GET IT IN WRITING, GET IT IN WRITING, ALWAYS GET IT IN WRITING

By Richard D. Lieberman, Consultant and Retired Attorney

In Government contracting, there's at least one inviolate rule for contractors: "Get it in Writing." This rule is the Government contractor's version of Yogi Berra's famous saying "It ain't over till it's over." But Government Contractors would say "It ain't over till you get it in writing, signed by a warranted contracting officer." Sigma Construction, Inc. ("Sigma") learned this the hard way in *Sigma Const., Inc. v. United States,* No. 12-865, (Fed. Cl. Sept. 30, 2013).

Sigma had a design/build contract for $980,000 to install a roofing system on the Hawthorne Federal Building in Lawndale, CA. The contract was delayed by the Government (failure to approve performance bonds, shop drawings and requiring new background investigations for certain workers). Then asbestos was discovered in the roof. The General Services Administration ("GSA") eventually terminated the contract for the government's convenience after receiving a request for equitable adjustment from Sigma for $824,000 for the delays and asbestos abatement.

Sigma submitted a termination settlement proposal of $1.1 million, including its requests for equitable adjustment. GSA offered $236,000. Soon thereafter, the Contracting Officer and the Sigma CEO negotiated a settlement of $485,000 *by telephone.* The CO advised Sigma's CEO that a written confirmation of this amount would be forthcoming. Five days later the CO emailed Sigma and stated that the oral agreement would be issued as a "final supplemental modification to the contract, and you will receive it for your signature prior to execution by the Government." About two months later, the CO emailed Sigma stating that the "final modification requires a review by the GSA Regional Office." Then, three months later, the CO advised Sigma by email that pursuant to the GSA internal review, the telephonically negotiated settlement was not acceptable and would not be approved without a complete third party audit. The CO stated he would like to reopen negotiations to avoid an audit.

Sigma responded stating that it considered the telephonic agreement final, and declined to negotiate. Sigma submitted a certified claim for $485,000 to the CO. A month later the auditors contacted Sigma for information, but Sigma responded that an audit was unnecessary. A week later, the auditors advised Sigma that the Termination Settlement Proposal was not valid, and requested more information about Sigma's delay claims. Sigma reasserted its termination claim, but the CO never responded.

At the Court, Sigma claimed that the telephonic settlement was an express oral contract, the United States was bound by common law contract rules, and the oral agreement did not contemplate a formal contract modification or use of a FAR form.

The Court noted that an agreement in government contracts requires four basic elements in order to bind the government:

1) Mutuality of intent to contract;
2) Lack of ambiguity in offer and acceptance;
3) Consideration and
4) A government representative having actual authority to bind the U.S. in contract

The Court noted that the FAR clearly requires written words for settlement agreements, and also requires the execution of Standard Form 30. FAR 49.001 defines settlement agreement as a "written modification", and FAR 49.109-1 requires Standard Form 30 for settlement agreements. Also, FAR 2.101 defines a contract modification as "any written change in the terms of a contract." These provisions require that modification of a contract be in writing and executed by both parties—an oral modification is *ineffective.* The court noted that the CO made it clear that there would be a final settlement agreement (modification) transmitted for Sigma's signature, in order to finalize the telephonic agreement. Furthermore, this CO had no authority to enter into an oral settlement.

The Court dismissed Sigma's case because there was no contractual obligation binding on the government that could be adjudicated.

TIPS: As the title of this article implies, *Get it in writing—always get it in writing.* Your contract must be in writing, and any changes to any part of the contract (modification, termination, etc.) must also be in writing, signed by a warranted contracting officer with proper authority.

When a CO, COR, COTR, or Contract Specialist asks you to do something that is *not* in your contract, or that conflicts with your contract, *always insist that a proper CO issue a written modification. Don't make the changes without it.*

Had Sigma realized that they needed a written modification in order to get their $485,000, they would have understood Yogi's maxim that "It ain't over till it's over" and realized that without the written modification, it would be a long century before they ever received a government check for the settlement. And even if it's not a "Yogi-ism" they would have understood the famous maxim, "Don't count your chickens before they hatch." All contractors would be well-advised to follow these rules as well.