

Lessons On Gov't Contractor Employees' Apparent Authority

By **Kayleigh Scalzo and Evan Sherwood** (December 2, 2020, 4:43 PM EST)

As a cardinal rule of federal contracting, government employees cannot bind the U.S. to a contract unless they have actual contracting authority. As a general matter, the contracting officer is the only person actually authorized to sign or modify contracts for the government, although the contracting officer may delegate authority to others.

But what about contractor employees? When are they empowered to make binding obligations on behalf of a contractor in dealings with the government?

As the Armed Services Board of Contract Appeals recently reaffirmed in *Aspen Consulting LLC*, contractor employees may have apparent authority to bind their employer based on the facts and circumstances, even if they are not actually authorized to sign contracts on behalf of the company.[1]

In other words, while contractors cannot rely on a government official's appearance of authority, the government may be able to rely on a contractor employee's appearance of authority. This can create a procedural trap with harsh results for contractors, as demonstrated by *Aspen Consulting*.

Background on Principal-Agent Relationships

Under the common law of principal-agent relationships, a principal can designate an agent to sign contracts and assume liabilities on its behalf. There are two main legal theories for designating agents.

First, a principal may actually authorize an agent. A contracting officer's warrant is an example of actual authority — the warrant expressly empowers the contracting officer to execute contracts for the U.S. government. As a corollary to this rule, an agent has implied actual authority to do things that are integral to its duties. Thus, a contracting officer with express authority to execute contracts also normally has implied authority to modify contracts.[2]

Second, if a principal's acts or omissions cause a third party to reasonably believe that a person is the principal's agent, then that person is said to have apparent authority.[3] As a classic example of apparent authority, a customer at a retail store can normally assume that the store clerk behind the



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counter is authorized to make sales.[4]

Because the scope of apparent authority is based on a third party's reasonable belief, principals must be careful not to give others the wrong impression about their employees' authority. Otherwise, the principal might be forced to honor an arrangement made by its employees, regardless of whether the employees are actually authorized to bind the employer.

Like many aspects of government contracting, however, the rule that applies to the government is different than the common law rule that applies to private parties. Government employees have authority to make contracts only if they are actually authorized by law, either expressly or impliedly.[5]

Agreements made by government personnel who lack actual authority can be found unenforceable, even when a contractor has relied on them.

In *Liberty Ammunition Inc. v. U.S.*, for example, a contractor asked a lieutenant colonel from the U.S. Army's Directorate of Combat Development to sign a nondisclosure agreement before sharing its confidential bullet technology.[6]

The lieutenant colonel was the chief of small arms at the directorate and routinely met with prospective contractors, and thus appeared to have authority to sign nondisclosure agreements. It turned out, however, that he did not have actual contracting authority.

Years later, the contractor came to believe that the Army had misappropriated its technology, but when it sued for breach of contract, the court found the nondisclosure invalid and dismissed the claim.[7]

Actual Versus Apparent Authority in Aspen Consulting

The risk of apparent authority was on display in Aspen Consulting. There, the contractor's vice president asked the Army to wire contract payments to a bank account he had made in Germany, instead of his employer's U.S.-based bank account.

The contract contained a version of Federal Acquisition Regulation 52.232-33, which stated that if a company's "[electronic funds transfer] information changes, the [c]ontractor shall be responsible for providing the updated information to the [government's] database." The agency complied with the vice president's request, and wired the money to Germany rather than to the contractor's U.S.-based bank account. As a result, the contractor did not receive payment for its work.

When the company discovered the issue, it filed a claim with the contracting officer, arguing that the vice president had no authority to negotiate on its behalf, and asserting that the Army breached the contract by not wiring the funds to the correct bank account. According to the contractor, the vice president had no authority to sign contract documents without first obtaining approval from the company's president, which he had not done.

The Armed Services Board of Contract Appeals disagreed, finding that the vice president had apparent authority to bind the contractor. The board observed that the contractor never told the Army that the vice president's authority was limited.

To the contrary, the contractor had taken steps to suggest the vice president did have negotiating authority — it had designated the vice president as the point of contact for its Army contract; he was

the day-to-day manager of the project; and he had signed at least one contract modification. That was enough to give the Army a reasonable belief that he had authority.

Key Takeaways

Aspen Consulting and its forbearers highlight three key issues for government contractors:

First, contractors should identify which employees have authority to bind the company and tell customers about any limitations. Contractors may consider including language in their agreements to identify the personnel with or without authority. If that is not possible, a contractor can still communicate that information to its customers by sending an email or letter.

Second, contractors should be mindful of whether any company personnel may be perceived to have taken on greater authority during day-to-day performance of a contract, even if they are not actually authorized to bind the company.

For example, is it customary for certain employees to sign contract modifications or receive directions from the customer? If yes, that could create the impression that they have authority to bind the company.

Third, contractors should take steps to understand who on the government customer's team has contracting authority. When in doubt, request confirmation, or check the relevant contract provisions to confirm whether a government employee has actual authority.

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[1] Aspen Consulting LLC, ASBCA No. 61122 (Oct. 14, 2020).

[2] H. Landau & Co. v. U.S., 886 F.2d 322, 324 (Fed. Cir. 1989).

[3] See, e.g., A-J Marine Inc. v. Corfu Contractors Inc., 810 F. Supp. 2d 168, 178-79 (D.D.C. 2011).

[4] See id. (citing Livingston v. Fuhrman, 37 A.2d 747 (Ct. App. D.C. 1944)).

[5] See, e.g., Fed. Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

[6] Liberty Ammunition Inc. v. U.S., 835 F.3d 1388 (Fed. Cir. 2016).

[7] In a dissenting opinion, Judge Newman stated that she would have found the lieutenant colonel had implied actual authority to sign the NDA.