Department of Commerce-Office of General Counsel

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of the COTR's Role

November 20, 1992

Assistant General Counsel for Finance & Litigation

A Lawyer's View of the COTR's Role

by Kenneth A. Lechter

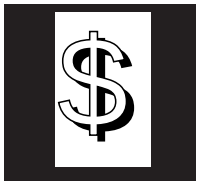
The Government Contracting Triangle

THE CLAUSE

The COTR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes which affect the Contract price, terms, or conditions. No [changes] shall be made without the expressed prior authorization of the Contracting Officer.

THE DILEMMA

We have all seen this clause thousands of times, and there is certainly nothing ambiguous or difficult to understand in it. It is necessitated because FAR 2.101 proscribes that a clause defining the term "contracting officer" shall be included in all solicitations (52.202-1), and therefore contractors are admonished that the COTR (with whom the contractor will be working on a daily basis) is not a contracting officer. It is what could be referred to as "hornbook" law in government contracting; the concept that in this area of the law, the legal theory of apparent authority is rejected; that if the Government is to be bound, it must be through the actions of a warranted contracting officer. It could be argued that the FAR must have anticipated that there would be problems created by unauthorized commitments by providing for the ratification procedures found at FAR 1.602-3. But these procedures presume concurrence by the contracting officer after the "unauthorized act." What if there is no such concurrence?



It would not be going out on a limb to posit that an inordinate amount of claims, and therefore appeals, [and hard feelings?] are generated through a dynamic which is peculiar to government contracting — the triangle created by the necessary roles assigned by statute, contract, and regulation to the contractor, the CO and the COTR. These roles, although specifically defined, may place the parties in inherently conflicting positions, and the only real solution to the dilemmas created by them is for each party to appreciate that they exist.

For example, the facilities manager at an installation assigned as the COTR on a construction contract feels he has more in common with the construction contractor than with his contracting officer, who "doesn't know which end of the shovel is up." That COTR may sincerely believe that he is in a better position to identify and approve, for example, a requested change for an alleged differing site condition [on site] than the Contracting Officer who has never gotten his hands dirty in his life, and may be located a thousand miles away. Intellectually, he knows that the CO must approve the change, but he also knows that the job has got to be done; that the CO will ultimately rely upon his input in approving the commitment [after the fact], but that he's the one responsible for getting the work done on time. He knows the contractor as a person. The CO doesn't. He knows the Contractor is an honest chap, who has bent over backwards to get the job done. Is it fair to hold him up on a "technicality?" He may have to work with this contractor again. Isn't part of his job to keep good relations with that contractor for the benefit of the Government?

THE LAW

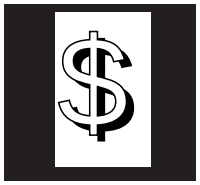
Where are we today legally, if a COTR, in perfectly good faith and with the best of intentions, approves a change or makes any type of unauthorized commitment which, for the purposes of this discussion, turns out to have been absolutely necessary to the successful completion of the contract, and which, after the fact, the CO either will not, or can not approve [for example, *there is no money]?* Ironically, what had earlier been described as "hornbook law" really isn't that settled after all. There are authorities

From the Editor Ken Lechter is an attorney in the Contract Law Division who advises various Bureaus in the Department.

A Lawyer's View is a monthly publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at FTS 202-482-1122, or via e--mail to Jerry Walz@OGCMAC@OSEC

going in both directions, and it appears that Board decisions may very well turn on the facts and the Board's interpretation of those facts in each particular case.

We all remember being infused with the rubric that anyone entering into an arrangement with the government takes the risk of having accurately ascertained that "he who purports to act for the Government, has that authority, and exercises it within its proper bounds."[1] As a result, one would think that the Government could successful defend a claim based upon an unauthorized commitment by a COTR under any circumstances. However, under proper circumstances, and if certain elements are met, contractors have succeeded with such a claim under an equitable principle known as estoppel. See *American Electronic Laboratories, Inc. v. United States*, 774 F.2d. 1110 (Fed. Cir. 1985), which held that estoppel can be asserted against the Government if (1) the Government knows the true facts; (2) the Government intended its conduct to have been acted upon; (3) the contractor is ignorant of the true facts; and (4) the contractor relies to his economic detriment. See also *Max Drill, Inc. v. U.S.*, 192 Ct. Cl. 608, 427 Fd. 1233 (1970).



In the American Electronic Laboratories case, *supra*, an appeal from the Armed Services Board of Contract Appeals, the contractor, in a cost plus fixed fee contract, attempted to recover costs incurred in excess of the funds which were allotted in the contract, and in the face of a limitation of funds clause. Its claim hinged on convincing the Board that it was reasonable for it to have relied on the COTR's representation, when it started experiencing cost overruns, that more funds could be placed on the contract [they couldn't]. The Court of Appeals held, that under the facts of that case, the contractor's reliance was reasonable and the Government was required to pay the contractor's excess costs. Conversely, in a recent case, there is dictum that infers that estoppel can never be asserted against the Government, absent some type of bad faith. *OPM v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d. 387 (1990), and *Jana, Inc. v. United States,* 936 F. 2d. 1264 (Fed. Cir. 1990).

In Jana, *supra,* the contractor had been assessed overcharges as a result of a DCAA audit after the COTR had certified the correctness of its invoices. It attempted to claim that the Government was estopped from assessing the overcharges as it had a right to rely on the COTR's prior certifications of correctness, and therefore the audit was inappropriate and the results could not be used against it. The Court held that as the COTR was contractually charged with only the responsibility for determining the quality of the work, and not with whether the hours were properly billed, the contractor had no reasonable basis to rely on the certifications. The Court went on to say that as the contract had clearly granted the Government the right to conduct an audit at any time, the contractor should have realized that fact, and therefore its reliance was misplaced.

Acknowledging that, at least before the Boards of Contract Appeals, there is a stated philosophy that equitable principles will be applied when appropriate,[2] then, for the foreseeable future, the Government risks a potentially large economic "exposure," if the Board determines under the facts of a specific case that a contractor had a right to rely and concludes that the Government representative intended the contractor to rely, on an unauthorized representation or commitment. At the very least, even if the case can successfully be defended, bad feelings between Government colleagues, and negative public relations between the Government and the private contracting community are created, when a COTR makes an unauthorized commitment.

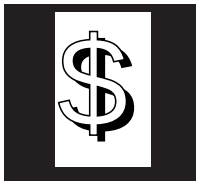
AN APPROACH

These problems can greatly be avoided through an open dialogue immediately after award, but before contract performance begins, among all of the "players." Begin with a frank discussion which puts out on the table an acknowledgement that these parties, by the very nature of the contracting process, can have concurrently identical, differing, and conflicting agendae. Make a commitment to setting aside any adversarial mind set or territorial claims during contract performance. Establish a cooper-

ative process for evaluating progress and solving problems in which all parties take part, but within the context of the regulations and the terms of the contract everyone must live by. Bring in a facilitator at this initial stage, if necessary, to aid in this communicative process.

CONCLUSION

Claims, disputes, and litigation are sometimes unavoidable evils. It is tragic when they can be, and are not, avoided through something as simple as an understanding that the government contracting process, if left to its own devices, has a tendency to create adversaries for the wrong reasons, and between people who should be on the "same side," and with the same goals.[3]



1. *Federal Crop Corp. v. Merril*, 332 U.S. 380, 68 S.Ct. 1, 92 L. Ed. 10 (1947), *Prestex Inc.. v. U.S.*, 3 Cl. Ct. 373 (1983).

2. See e.g. *Appeal of Daranke Corporation*,VABCA-3601, August 18,1992. Estoppel is a principle of equity originating centuries ago under the English common law, and is defined generally as the prevention of a party by his own acts from claiming a right to the detriment of another party who was entitled to rely on such conduct and has acted accordingly.

3. See"Partnering," an excellent treatise on the concept discussed, published by the Institute for Water Resources of the U.S Army Corps of Engineers (IWR Pamphlet 91-ADR-P-4).