

**Beware of the Authority Issue – Do Not be Afraid to Ask:**

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*As a contractor, always make sure that the person you are dealing and reaching agreements with for extra work has the necessary authority to direct that work be done and to bind the owner to pay.*

The legal and contracting authority of the government/owner personnel with whom you are dealing often becomes an issue when a contractor has done an “extra” and wants to get paid. We address this because we see even large and experienced contractors making mistakes in this area. In the case of a private owner/client, the people with proper authority are usually a person named in the contract or an officer of the company. In the case of the government acting as the owner/client, this is almost always a warranted contracting officer as defined in, and designed under, the Federal Acquisition Regulation Subpart 1.6 (or the State, District of Columbia or County equivalent regulation) or the designated Contracting Officer’s Representative (“COR”). Under government contracts, to protect the taxpayers, only certain government employees are granted authority (usually limited to a certain dollar amount) to bind the government in contract, and those employees almost always have the title of Contracting Officer (“CO”, or “KO” in the U.S. Army). The formal warrant issued to the CO states his or her dollar limit of authority and it can range from \$2,500 to unlimited.

One easy way to remember this in your day-to-day work is that *only the CO has the power to award, issue a Notice to Proceed, modify a contract for money or schedule, use a directive change order or stop work to suspend, terminate, or close out a completed contract.* There are very few exceptions to this rule, although other government personnel can carry out functions such as inspection and testing, schedule review, invoice review and acceptance, which is often why confusion arises. If anyone other than a warranted CO attempts to issue a directive that could be considered a change/modification to the contract, and you do not speak up and take action to be sure that there is a valid, binding agreement and protect your company, you, the

contractor may be deemed to have assumed the risk that the government employee did not have sufficient authority and end up paying for what you thought was a valid change order to your contract. While the majority of government workers are willing to work with contractors and advise them to wait or to go to the CO with a question about performing, we see a sizeable number of them act as though they have authority and some actually believe they do. For example, you can reach a verbal (and even written, in an email or letter) agreement with the government's inspector or Field engineer overseeing your daily work to perform extra work with the understanding that a formal change order will follow, only to learn after you have expended a significant effort and funds that the CO would not sign the change order and you are deemed a "volunteer" because your contract clearly tells you who the Contracting Officer is and who else has authority to change the contract. This happens most often in the situation where the contractor is working hard to expedite the work to keep the government/owner client happy, and trying to appear cooperative and build a good relationship. This does not mean you must accept a verbal or email directive without question. It has even happened where the contractor trusts the warranted CO her/himself and starts work prior to the issuance of a change order, only to find that the agency's priorities have changed and the change order will not be issued/funded.

Although there are legal cases where judges found the person without authority had "implied authority", or that the CO knew what was happening, allowed it, and said nothing to stop it, called "ratification", "estoppel" and/or "waiver", this is not something to rely on. We have had success with these arguments, but these are difficult to make and often take a lot of time to resolve. It is much better to ask and know exactly who you are dealing with in the first place, his/her title and status as a warranted contracting officer, and the dollar limits of the warrant. In cases where you have an "absent CO" (i.e. one who awarded the contract and is seldom if ever heard from again) and your entire dealings are with the RE, COR, COTR or other representative, you should demand a formal written change order or directive from the CO her/himself, or at a minimum, you send a confirming writing to the RE or COR *with a copy to the CO*, stating that a change has been issued and requesting that the CO respond/object to what you have written if she/he disagrees with your position/understanding. It is also important to train your subordinates,

such as project managers, on the issue of authority, and enforce a requirement that they follow the formalities of obtaining clear and written CO approval/directive or a signed and funded change order before starting extra work. A letter or email from the CO agreeing that an extra has been ordered and that a change will be issued is satisfactory.

Often, it is an overworked and harried PM who feels pressure to please company management as well as the government's RE/COR and will not wait for "paperwork" that might slow progress and timely project completion. She/he needs to understand that, sooner or later, the company will get "burned" by this practice, and it could result in tens or hundreds of thousands of dollars of liability to your company. Always remember, the government or owner wrote the contract and put the "written change order only" language in it. If that owner wants a change, you have every right to follow their contract requirements. If the owner wants to change the contract to speed things up, they will.