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## Contractor Alert: Beware Bilateral Modification Release Language

By Nicholas T. Solosky on January 31, 2017

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Contractors intending to **submit a Request for Equitable Adjustment or Claim on a government contract** need to be aware of the implications of bilateral modifications.

In simple terms, a bilateral modification is a supplement to your company's contract with the government that is signed by both you and the government. The agency can use a bilateral modification to execute any number of contract changes or otherwise modify the terms of the agreement.

Sometimes, however, a contracting officer may use a bilateral modification to execute a change that the contractor believes is outside the scope of the original contract (also known as a Cardinal Change). In those cases, the contractor has two options: accept the change and perform the work – or refuse to perform and risk a default termination (and all of the devastating negative performance ratings that will follow).

Given that no contractor ever wants to voluntarily take a default termination – that means the only real option is to continue to perform. Therefore, contractors need to

be smart about how to accept a Cardinal Change issued through a bilateral modification.

Specifically, when faced with a bilateral modification including disputed terms (such as scope of work, increased costs, or increased time to perform), contractors must reserve the right to pursue damages at a later date. An important part of reserving those rights is reading and understanding all of the terms and conditions set forth in the modification.

**In particular, contractors must be mindful of waiver language. That is, specific language (routinely included by the government in bilateral modifications) that releases the agency from future claims for damages.**

The impact of such a waiver was on full display in a recent **Armed Services Board of Contract Appeals (ASBCA) case**, where a contractor agreed to a Termination for Convenience and signed a bilateral modification zeroing out the CLIN deliverables and contract value. The modification also included language stating the contractor waived any charges against the government due to the cancellation and that all obligations under the contract were concluded.

After signing the modification, the contractor submitted a claim to the agency seeking to recover certain costs associated with the agreed termination. The agency denied the claim in full, citing the modification language.

On appeal, the ASBCA agreed with the agency and found against the contractor. Importantly, the Board Judge refused to admit any outside evidence offered by the contractor suggesting that the parties agreed to different terms at the time the modification was signed. According to the board, the language of the modification was clear, unambiguous, and “unconditional.”

Contractors need to be vigilant about recording and documenting contract changes – as well as preserving their legal right to seek compensation for those changes later down the line.

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