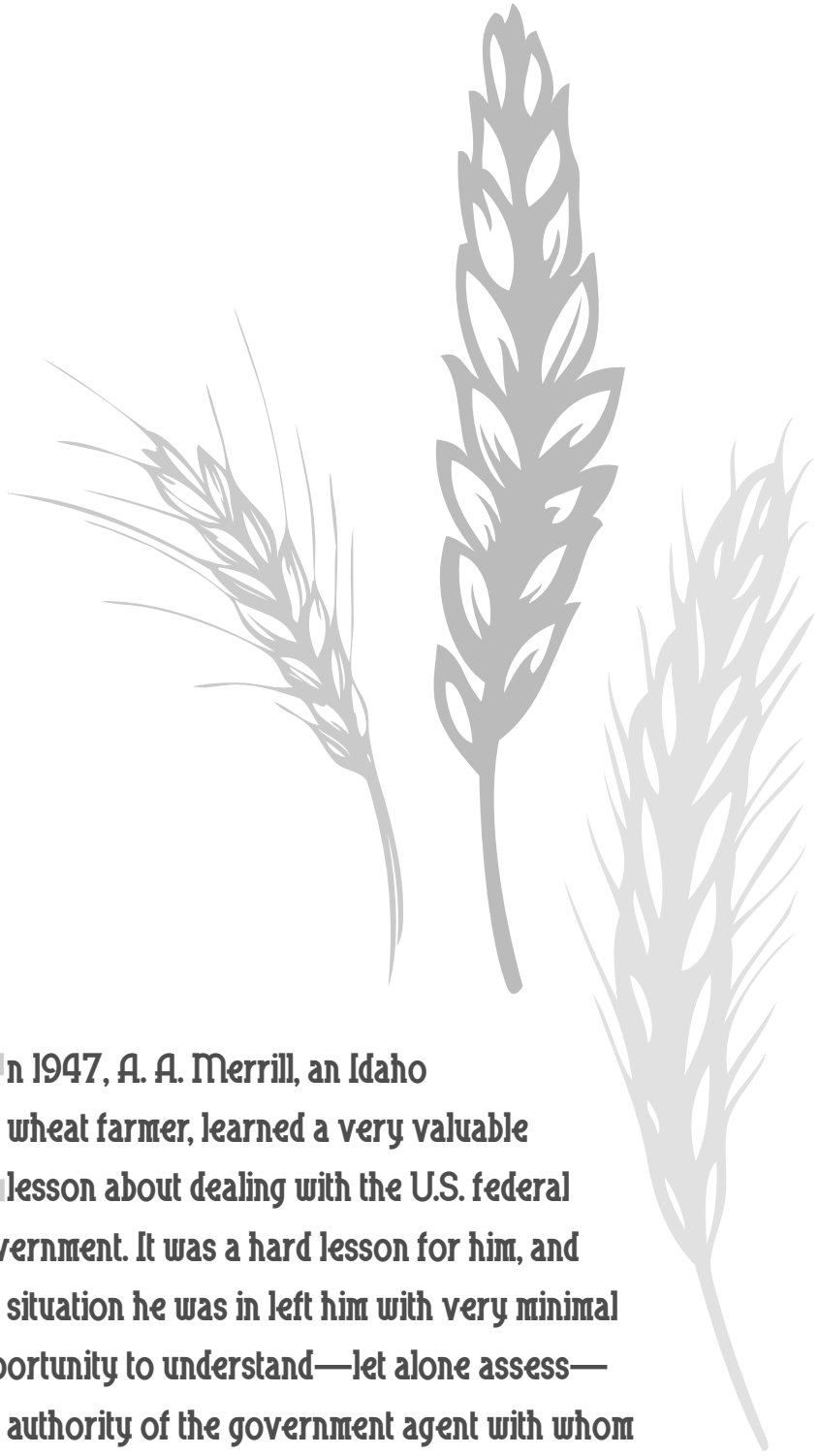

In 1947, A. A. Merrill, an Idaho wheat farmer, learned a very valuable lesson about dealing with the U.S. federal government. It was a hard lesson for him, and the situation he was in left him with very minimal opportunity to understand—let alone assess—the authority of the government agent with whom he was dealing. Nonetheless, he suffered for not understanding the concept of government authority and his case gave the Supreme Court an opportunity to educate us all on the important matter of contracting officer authority.

Does the use of the granted authority by a contracting officer pose any potential risk to your contract? When we say a contracting officer has an "unlimited" warrant, what exactly do we mean by that? Are his or her actions automatically proper due to this expansive term, or are there in fact limits to even an "unlimited" warrant? To understand the answers to these questions, it is instructive to ask: "Did you hear what happened to Farmer Merrill?"

Bonneville County, Idaho, encompasses 1,897 square miles of mostly rural land and what is now the city of Idaho Falls. Merrill was a wheat farmer in Bonneville County who had a couple of bad years. His crop of winter wheat in 1944–1945 was so bad that he could only harvest about 60 acres of it, and instead plowed the rest under using the crop as seed for the following year. This is what is known as "re-seeded wheat." Altogether he had about 460 acres of wheat planted that year and 400 of those acres were re-seeded in this fashion.

A few years prior to this, the federal government had decided to get into the crop insurance business and created a quasi-agency in 1938 called the Federal Crop Insurance Corporation (FCIC) to provide this service.[1] On March 26, 1945, Merrill showed up at the local Bonneville County Agricultural Conservation Committee offices, a designated agent of the FCIC, and applied for insurance on his crop. Merrill told the agent that 400 of his 460 acres were re-seeded and was assured by the agent that the entire crop was insurable. The agent forwarded his application to the FCIC Denver Branch Office, where it was accepted on March 28, 1945.

Sadly, Merrill's luck was not destined to change and in July 1945, the bulk of his crop was destroyed by drought. "At least this time I have insurance," he must have thought, and he proceeded to file his claim with the FCIC. His claim was denied. The FCIC cited a regulation that had been published in the *Federal Register* on February 7, 1945, stating that no insurance would be provided for "winter wheat in the 1945 crop year, and spring wheat which has been re-seeded on winter wheat acreage in the

1945 crop year." They declared the insurance contract invalid, forcing Merrill to sue the FCIC.

The Idaho state courts were very sympathetic to Merrill's plight, and he received a favorable result from the trial court jury. The Idaho courts applied the commercial law rule that a principal is bound by the acts of its agent. Since the federal government had entered the realm of commerce as a seller of insurance, they reasoned, it should be held to the same standard. This judgement was affirmed by the Supreme Court of Idaho. Before Merrill could break out the wheat ale in celebration, however, the FCIC requested review of this state court decision by the U.S. Supreme Court.

When the Supreme Court entered its ruling on the case in 1947, Justice Robert Jackson provided this view of the situation:

> It was early discovered that fair dealing in the insurance business required that the entire contract between the policyholder and the insurance company be embodied in the writings which passed between the parties, namely the written application, if any, and the policy issued. It may be well enough to make some types of contracts with the government subject to long and involved regulations published in the *Federal Register*. To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event.[2]

Unfortunately for Merrill, Justice Jackson was writing the dissenting opinion for the minority of the Court. The majority opinion expressed a very different and significant principle concerning the authority of government agents and the responsibility of those who deal with them:

> Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[3]

"To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains or even knows that there is such a publication."
—Justice Robert Jackson, 1947

Farmer Merrill lost his crop and his case. This outcome is significant for professionals in government contracting. Clearly, government contracts exist in a highly regulated environment. The procurement legislation embodied in the U.S. Code, specifically titles 10 and 44, covers a great range of matters. The *Federal Acquisition Regulation* (*FAR*)—changes to which are published in the "voluminous and dull" *Federal Register*—is further supplemented by the various agency *FAR* supplements, including the *Defense FAR Supplement* (*DFARS*). If there is anything contained in that entire body of law and regulation that could affect the authority of your contracting officer to act, are you well enough versed in the content to protect your company from potentially invalid contracts? If you presently serve as a contracting officer, are you sufficiently aware of the limits on your authority, even if you hold an "unlimited" warrant?

Several sections of the *FAR* address this topic explicitly:

> Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.[4]

This section comes immediately after the section that explains that generally "the authority and responsibility to contract for authorized supplies and services are vested in the agency head."[5] In other words, when creating executive branch agencies, Congress delegates some of its authority to the respective agency for further re-delegation to the various contracting officers. And of course, Congress gets its authority from Article I of the U.S. Constitution. Thus, the authority of each and every contracting officer can be traced directly to the Constitution through the organic legislation that created the agency for which he or she works. The *FAR* further directs agency heads to set up a system within their agency for the appointment, and the termination of appointments, of contracting officers. The *FAR* also states: "Contracts may be entered into and signed on behalf of the government only by

contracting officers."[6] The regulation then goes on to explain that any appointment must be in writing "on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised...."[7]

Beyond the requirement that the appointment of contracting officers must be in writing and must expressly state any applicable limitations, agencies have very broad discretion in placing limits on contracting officers. Thus, there will often be significant variations in the authority delegated. It may be limited by dollar value; contract type; type of service or commodity (e.g., construction or information technology); documentation required to issue the contract (e.g., task order, full contract, or Federal Supply Schedule order); or even by a specific part of the acquisition process, for example termination settlements only.[8] There are no real constraints on how an agency head might decide to limit and compartmentalize the functions of its contracting officers. It becomes very obvious, then, that all contract managers dealing with the government should consider a request to see the contracting officer's warrant, even though some contracting officers have reacted badly when such a request has been made. This is despite the clear language in FAR 1.601 that such information be "readily available to the public." In at least two situations known to the author, dealings with an agency representative turned sour when the request was made, only to learn that the parties representing the agency were support service contractors with no authority whatsoever. Under the holding in *Merrill*, the contractor would have been at risk in trying to conclude negotiations with this support contractor.[9]

Limitations on a contracting officer's authority might also be contained in legislation. For example, under the Contract Disputes Act,[10] contracting officers were given very broad authority to settle any claims "arising under or relating to a contract...."[11] Despite this broad grant of authority, which goes well beyond what had traditionally been within a contracting officer's purview, the authority granted by the Contract Disputes Act was expressly limited in the legislation when either the matter has been specifically authorized to be under a different federal agency[12] or where the claim in question involves fraud.[13]

All contracting officers are to ensure that *all* rules have been followed before they execute a contract, or they are without authority to make the award.

There are other risks to consider, even when dealing with a properly warranted contracting officer. For example, FAR 1.602-1(b) provides: "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." In other words, unless a contracting officer has followed *every* applicable law, executive order, regulation (in all their many forms and formats), and *all* other applicable procedures, including clearances and approvals (thus incorporating the internal processes of their respective agency), and further ensures that each and every one of these has been met, the contracting officer is without authority to even award the contract.[14]

Consider this in the context of FAR Part 6 related to competition. The general rule, found in FAR 6.101, states that with certain limited exceptions, federal law requires "that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding government contracts." How is a contractor to know if a contracting officer has complied with internal procedures concerning the award of a contract that might arguably fit within one of the competition exceptions? If you are the recipient of a set-aside contract award, is the award at risk because the contracting officer failed to comply with some internal agency requirement? How would you know, for example, if the exception had been properly documented and approved by an official of the agency at the appropriate level?

Generally, there is a presumption that such rules and regulations, or procedures and processes, have been followed. The holding in *Merrill*, however, coupled with the express and unambiguous language of the *FAR*, suggests that if the contracting officer failed to meet this stringent standard, he or she is without authority to award the contract. The contract is thus invalid and the contractor is at risk. We rarely read about such cases because contractors are unaware of the underlying issues, and most agencies, despite *Merrill*, will treat contractors fairly and equitably when a mistake has been made.[15] This highlights, however, the importance of full and complete file documentation on the part of contracting officers to legitimize their authority to enter into each and every contract they sign. The author has personally challenged, and is aware of others who have challenged, contracting officers who are clearly violating FAR Part 6 with an unjustified or inadequate sole source document. They have not agreed that they are without authority to award the contract, but that just highlights deficiencies in their training. The *FAR* is not at all unclear on the subject. All contracting officers are to ensure that *all* rules have been followed before they execute a contract, or they are without authority to make the award. Unfortunately, like Merrill, it is

the contractor who is at risk in these situations, not the errant contracting officer.[16]

If you look at the standard award documents used by the government, you see this statement in the signature block for the contracting officer: "United States of America." It is not the contracting officer's name that is preprinted here. That name appears in a prior block in which the name is typed or printed. This is the official signature block where the contracting officer is placing the full authority of the U.S. government behind the agreement of the parties. This is an extremely meaningful action and must be done with the full authority assigned to the contracting officer speaking on behalf of the entire U.S. government. That is a significant responsibility!

This article does not suggest that all contractors should independently verify that the contracting officer has completely fulfilled his or her obligations under these limitations of authority and has further complied with every detail of the rules, regulations, policies, and procedures of the agency. That is not practical. It does suggest, however, that a certain level of due diligence should occur and as a minimum there should be a request to see the contracting officer's warrant. The contracting officer should have no problem in providing that, and in fact most are quite proud of the accomplishment of having fulfilled the requirements to be awarded a warrant. It often hangs prominently in many of their office areas.[17] If you are visiting with the contracting officer and do not see it, however, it is a best practice to request it. Further, every contract manager should know and understand the basic procurement statutes and applicable regulations, whether appearing in the *FAR* or in an agency supplement, and should be in a position to know whether these rules are being followed. As a profession, we must often police ourselves and when a contracting officer appears to be acting beyond his or her authority, it is incumbent upon us as professionals to bring this to the attention of appropriate agency officials.

The *FAR* is equally clear here. In FAR 1.102-3, the contractor is specifically mentioned as a member of the "acquisition team." If we are to function as a team, we must work cooperatively in seeing that the laws and regulations are followed. The government commits to "provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all government participants on the team...."[18] The *FAR* then states: "The contractor community is encouraged to do likewise."[19] If we are to function as a team, then we must work cooperatively in ensuring that the risks in contract award and performance are managed in an effective manner. While cost, schedule, and technical compliance all bring their aspects of risk to any project, the risk of an invalid contract must also be managed in a proactive and cooperative manner. This section of the *FAR* also explicitly states: "The [*FAR*] system will foster cooperative relationships between the government and its contractors consistent with its overriding responsibility to the taxpayers."[20]

There are professionals on both sides of this process trying their best to comply with the "voluminous and dull" rules that we all must follow.

You may or may not agree with Justice Jackson, paraphrasing for present purposes that it is an absurdity to hold that every contractor who deals with the government knows what the *FAR*, as published in the *Federal Register*, contains or even knows that there is such a publication. If a contractor were to peruse this "voluminous and dull" publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects the contractor's rights, the contractor would never need a contract, for the contractor would never get time to perform it. Nonetheless, the regulations are quite clear and the Supreme Court has been equally clear. While recognizing the *Merrill* case "no doubt presents phases of hardship," the Supreme Court in *Merrill* went on to say: "The oft-quoted observation...that 'Men must turn square corners when they deal with the government,' does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury."[21] While there are many and various risks in performing a government contract, on balance, the Court tells us, the preference is to protect the public purse at the expense of contractors, if necessary.

When a contracting officer speaks for the U.S. government, it is a burdensome obligation. Congress has given us a multitude of laws, rules, and regulations to follow before allowing charges against the Treasury, and every agency of the executive, legislative, and judicial branches have added freely to this multitude. It is incumbent upon every contracting officer to honor the responsibility given to them and to do his or her utmost to fulfill every detail of the limits on the authority granted to them; to follow all of the rules, procedures, and processes imposed by law, regulation, or agency directive; and to clearly document their files to substantiate their effort to do so.[22]

In cooperation with the contracting officer, all contractor contract managers should likewise know the law and rules, and assist the contracting officer in fulfilling this difficult and sometimes tedious duty. If you encounter a recalcitrant contracting officer, it becomes your obligation to the process to report this to the appropriate officials

in a cooperative and supportive fashion. There are professionals on both sides of this process trying their best to comply with the "voluminous and dull" rules that we all must follow. The authority of the contracting officer is full, but not complete. There are limits and they must be imposed on any actions taken. We must all work cooperatively as part of the acquisition team to ensure that the best interests of the government and its taxpayers are served.

Thank you Farmer Merrill for the hard but valuable lesson on contracting officer authority. **CM**

The authority of the contracting officer is full, but not complete.

ABOUT THE AUTHOR

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Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. The FCIC continues to exist today under the Department of Agriculture.
2. *Federal Crop Insurance Corporation v. Merrill et al.* (332 U.S. 380 (1947)).
3. *Ibid.*
4. FAR 1.602-1(a).
5. FAR 1.601(a).
6. *Ibid.*
7. FAR 1.603-3(a).
8. *See* FAR 49.101(d).
9. There are two points of interest to convey in this regard. One retired contracting officer, who served in that role for over 23 years, has stated in a personal interview (December 7, 2011) that only once in that entire time was he ever requested to validate his authority. Further, as a point relevant to negotiations, it is always important to negotiate with the decision maker. Otherwise, you might give up your full margin to the non-decision maker, and then be confronted with a further concession request from the decision maker. This effectively forces you to negotiate against yourself, which is never a wise business move. Understanding the authority of those with whom you deal is simply good business, whether the other party is a federal government representative or a commercial counterpart. For this reason it is common practice among contracting officers to request that any company negotiator be authorized to bind the company.
10. *Public Law* 95-563.
11. FAR 33.210.
12. For example, the Food and Drug Administration related to, perhaps, a drug use, or the Securities and Exchange Commission related to, perhaps, a required filing.
13. *See* FAR 33.210(a)–(b).
14. For an expansion on this concept, refer to Tom Reid, "Exactly who IS the Government Customer?" *Contract Management* (December 2006): 8, where the perspectives of the requisitioner, the financial officer, and contracting officer, while all acting "in the best interests of the government," actually have very different and sometimes conflicting interests in performing their obligations.
15. The *FAR* now contains a posting requirement for justifications where less than full and open competition is being sought, so there is some opportunity to challenge the determination. This posting requirement, however, is an after-the-fact requirement. FAR 6.305 says that the posting must occur "within 14 days" *after* contract award, thus giving little opportunity to challenge the determination or to verify that it was properly made in accordance with all laws, regulations, and agency procedures. Based on a continuing review of these postings in FedBizOpps, however, and the very few of them that are found, it is probably safe to say that very few contracting officers are complying with this requirement, which arguably makes the contract award invalid.
16. While no statistical data has been gathered for present purposes, the risk is not solely on contractors. Contracting officers that exceed their authority may be guilty of an Anti-Deficiency Act violation (which, depending on the circumstances, has both criminal and civil sanctions), in which case they can go to jail (however, an informal survey was unable to identify a single instance of this); be held personally financially liable (and have been bankrupted by being held liable); and can lose their jobs, be personally debarred, or have their warrants pulled, effectively ending their careers. Most practitioners in this field are aware of one or more of the latter three situations personally. None of this, however, provides relief for the innocent contractor involved.
17. More agencies, to their credit, have recently implemented more rigorous contracting officer training programs, whether modeled after the VA Acquisition Academy, Defense Acquisition University, or other agency initiative. These sometimes include exams and interviews with senior agency officials. In this author's opinion, receiving a contracting officer warrant *should* be difficult and subject to rigorous standards. There are additionally legislative mandates relative to continuing education and training for contracting officers as well as others involved in the acquisition process.
18. Using only the data point of increased sustain rates on protests by the Government Accountability Office going back several decades, there has been an increase from about a five percent sustain rate historically to rates hitting the teens and 20s in the past 20 years. This suggests, but by no means confirms, that neither contracting officers nor their legal teams are meeting their legal obligations in awarding contracts as well as they might.
19. FAR 1.102-4.
20. FAR 1.102-4(d).
21. *Merrill*, *see* note 2.
22. *See* FAR 4.800 generally and FAR 4.801(b)(2) specifically.