthorized Commitments:

“...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.”

In essence, what this means for a contractor is that it is essential to know who has the authority to perform which actions on behalf of the Government. This is especially true where verbalized changes to the proposed or contracted work are being made. There are specific outlines that delegate what capacity each Contracting Officer (CO), Contracting Officer’s Representative (COR), or other Government employees has.

Unfortunately, often the contractor’s personnel may not be aware that simply because a Government representative is giving instruction, such as on a pre-bid site visit, that he or she does not have the authority to give verbal instruction that might change what is in the original Scope of Work. Therefore, it is incumbent on the contractor to be aware of which Government employees possess what authority to make changes, to include verbal instruction on a job site.

POTENTIAL IMPACT

According to the Department of Defense COR Handbook, COs are the only Government personnel who have the authority to make changes to contracts. (See [DOD Handbook](#)) Unfortunately, it is up to a contractor to be sure the person he or she is speaking with has authority to properly handle changes to the work. As such, the Government can only be rightfully bound by a CO.

The reason for this requirement is to help prevent any agreements that can violate federal laws and regulations, including the (DFAR). *Id.* It is intended to prevent spending of money that exceeds the amount allotted for certain work. However, there is an exception and that is if the Unauthorized Commitment becomes Ratified.

RATIFICATION

Ratification, as defined by [FAR 1.602-3 \(a\)](#), “...means the act of approving an unauthorized commitment by an official who has the authority to do so.” The policy under this FAR provision gives conditions that outline who may possess the authority to Ratify Unauthorized Commitments and what criteria is necessary as stated under FAR 1.602-3(c)(1-7):

1. *Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;*
2. *The ratifying official has the authority to enter into a contractual commitment;*
3. *The resulting contract would otherwise have been proper if made by an appropriate contracting officer;*
4. *The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;*
5. *The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;*
6. *Funds are available and **were available** at the time the unauthorized commitment was made; and*
7. *The ratification is in accordance with any other limitations prescribed under agency procedures. (underline and bold for emphasis)*

In any event, if the CO does not approve the ratification process, a contractor may still seek relief under the Disputes and Appeals FAR provisions that begin at FAR 33.2. Under this FAR provision, a contractor may file a claim which may lead to negotiations with the CO and a possible resolution and recovery of monies due. Ultimately, the burden of proof rests on the contractor and makes it essential that contractors not only understand that Unauthorized Commitments can occur, but also how to avoid them and if necessary recover against them.

CONCLUSION

Contractors should be aware of the ramifications of performing work under Unauthorized Commitments. Only a CO is legally authorized to bind the Government contractually, and it is possible that any work performed outside of the Scope of Work without proper CO authorization and a subsequent contract modification can result in a loss for a contractor. The inability to recover costs associated with additional work can be devastating to most contractors.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor's interests properly and thoroughly. The experts at Excell Consulting International, Inc. have experience with Contracting Officers as well as Unauthorized Commitments, and 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 a FREE CALL.

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