

# Contract board holds that only the contracting officer can bind the government

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AUGUST 20, 2024

Most government contracts include a Changes clause (notably, FAR 52.243-1), which grants the Government the right to order changes to the scope of the contractor's work. That clause also entitles the contractor (<https://bit.ly/46ZFCq0>) to an equitable adjustment for the increase in time and/or cost of performing the changed or additional work.

The Changes clause is broad and covers innumerable situations that can occur on any variety of government contracts. The process for claiming entitlement based on a change (whether through a Request for Equitable Adjustment or Certified Claim, <https://bit.ly/3YObYS0>) is well established. However, there are still pitfalls that even the most experienced government contractors can fall into.

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The Civilian Board of Contract Appeals recently issued a decision (<https://bit.ly/4duRe6F>) highlighting an all-too-common problem that contractors can face — which government representatives have the authority to change the contract?

**The importance of understanding exactly who can bind the government cannot be understated. Contractors that act without proper authorization perform that work at risk.**

### **Case study: Relying on direction from the contracting officer's representative**

The facts of the case decided by the Board are simple. The Government hired the contractor to build an overseas embassy. The contract included a requirement to use fire-rated plywood during construction for backing panels.

During construction, the contractor asked the Contracting Officer's Representative (COR) whether fire-rated plywood was necessary for all construction — or just rooms with electrical equipment. The COR stated that the requirement only applied to rooms with electrical equipment. The contractor relied on that communication to proceed accordingly.

Later, the Government determined that the construction did not comply with the contract requirements. The Contracting Officer (CO)

thereafter directed the contractor to remedy the defect by removing the improperly rated plywood and installing fire-rated plywood in all rooms (not just those with electrical equipment).

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## *The Board held that the COR did not have the authority to bind the Government or modify the contract.*

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The contractor complied, but also submitted a claim for the additional costs associated with what it deemed extra work. The agency denied the claim.

### **The board holds the contractor proceeded at risk**

On appeal, the Board sided with the agency, finding that the contract explicitly required the use of fire-rated plywood in all rooms.

The Board expressly rejected the contractor's argument that the COR's apparent authorization of alternative materials bound the Government. The Board held that the COR did not have the authority to bind the Government or modify the contract. The contractor relied on the COR's statement at its own risk.

### **Takeaways and legal strategies**

The obvious takeaway from the decision is that contractors should not rely on statements from the COR as a basis for proceeding with changes or performing work inconsistent with the contract requirements.

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## *In certain cases, the Board has determined that the government employee directing the work is sufficiently associated with the CO so as to be vested with the required authority.*

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But is all lost when you follow the direction of someone other than the CO? Not necessarily.

In certain cases, the Board has determined that the government employee directing the work is sufficiently associated with the CO so as to be vested with the required authority.

This is particularly true where a government inspector has been delegated with the authority to inspect or reject work. For example, a line of Armed Services Board of Contract Appeals decisions (<https://bit.ly/4dM0Ycl>) holds that “[i]nspectors with authority to accept or reject work have been held to bind the Government.”

Additionally, even if the CO does not act *first*, the law holds that he or she can later ratify the actions of the COR or other government employees. That act removes the contractor’s risk in relying on the direction.

The safest path forward is to always make sure that CO is aware of any potential clarifications and/or changes to the contract. All contractors would be wise to confirm in writing that the CO is aware of any such actions before performing work at risk.

### About the author



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This article was published on Westlaw Today on August 20, 2024.

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