

## WHAT IS “INSTITUTIONAL RATIFICATION” OF A CONTRACT, AND CAN IT HELP A GOVERNMENT CONTRACTOR?

By Richard D. Lieberman, Consultant and Retired Attorney

A contract with the government requires that the party alleging the contract prove 4 elements, namely, beginning with mutual intent to contract which consists of (1) an offer; (2) an acceptance; (3) consideration—usually but not always, money; and (4) that the Government representative who entered or ratified the contract had actual authority to bind the United States. *Chattler v. United States*, 632 F.3d 1324, 1330 (Fed. Cir. 2011), citing *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir.1997). Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). It is for these reasons that contractors are always advised to ensure that any contract they perform not only be in writing, but contain the signature of a warranted contracting officer (a person who has actual authority to bind the U.S. as demonstrated by a written “warrant” or delegation of authority). Only with these requirements fulfilled can a contractor use the courts of the United States to enforce its government contract.

There is another way that a contractor may receive the approval of a person who has authority to bind the U.S., and that is “institutional ratification,” but this is tricky, and should rarely be relied upon by contractors. *Americom Gov’t Serv., Inc. v. GSA*, CBCA 2294, August 13, 2014 is an excellent example which explains the concept, and also outlines the pitfalls.

Americom entered into an indefinite delivery contract with GSA to provide licenses to operate satellite terminals in foreign countries, which were called “Host National Authorizations” (“HNA”). These licenses were obtained on behalf of U.S. Forces Korea, which transferred money to GSA. US Forces Korea transferred \$579,000 to GSA for 50 HNAs, and Americom provided them, and then billed GSA under a task order, but the task order *did not* specifically include the 50 HNAs. The invoices were accepted and approved by Ms. Elizabeth Bigger, a “Technology Project Advisor” working for GSA Federal Technology Services. Later, when GSA was reviewing invoices, it determined that there had been an overpayment and “recouped” the \$579,000 by short paying AGS invoices for other work.

Americom submitted a claim for the \$579,000, asserting that GSA had paid the invoice and thereby ratified the contract (creating an implied contract) or that the procurement was “institutionally authorized.” GSA claimed that no GSA official ever authorized or ratified this purchase, and there was no institutional ratification. GSA further stated that the benefit the Government obtained went to US Forces Korea, *not to GSA*—and therefore GSA secured no benefit from the procurement.

The Board found that there was no implied contract, because there was no involvement of knowledge (constructive or actual) of the contracting officer at the time the work was performed. Then the Board addressed “institutional ratification,” which is contractual ratification which is made by someone who is not an authorized official. *Janowsky v. United States*, 133 F. 3d 888, 891-92 (Fed. Cir. 1998). Only in limited and exceptional circumstances may the Government be

Copyright 2014 Richard Lieberman.

This article does not provide legal advice as to any particular transaction

pound to pay for otherwise unauthorized contract work, even though neither the initial commitment nor ratification was carried out by an official with contracting authority.

To demonstrate institutional ratification, the contractor must prove: (1) the Government received and retained benefits from the unauthorized contract; (2) the ratification was not done by mistake but with knowledge of the work being aid for; and (3) the ratifying official must be one who either because of position or status, makes ratification reasonable. (The official does not have to have specific contracting authority in order for institutional ratification to occur).

The Board concluded that in the absence of evidence to the contrary, the approving official (Ms. Bigger) was aware of what was being paid for and may have qualified as to status. However, there was some doubt about her status, causing the Board to refuse to grant summary judgment to either GSA or Americom in this case. The Board also noted that with respect to “benefits received,” even though GSA received none, the benefits were received by US Forces Korea, which was a different agency, but part of the government. The Board refused to “parse out the Government into pieces for purposes of defining benefits in a case where the agency recouping funds is recouping them based on a transaction involving benefits to another agency.”

Although “institutional ratification” was not specifically found in this case, it is important to keep in mind—but only if a contractor makes the gigantic mistake of performing work or providing goods without a written contract that is signed by a warranted contracting officer. If a contractor exercises good judgment at the outset of the contract, and insists on proper documentation and proper signatures, the contractor will never need to allege “institutional ratification.” But, if the contractor rushes into a contract without care, the contractor may need to allege institutional ratification if it can prove the elements.