

MODIFICATION SIGNED UNDER PROTEST: AGENCY MUST CONSIDER ALL DOCUMENTS IN THE TRANSACTION

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What happens when an agency seeks to obtain a contractor's signature on a modification, but the contractor is not happy with the prices/costs in the mod? The answer is that the agency must consider a written cover letter of objection (or protest), and if a request for equitable adjustment is reserved by the contractor, the contracting officer must consider it. *NMS Management, Inc.*, ASBCA No. 61519, April 11, 2019.

NMS involved a Navy food service contract for facilities in San Diego. The contract included a base year and four option years. Prior to the exercise of the second option, the Navy decided to close down one location. When the contracting officer exercised the modification, he *deleted* the line item for that one location, along with its price. The contracting officer asked the contractor to execute the modification. On the same date, the contractor forwarded the executed modification, with the following cover letter by email:

In support of [the Navy] I am providing [Option 2]. By executing this modification, NMS accepts the government's direction to perform as directed, but does not agree that the option was properly exercised, nor does it waive its right ...to seek an equitable adjustment under the terms of the contract for any additional costs flowing from that improper exercise and accompanying change to the contract terms.

Four months later, NMS submitted a properly certified claim to the contracting officer, challenging the government's right to make a partial exercise of the option and to exclude one line item for one location. The Navy moved for summary judgment, stressing the signed modification as dispositive of NMS's agreement, but ignoring the fact that NMS signed the modification under protest and reserving its right to file a claim.

The Board recognized that the protest/objection letter clearly set forth a dispute of material facts, which made summary judgment inappropriate. The protest letter "dispel[ed] any motion that the modification is the only writing to consider when evaluating the legal consequences of the modification" [citing *Relyant LLC*, ASBCA No. 58172, 16-2 BCA ¶ 36288, which indicates that interpretation of a contract as a whole requires consideration of all documents that are part of the same transaction together]. Accordingly, the Board denied the Navy's motion for summary judgment.

The takeaway: When a contractor wants to continue a contract via an option, and the agency is trying to force it to accept a new statement of work or specifications, the contractor has the right to object to a modification exercising the option. However, in order to continue the contract, it can sign the modification, and reserve the right to submit an equitable adjustment (or claim), just as NMS did in this case.

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