E-MAIL ACCORD AND SATISFACTION FOR A MODIFICATION

Can an exchange of electronic documents (such as emails) between a contracting officer ("CO") and a Contractor's Contracts Manager create a binding contract modification? The issue was recently explored by the Armed Services Board in *Dawson Tech. LLC,* ASBCA No. 62839, Sept. 1, 2022. The Board implied that appropriately worded emails that were "signed" could suffice.

Dawson received task orders under an Indefinite Delivery, Indefinite Quantity contract for advisory and assistance services. Each task order was firm fixed price and contained its own performance work statement. Instead of paying on a fixed price basis, Dawson was paid using a negotiated procedure that included deductions taken by the government for personnel not provided during the month as required by the task orders. After the negotiation, the government would pay the negotiated amount (which was lower than the fixed price for the task order).

A new CO was assigned to the contract, and she directed Dawson to begin invoicing the fixed price in each task order. A month later another new CO was assigned. He reversed the invoicing decision, and directed Dawson to invoice only for the personnel who actually performed the services.

Two months later, Dawson's Contracts Manager requested the CO in an email to reconsider the method of billing and permit him to bill the fixed prices. The CO did not respond to two emails on this matter. But about a month later, Dawson wrote to the CO and withdrew its request, asking the CO to ignore its two emails. Dawson also asked the CO to look into a Contract Performance Assessment Report ("CPAR") matter. One day after receipt of the last email, the CO stated he considered Dawson's email to close the issue and he would look into the CPAR request.

After contract completion, Dawson emailed the CO reasserting his same billing objections that he had previously withdrawn, and invoicing for the unpaid amounts ($1.1 million). These invoices were rejected, and Dawson filed a claim for the $1.1 million, which was deemed denied without a CO decision. Dawson appealed to the Board.

The Government Answer in the appeal asserted the affirmative defense of accord and satisfaction, stating that Dawson invoiced and was paid and accepted the amount he requested each month. The Board noted that the government had the burden of proof of the accord and satisfaction. Dawson argued that there was no agreement in writing and signed by the parties, as required to change the terms and conditions—and the Board agreed that a written modification was required to be a binding modification of the contract.

The Government replied by arguing that the agreement was reduced to writing in "an exchange of electronic documents" (a series of signed emails). The Government urged the Board to indicate that an exchanged of "signed" emails meets the FAR 2.101 definition of a "signed writing."

The Board refused to agree that an exchange of emails in this case represented a valid contract modification, but did not rule definitively on the general issue. The Board noted that "the

agreement if any had not been reduced to writing and therefore the government failed to meet its burden of proof establishing undisputed facts that an accord and satisfaction existed." Therefore, the Board denied the Government's request for summary judgment against Dawson.

Takeaway. Contracting officers should reduce any change in price, specifications or terms or conditions to writing, and provide a formal modification to the contractor to sign. While it might be possible to use an exchange of emails to create an accord and satisfaction, the emails should be "signed" and further, should lay out the exact changes to the contract that are made in the modification(s), and reproduce those changes in both the emails that are exchanged.

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