

READ ANY RELEASE CAREFULLY-TWICE!

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A “release” is the “act of giving up a right or claim to the person against whom it could have been enforced.” *Black’s Law Dictionary* (10th Ed, 2014). Releases are frequently used by the government in modifications (for change orders or bilateral modifications). For example, for change orders, Federal Acquisition Regulation (“FAR”) 43.204 requires releases as follows:

- c) Complete and final equitable adjustments. To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order, the contracting officer should—
 - (1) Ensure that all elements of the equitable adjustment have been presented and resolved; and
 - (2) Include, in the supplemental agreement, a release similar to the following:

CONTRACTOR'S STATEMENT OF RELEASE

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ (describe) _____ “proposal(s) for adjustment,” the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the “proposal(s) for adjustment” (except for _____).

Releases are also required in a settlement by determination (such as, in an appeal), FAR 49.109-7, or when final payment is made in a time and materials or labor hour contract, FAR 52.232-7. Contractors should be careful when executing a release to ensure that they fully understand the import and scope of the release. In *Odyssey Int’l, Inc.*, ASBCA Nos. 62062 & 62279, July 29, 2021, the contractor unhappily received something in its release language which it sincerely regretted later.

The Army Corps of Engineers (“Corps”) made award to Odyssey for the construction of a building in Pennsylvania. The solicitation specified that a micropile system was to be used in the foundation. Micropiles involve drilling small diameter holes into bedrock and inserting grout into any voids before inserting a metal pole and casing. The solicitation advised that offerors were to assume that 60 micropiles were required, but noted that the contractor was required to design the micropile system. Odyssey submitted its design, which the government approved, using 80 micropiles instead of 60. The government then requested Odyssey to submit an equitable adjustment request for 20 micropiles, however, the government later canceled that request and stated that the solicitation only required 72 micropiles, hence Odyssey was to provide a change proposal for only 8 micropiles.

Modification no. 2: Eventually the Corps issued modification no. 2 for \$54,800 for installing 8 additional micropiles. Modification no. 2 included a “closing statement” (which contained a release) was as follows:

It is understood and agreed that this adjustment constitutes compensation in full for all costs, directly and indirectly attributable to the changes ordered herein, for all delays related thereto and for performance of the changes within the time frame stated. In addition, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the changes ordered.

Odyssey signed modification no. 2.

Modification no. 3: However, Odyssey later submitted a request for an equitable adjustment for 20 micropiles, all of which had been completed at the time. Because the parties couldn't agree, the government unilaterally issued modification no. 3 which provided some money and delay time for the micropile system. As a unilateral modification, Odyssey wasn't required to sign modification no 3, and it did not.

Modification no. 9: About a year later, the Corps and Odyssey entered into bilateral modification, no. 9, which adjusted quantities of three line items, and was not directly related to the micropiles. It was titled "Variation in Estimated Quantities." Modification no. 9 included the following language:

Modification [no. 3] effective 5/17/17 in the amount of \$141,400 with an increase of forty-three calendar days in the contract period of performance is hereby converted to a bilateral agreement.

It is understood and agreed that this adjustment constitutes compensation in full for all costs, directly and indirectly attributable to the changes ordered herein, for all delays related hereto, and for performance of the changes within the time frame stated. In addition, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the changes ordered herein.

Odyssey executed modification no. 9. Later, the person who executed modification no. 9 on behalf of the company stated that the second paragraph "had nothing to do with the entirety of the mod...This seem[s] to be a trick, trap or typo. [It dealt with quantities on three CLINs unrelated to micropiles]."

When Odyssey submitted a subsequent claim for the micropiles, the Corps denied it, citing the release. When Odyssey appealed, the Board noted that modification no. 3 was issued unilaterally, and didn't contain a release. However, modification no. 9 "converted modification No 3 to a bilateral modification, thus Odyssey's claim, which covers the same costs as its REA for the micropile foundation system, was waived by modification no 9." The Board found the release language to be unambiguous and denied Odyssey's appeal without resorting to any external evidence.

Takeaway: Whenever you are asked to sign a release, consider its exact scope carefully, and read the language carefully. Never sign something that differs from your belief of what is

covered without exploring and clarifying, *in writing*, exactly what the scope of the release covers—and only sign if it you agree that the release is accurate. Had Odyssey read the entire release carefully, it could have objected to the first paragraph in modification no. 9 which converted modification no. 3 to a bilateral modification, and embraced modification no. 3's scope as well. When there is a bilateral modification where both parties must sign, the contractor may negotiate the terms with the government, until there is bilateral agreement. And finally, when a contracting officer includes a closing statement (such as the one in modification no. 2 above), a contractor must treat it as a release, and review it carefully before signing.

Also note that when a contract is closed and final payment is made, the government frequently asks a contractor to sign a release. Consider insisting on a mutual release, so that while the contractor releases the government, the government releases the contractor from further liability as well (except where there may be statutory liability of the contractor, such as for defective pricing, which cannot be released).

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