

KNOW ABOUT THE DOCTRINE OF APPARENT AUTHORITY

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Most government contractors know (or should know) that the doctrine of apparent authority *does not* apply to the government. Did you know, however, that it can be applied to contractors? *Seven Seas Shiphandlers, LLC*, ASBCA Nos. 5785 et al., is an excellent demonstration.

First, what is apparent authority? It is the authority to bind your principal (owner, President, etc.) and require the company to pay for your acts. It is determined by looking at the conduct of the principal to assess whether the principal created a reasonable belief that the person acting was authorized by the principal. Apparent authority may be created by written words, spoken words or other conduct of a principal, which, if reasonably interpreted, causes a third person to believe that the principal has granted authority to act to the person who is acting. For example, a person who has been given the title “Chief Buyer” for a company, and has that title on his or her business card, would be reasonably assumed to have the authority to buy for the company, and to bind it (that is, the company would pay for anything so bought).

In commercial contracting, the doctrine of apparent authority is generally the rule throughout the United States. But, those in government contracting know that there is *no such thing* as apparent authority for any *government* person. In order to *bind* the government, you must have written authority (normally, a “warrant” or delegation of authority) that is passed down from the head of an agency, because the agency head has *statutory authority* to bind that particular agency. A person’s job title is irrelevant—only the written delegation gives a person authority to bind the government, and grants the contractor the right to reasonably assume it will be paid. This is the reason why only a “warranted contracting officer” may lawfully sign a contract on behalf of the United States, issue a lawful change to that contract, and terminate a contract or take other similar contractual actions. When a contract specialist, Contracting Officer Representative or Contracting Officer Technical Representative attempts to sign or change a contract, the Courts consider this an invalid act, and the contractor will not be paid, unless there are other lawful reasons for payment.

In *Seven Seas*, the contractor sought partial judgment and payment for contracts where the contractor contended that the person who received cash payment for services under the contract, and then absconded with the money, was not a company employee, and not authorized to receive payment. The Armed Services Board refused to grant summary judgment, because it was not clear that this employee lacked apparent authority. The Board noted that the doctrine of apparent authority can be applied to contractor personnel.

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Seven Seas had 5 contracts for commercial items (generators, cables, phones, etc.) in Afghanistan. Mr. Muhammed Qahir was an employee of AK Nariwal (a company other than Seven Seas) who periodically worked with Seven Seas. The Contracts permitted payment in local (cash) currency, which avoided a bank charge.

Seven Seas decided to accept cash, and its Operations Executive informed the Government that three individuals (Raja Khan, Saeed Khan and Shabeer Bajwa) were authorized to collect cash from you. One month later, Mr. Qahir delivered four invoices relating to unspecified other contracts not on appeal, to the contracting office. He received two separate payments in cash and delivered them to Seven Seas. However, Seven Seas did *not* tell the government that Mr. Qahir was not authorized to receive payments for Seven Seas until after June 10, 2009.

On June 10, 2009, Mr. Qahir showed up at the finance office and was paid \$12 million in local currency (\$240,549 US Dollars) in full payment for all 5 contracts in this appeal. Unfortunately, Mr. Qahir did not deliver the money to Seven Seas and has not been seen by the parties since receiving the cash.

The Board framed the issue as follows: Did Mr. Qahir have apparent authority to receive payments on behalf of Seven Seas for these five contracts in Afghan currency? The Court refused to grant summary judgment to Seven Seas, stating:

- Mr. Qahir delivered invoices and picked up cash payments twice before on other contracts and delivered the money to Seven Seas
- Seven Seas never told the government that Mr. Qahir was not authorized to receive payments
- It is disputed whether Mr Qahir presented invoices for payment
- It is unclear whether Mr. Qahir accompanied Seven Seas officials on other occasions when that company picked up payments
- It was unclear what the standard payment practice at the Afghanistan finance office were.

The Board noted that acts not disavowed by a principal can lead to a conclusion of apparent authority, and further, that such apparent authority may be derived from a course of dealing or the fact that previous acts are not disavowed by a principal.

Based on all of the evidence, the Board could not determine if Mr. Qahir reasonably possessed apparent authority or not. The Board did not find evidence so one-sided that either the Government or Seven Seas must prevail as a matter of law. So, summary judgment was denied, and further proof must be submitted in this appeal.

TIPS: (1) For government personnel, always ascertain what their written authority/delegation is. Ask!! And the FAR states you shall receive. FAR 1.602-1 (information on the authority of contracting officers must be made available to the public).

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(2) When working with other contractors, ensure that their agents have clear-cut, unquestionable apparent authority.