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Hit the Brakes Before Taking on Government Work Without a Contract

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The Court of Federal Claims' decision in *Panther Brands, LLC v. United States* reminds us that (1) only contracting officers (COs), not their representatives (CORs), have authority to bind the government in contract, and (2) at-risk work is risky! Although simple in theory, in practice these principles can be complicated.

CO authority can be split between a "contracting office" and a "contract administration office." COR authority may be clearly limited under one contract, yet indeterminate and expansive under another. Further muddying the waters, personnel titles can mean different things at different agencies: the "contract specialist" might be the full-fledged CO at one agency, but just an assistant at another. And while a COR's – or even a three-star general's! – oral directive might have reliably represented the Government's position in the past, as *Panther* shows, that doesn't mean it will be contractually binding next time around.

In October 2012, Panther, an IndyCar racing team, signed a sponsorship agreement with a broker under which Panther would be paid $12.8 million to put together a U.S. Army National Guard-branded racing team during the 2013 IndyCar series and to provide other promotional services. The agreement contained an option for the 2014 season exercisable before July 31, 2013.

A lieutenant general told Panther in a February 2013 meeting that its sponsorship was authorized and funded for 2014, according to Panther. Later that month, the COR orally advised Panther that its IndyCar contract would be renewed and that Panther should start preparing. Per Panther, whom the Guard had sponsored annually since 2008, this was the usual practice: the Guard would first give oral authorization to proceed, and contract documents would be signed later. Panther revved up its operations for 2014, hiring a new driver and technical advisor, conducting R&D for its vehicle, and engaging in various promotional services for IndyCar races. But July 31 came and went without option execution. Instead, the Guard explored sponsoring a different racing team and ultimately decided to go with a competitor for the 2014 season – RLL.

Following an unsuccessful bid protest, Panther filed its claim at the Court of Federal Claims under the Contract Disputes Act seeking reimbursement of expenses in preparation for the 2014 season. Among other counts, the claim alleged breach of an implied-in-fact contract. The Government filed for summary judgment following discovery on the grounds that Panther could not demonstrate the existence of any implied-in-fact contracts. Granting the Government's motion, the Court found that Panther failed to submit evidence that either the general or the COR had actual authority to bind the government for the 2014 season, and that Panther was unable to establish ratification of the oral advisements by a contracting authority. Panther was unable to recover about $5 million. It eventually would close shop in August 2014.

The lesson to be learned: seek clarification from the designated CO before undertaking work without a contract. And even with a written contract, only the CO can make commitments or changes to its price, quality, quantity, or delivery.