

## **MILITARY INDERDEPARTMENTAL PURCHASING REQUEST (“MIPR”)**

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A Military Interdepartmental Purchasing Request, or MIPR, is an internal funding document by which one military department or Department of Defense (“DOD”) agency requests another military department or DOD agency to purchase material or services for the requesting department or agency’s use. A MIPR, or Defense Department (“DD”) Form 448 is the acquiring department’s authority to acquire the supplies or services on behalf of the requiring department. It is not normally used to procure services or supplies directly from a private company or source. In *Guardian Safety & Supply LLC, d/b/a Enviro Safety Products*, ASBCA No. 61932, May 8, 2019, the Armed Services Board considered a MIPR that was used by the Air Force to purchase special children’s gas masks and components directly from Enviro Safety.

The Air Force requested a quote from Enviro Safety for 500 masks, and then inquired whether Enviro would accept a MIPR for purchase of these items, on a sole source basis. Based on the representations that this would be a quick way to procure the items, Enviro agreed to accept the MIPR/DD form 448 for purchase of the items, and the MIPR was issued for \$668,000. Payment was to be made by the Defense Finance and Accounting Service (“DFAS”). None of the Air Force personnel who were involved in the creation of the MIPR was a contracting officer, and none had authority to award a contract. An Air Force contracting specialist (who had no warrant or contracting authority) reviewed and approved the MIPR. When DFAS received Enviro’s invoice, it was rejected because it did not include a contract number.

The next day, Major Chambers, Deputy Chief of Contracting at the activity, and Mr. Smithey, Deputy Chief of the Regional Contracting Office, identified the MIPR as an unauthorized commitment, and proceeded to investigate. Mr. Smithey advised Enviro Safety that it “appears that a non-binding contractual commitment was made with your company based on a MIPR. However, the MIPR cannot be used to pay a civilian private business for goods or services.” Mr. Smithey advised Enviro Safety to stop all work on the project. Soon thereafter, Mr. Smithey again advised Enviro to stop all work, and advised that “We [the Air Force] will work with you in getting paid for the items that are completed, however, the procurement of the remaining items will be processed in accordance with federal regulations.” The same day, Mr. Smithey advised Enviro that “we will not leave you on the hook for errors caused by government personnel.” Major Chambers stepped in and negotiated a restocking fee with 3M (the manufacturer of the masks), which was subsequently reduced to \$57,536. Both Major Chambers, and his successor, Lt. Col Warren were contracting officers with the authority to ratify this unauthorized contracting action.

Enviro returned the masks to 3M and paid the \$57,536 restocking fee, however, Lt. Col Warren refused to recommend ratification of the unauthorized commitment because the government had received no benefit. Enviro’s claim for \$57,536 was denied and appealed to the Armed Services Board.

The Air Force asserted that no contract had been formed by the MIPR, while Enviro claimed that an implied-in-fact contract had been created. The Board noted that pleading an implied-in-fact

contract generally was sufficient to provide jurisdiction. An implied-in-fact contract is founded upon a meeting of the minds and is “inferred, as a fact from the conduct of the parties showing, the light of the surrounding circumstances, their tacit understanding... it is inferred as a matter of reason or justice from the acts or conducts of the parties.” The elements of a valid contract with the government are (1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration and (4) actual authority on the part of the government representative to bind the government. The Board found the following:

- (1) There clearly was mutuality of intent to contract by the communications and assurances of the government. There was a clear, priced offer from Enviro, and a clear desire to form a contract by the Air Force (clear offer and acceptance)
- (2) The agreement was sufficiently definite, as shown by the specifics in the MIPR.
- (3) The agreement was supported by consideration (the original price of \$668,000).
- (4) Although those who prepared and approved the MIPR had no authority to contract, a responsible contracting officer, knowing the material facts, and with authority to approve unauthorized commitments, did approve the contract. Assurances were made by the contracting officers (Maj. Chambers and Lt. Col Warren) that the government would proceed with ratification of the unauthorized action consistent with FAR 1.602-3-Ratification of Unauthorized Commitments. The Board found that the Government’s actions resulted in an implicit ratification of the contract.

Finally, the Board noted that under the *Christian Doctrine*, the Board would incorporate the standard termination for convenience clause (FAR 52.249-2) into the ratified contract. Since the government directed Enviro to stop all work, this constructively terminated the ratified contract for the convenience of the government. Enviro was entitled to be reimbursed for its restocking fees of \$57,536, and the Board ordered payment thereof.

The Takeaway. An implied-in-fact contract can only be lawfully formed with the presence of all four of the elements above. One of the more difficult things to prove is the authority of the government person who approves the implied-in-fact contract. Here, the approval authority was two warranted contracting officers who showed their intent to have the contractor paid (at least for the restocking fee), so there was no loss to Enviro.

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