RACING CARS AND IMPLIED CONTRACTS MADE BY THE HEAD OF AN AGENCY

A recent court case reconfirmed that neither a Contracting Officer's Representative ("COR") nor a head of an agency has lawful authority to award an implied-in-fact contract. *Panther Brands, LLC and Panther Racing, LLC v. United States,* No. 116-1157C (Fed. Claims Dec. 17, 2019). While the case has a not-surprising result, the subject matter is interesting for a government contract, namely a contract involving the Indy (Indianapolis) Car racing series.

Panther had a second tier subcontract (with subcontractor, "Docupak") to provide a racing team through the 2013 series that was sponsored by the Army National Guard ("ANG") for advertising purposes. Panther would supply the car, driver, and equipment and enter a car into the IndyCar series to provide advertising and promote recruitment for the ANG in exchange for a fee of $12.8 million. The ANG had been sponsoring Panther racing teams since 2008, and Panther had routinely begun its preparation for the next racing season before there was a written sponsorship contract in place—all based on verbal intent to exercise the renewal option in the prime contractor's and Panther's subcontract. It was routine for Panther to communicate directly with ANG officials with respect to the sponsorship agreements.

In January 2013, Panther CEO John Barnes attended a meeting which included Sgt. Tyrone Kosa, the COR for the prime contract. Mr. Barnes was told that the ANG wanted to focus efforts on "retention." The issue was the 2014 IndyCar contract.

In February 2013, Mr. Barnes and Lt. Gen. William Ingram, Director of the ANG, held a meeting with Major General Tod Bunting (Retired), who was a passionate advocate of the Panther team. At the meeting, Mr. Barnes stated in an affidavit that Lt. Gen Ingram told him that the ANG's sponsorship of Panther for 2014 was authorized and had been fully funded. Also at the meeting was Sgt. Tyrone Kosa, the COR for the prime contract.

Also in February 2013, Maj. Gen Bunting received a call from LTC Michael Wegner, Chief of the ANG Marketing Branch in which Wegner advised him that, going forward, all communications to or from the ANG about the IndyCar Program were to be with Sgt. Tyrone Kosa, the COR. Sgt. Kosa had a typical delegation from the ANG Contracting Officer (Major Rodriguez) which expressly stated that the COR "was not authorized to award, agree to, or sign any contract modification[] or in any way to obligate the payment of the money by the Government."

Later in February, LTC Mark Boettcher, Chief of ANG Recruiting, who reported directly to LTG Ingram, advised the COR that the Panther IndyCar sponsorship was being renewed for 2014, and Kosa repeated that statement to CEO Barnes. Kosa stated that the National Guard had exercised its 2014 renewal option and Panther could start preparing for the 2014 season. Mr. Barnes asserted that in reliance on that notification, Panther incurred substantial costs for the 2014 season.

Instead of actually exercising the option in the prime contract for sponsorship, the Guard decided to explore sponsorship of another racing team for the 2014 season. In August/September 2013, the ANG and the prime contractor sought proposals from six other racing teams, and ultimately selected a new team, Rahal Letterman Lanigan Racing, which proposed costs well below Panther's.

Panther filed a claim for breach of an implied-in-fact contract for reimbursement of its expenses in preparation for the 2014 racing season. As readers of this blog know, an implied-in-fact contract is based on the meeting of minds and is inferred, as a fact, from the conduct of the parties showing their tacit understanding. Implied-in-fact contracts must meet the same requirements as express contracts, namely:

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 key issue here was the authority of a government representative who could bind the government. The Director of the ANG had no such authority. The Contracting Officer (CO-Major Rodriguez) explained that contracting authority at the ANG was vested in the Deputy Assistant Secretary of the Army for Procurement, who had delegated his authority to the Chief of the Army National Guard, who in turn delegated that authority to the Principal Assistant Responsible for contracting, who had delegated contracting authority to the CO. The Director of the ANG did not have express contracting authority.

Panther claimed that the COR, Sgt. Kosa, had implied actual authority to bind the government as an integral part of his assigned duties. However, the COR was explicitly not authorized to agree to, sign any contract or modification or obligate the government to make payments.

Panther also argued that even if the COR did not have authority to contract on behalf of the government, his actions were subsequently ratified by the CO. Ratification, however, must be based on a full knowledge and awareness of the conduct being ratified. But there was no evidence in the court record that anyone (CO or otherwise) with contracting authority had full knowledge regarding the COR's communication with Panther, or that anyone had acquiesced in any commitments made. Indeed, there was no evidence that the CO had any knowledge that Panther had been given any go-ahead for the 2014 season.

So the Court held that there was no evidence that Sgt. Kosa or LTG Ingram had authority to bind the government in contract, or that individuals with contracting authority had ratified a 2014 sponsorship agreement. Panther's claim was totally denied.

Takeaway. There are two parts to the moral of this story:

1) Never rely on oral agreements to contract or to modify a contract.
2) Ensure that the government official who signs a contract or modification has actual, written authority to do so. Every contractor can easily obtain this, simply by requesting a copy of that authority (a Certificate of Appointment, Standard Form 1402, also known as

a "warrant"). FAR 1.602-1 states that "Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel." If the Agency or CO refuses to provide it, make your objections known in writing and consider filing a protest.

For other helpful suggestions on government contracting, visit:
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