Implied-in-Fact Contracts Under the Federal Acquisition Regulation: Why Pacord Got It Wrong

Arnie Bruce Mason

Follow this and additional works at: https://scholarship.law.wm.edu/wmlr

Part of the Government Contracts Commons

Repository Citation

Copyright © 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
https://scholarship.law.wm.edu/wmlr
IMPLIED-IN-FACT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION: WHY PACORD GOT IT WRONG

The case of PacOrd, Inc. v. United States\footnote{139 F.3d 1320 (9th Cir. 1998).} exemplifies why people should follow their gut instincts. PacOrd, a subcontractor, hesitated to work with the general contractor, A & E Industries, in performing ship repair work for the United States government. PacOrd knew of A & E's reputation for not paying its subcontractors.\footnote{See id. at 1321.} To entice PacOrd to do the work, a federal government contracting officer allegedly promised that the government would take measures to guarantee payment to PacOrd.\footnote{See id.} Relying on this promise, PacOrd agreed to do the work.\footnote{See id.} PacOrd's fears of nonpayment came to fruition when A & E hid behind the shield of bankruptcy and the government refused to honor its alleged promise.\footnote{See id.}

In addition to the mistake of neglecting its gut instinct, PacOrd erred by contracting with the federal government without securing a writing. Under the Federal Acquisition Regulation (FAR), a contract with the United States government must be in writing to be enforceable.\footnote{See infra notes 100-18 and accompanying text.} In \textit{PacOrd}, however, the Ninth Circuit called into doubt the existence of this writing requirement by opening the door to an implied-in-fact contract.\footnote{See \textit{PacOrd}, 139 F.3d at 1323 (remanding to the district court to determine whether an implied-in-fact contract existed).} Assuming that a writing requirement exists, \textit{PacOrd} raises the issue of whether the regulatory writing requirement should bar the enforcement of implied-in-fact contracts in government acquisitions. This Note explains the importance of a writing requirement and the policy reasons for its consistent enforcement in
light of history, case precedent, and the circumstances unique to
government contracts.

The express language of the FAR supports the existence of a
writing requirement. The FAR has the force and effect of law, and by definition requires that a contract be in writing, unless otherwise authorized. The presence of a writing requirement is supported further in the context of agency authority. The FAR charges all parties to a government contract with knowledge of the writing requirement. A contracting officer has the authority to bind the government only when the contract meets all the requirements of the law, including the FAR's requirement that the contract be in writing.

As the first section of this Note explains in greater detail, the import of history, the definition of a contract under the FAR, and the scope of authority vested in the contracting officer all combine to prohibit the enforcement of a contract unless a writing exists. The second section of this Note highlights the case history surrounding the subject of writing requirements in government contracts. Although the cases do not demonstrate unanimous support for a writing requirement, it is clear that PacOrd chose the minority position by opening the door for a court to later find an implied-in-fact contract. The third section of this Note attempts to resolve the doubt PacOrd created regarding the role of a writing requirement for government contracts by highlighting the benefits of a virtual statute of frauds for government contracts, and distinguishing it from the traditional criticisms associated with statutes of frauds.

Strict enforcement of the writing requirement under the FAR serves important evidentiary and channelling functions, but a
per se enforcement of the writing requirement has its own dangers. Enforcement of the writing requirement in a case such as PacOrd may be unfair, and perhaps result in the perpetration of a fraud by the government. Accordingly, the fourth section of this Note recognizes the major criticism of a virtual statute of frauds: that it will perpetuate, rather than prevent, fraud. Government abuses of the requirement should be curtailed by a narrow exception to the requirement allowing an implied-in-fact contract upon a showing by the plaintiff of some blatant act rising to the level of fraud by the government.

Whether the government defrauded PacOrd by not honoring the alleged oral agreement the contracting officer made is debatable, especially considering the lack of intent on the part of the government to cause PacOrd to rely on the contracting officer’s statement. Absent such a showing of government fraud, the regulatory writing requirement should be enforced because parties contracting with the government should know the law, and therefore, know to obtain a writing before beginning any performance to their detriment. Consistent enforcement of the writing requirement absent a showing of fraud will prevent fraud, increase the certainty of when the government will be bound, and decrease transaction costs.

THE ANOMALY KNOWN AS PACORD

The Ninth Circuit’s decision in PacOrd gives new life to the argument that the writing requirement for the formation of government contracts may be ignored when a party alleges a contract that is not memorialized in a writing. After the government refused to honor the oral promise in PacOrd, PacOrd sued to have it enforced. The district court granted the government’s motion for summary judgment on the basis “that the alleged contract was not in writing as required by the Federal Acquisition Regulation.” On appeal, the Ninth Circuit faced the issue

18. See infra note 148 and accompanying text.
19. See infra note 161 and accompanying text.
20. See infra notes 178-95 and accompanying text.
21. See PacOrd, Inc. v. United States, 139 F.3d 1320, 1320 (9th Cir. 1998).
22. Id. at 1321.
of whether an implied-in-fact contract may be found despite a regulatory writing requirement for formation of a contract.\textsuperscript{23} \textit{PacOrd} took the controversial position that "[i]mplied-in-fact contracts with the government have been enforced despite statutory or regulatory requirements that contracts be in writing."\textsuperscript{24} The disturbing holding created the possibility of enforcing a FAR contract "so long as [the plaintiff] can establish sufficient facts, beyond a mere oral agreement, for the court to infer the existence of an implied-in-fact contract."\textsuperscript{25} Such a result dulls the thrust of the writing requirement under the FAR by undermining its goals of certainty, consistency, and lower transaction costs.

The \textit{PacOrd} court relied heavily on \textit{Narva Harris Construction Co. v. United States}.\textsuperscript{26} In \textit{Narva Harris}, the court ignored the writing requirement, choosing instead to enforce an implied-in-fact contract out of a fear that the government would escape liability.\textsuperscript{27} In his dissenting opinion in \textit{PacOrd}, Judge T.G. Nelson distinguished \textit{Narva Harris} on two grounds.\textsuperscript{28} first, that \textit{Narva Harris} was not decided under the FAR,\textsuperscript{29} and second, that "[t]he language of the regulation and the concept of agency authority"\textsuperscript{30} "is just plain wrong." Judge Nelson argued that "[w]ith thousands of contracts and hundreds of billions of dollars in play every year, the Government simply has to know to whom and for what it is obligated."\textsuperscript{31} Two legal principles guided Judge Nelson's dissent: the language of the regulation and the concept of agency authority.\textsuperscript{32} First, Judge Nelson interpreted the relevant FAR sections\textsuperscript{33} to contain a virtual statute of frauds, thereby

\textsuperscript{23} See \textit{id.} at 1323.
\textsuperscript{24} \textit{Id.} at 1322. The court in \textit{PacOrd} defined an implied-in-fact contract as "a true contract, the agreement of the parties being inferred from the circumstances . . . ." \textit{Id.} at 1323 n.2 (quoting \textit{Narva Harris Constr. Corp. v. United States}, 574 F.2d 508, 511 n.6 (Ct. Cl. 1978)).
\textsuperscript{25} \textit{Id.} at 1323.
\textsuperscript{26} 574 F.2d 508 (Ct. Cl. 1978).
\textsuperscript{27} See \textit{id.} at 510-11.
\textsuperscript{28} See \textit{PacOrd}, 139 F.3d at 1324 (Nelson, J., dissenting).
\textsuperscript{29} See \textit{id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{See id.}
precluding enforcement of the contract absent a writing.\textsuperscript{34} Second, he posited an agency authority argument, asserting that the proposition noted in \textit{Federal Crop Insurance Corp. v. Merrill},\textsuperscript{35} that a party contracting with the government bears the risk of determining if the government officer has the authority to do so, should control the case.\textsuperscript{36}

In \textit{Kenney v. United States},\textsuperscript{37} the court reached a middle ground. In \textit{Kenney}, the plaintiff negotiated with the government in an attempt to provide human resource development and training.\textsuperscript{38} After a change in command, the negotiations became a low priority for the government and eventually the negotiations ceased.\textsuperscript{39} Although the plaintiff never conducted any training courses for the government, the plaintiff sued the government for breach of contract.\textsuperscript{40} The \textit{Kenney} court granted the government's motion for summary judgment for two reasons.\textsuperscript{41} First, the court held that there were insufficient facts to infer from the circumstances an implied-in-fact contract.\textsuperscript{42} Second, the court noted that even if an implied-in-fact contract existed, the government could avoid its enforcement because the contracting officer lacked authority to bind the government.\textsuperscript{43} Although \textit{Kenney} acknowledged \textit{Narva Harris} and implied-in-fact contracts in government contracting, the \textit{Kenney} court delivered a blow to this line of reasoning by introducing the agency authority argument in such a context.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{34} See \textit{PacOrd}, 139 F.3d at 1324 (Nelson, J., dissenting) ("The executive branch of the Government has made it clear that contracts coming within the FAR must be in writing.").
\item \textsuperscript{35} 332 U.S. 380 (1947).
\item \textsuperscript{36} See id. at 384.
\item \textsuperscript{37} 41 Fed. Cl. 353 (1998).
\item \textsuperscript{38} See id. at 354-55.
\item \textsuperscript{39} See id. at 355-56.
\item \textsuperscript{40} See id. at 356.
\item \textsuperscript{41} See id. at 359-60.
\item \textsuperscript{42} See id. at 359.
\item \textsuperscript{43} See id. at 360.
\item \textsuperscript{44} The \textit{Kenney} court showed \textit{Narva Harris} respect and appeared to give \textit{Narva Harris} credibility, but it did so with a wink and a nudge. Rather than stopping after determining an implied-in-fact contract did not exist under the facts, the court proceeded to point out that even if such a contract existed, the contract would be unenforceable because the contracting officer lacked authority and "the United States
PacOrd, Kenney, and Narva Harris all broke from the precedent established by United States v. American Renaissance Lines, Inc., which found a virtual statute of frauds based on a statute similar to the writing requirement found in today's FAR. A later case criticized American Renaissance Lines, describing that court's statutory interpretation as "unique and appearing to be a misapplication," given the statute's original budgetary control purpose. The American Renaissance Lines court, however, did not ignore that the statute's original purpose "was to prevent executive officials from excessive or inappropriate spending," but simply believed that the writing requirement would protect "both sides from the possibility of fraud or misinterpretation by the other." On this basis, the court found a virtual statute of frauds and, therefore, refused to enforce the oral contract.

Just four years later, the court in American General Leasing, Inc. v. United States reaffirmed the principles of American Renaissance Lines. American General Leasing interpreted a statute similar to the one in American Renaissance Lines to bar the enforcement of an oral contract. The court in American General Leasing reasoned that, because "[t]he Federal Procurement Regulations have the force of law," and the "parties contracting with the Government are charged with having knowledge of the law governing the formation of such contracts," an oral agreement is unenforceable when an applicable procurement regu-

government may generally deny unauthorized acts of its agents." Id. For a discussion of the interrelation between agency authority and the FAR's writing requirement to weave a virtual statute of frauds, see infra notes 119-50.

45. 494 F.2d 1059 (D.C. Cir. 1974).
46. See id. at 1062 (acknowledging that the statute did "not follow the typical statute of frauds format," but nonetheless holding that the statute did require that government contracts be in writing "and that contracts which are merely oral are not enforceable").
49. Id. at 1063.
50. See id. at 1062.
51. 587 F.2d 54 (Ct. Cl. 1978).
52. See id. at 57-58.
53. Id. at 58.
54. Id.
lation requires a writing to bind the government.\(^{55}\) Similar to the statute at issue in *PacOrd*, the applicable procurement regulation in *American General Leasing* defined a contract as the "establishment of a binding legal relation . . . includ[ing] all types of commitments which obligate the Government to an expenditure of funds and which except as otherwise authorized are in writing."\(^{56}\) In concluding that the statute barred enforcement of an oral contract, the court limited its holding to situations in which there has been no actual performance of the contract, no detrimental reliance, and the parties intended that a binding contract could be created only by a formal writing.\(^{57}\)

Over the next decade it became clear that the *Narva Harris* decision was the minority position as subsequent decisions followed the *American Renaissance Lines* holding.\(^{58}\) The *Narva Harris* court tried to distinguish itself from *American Renaissance Lines* by drawing a distinction between a "naked, express oral contract" and an implied-in-fact contract.\(^{59}\) This distinction is tenuous at best in the face of a regulation requiring a writing. The writing requirement serves an evidentiary purpose as well as making the resolution of contract disputes more efficient.\(^{60}\) Enforcing a contract without a writing, whether inferred from the circumstances (implied-in-fact) or based solely on parol evi-

---

55. See id.
56. Id. at 57 (quoting 41 C.F.R. § 1-1.208) (codified as amended at 48 C.F.R. § 2-2.101(A) (1998)).
57. See id. at 58.
58. See, e.g., Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998) (noting that the contracting officer lacked the authority to contract without obtaining the required written approval), cert. denied, 119 S. Ct. 1111 (1999); Aronson v. Resolution Trust Corp., 38 F.3d 1110, 1112-13 (9th Cir. 1994) (refusing to enforce an oral contract in part because the contracting officer did not comply with the writing requirement); Edwards v. United States, 22 Cl. Ct. 411, 422 (1991) (same); Prevado Village Partnership v. United States, 3 Cl. Ct. 219, 224 n.3 (1983) (noting that if the regulation required a writing for a contract, then no contract existed absent such a writing); Lomas & Nettleton Co. v. United States, 1 Cl. Ct. 641, 644 (1982) (holding that an oral acceptance is insufficient when a regulation requires a written acceptance). But see *PacOrd*, Inc. v. United States, 139 F.3d 1320, 1322 (9th Cir. 1998); Kenney v. United States, 41 Fed. Cl. 353, 357 (1998).
60. For a more detailed discussion of the evidentiary and channelling functions a writing requirement serves, see infra notes 152-60 and accompanying text.
dence (oral contract), cuts against the policy of providing clear evidence of the contract so that the government will know when and to whom it is bound.

The majority of cases since American Renaissance Lines and Narva Harris have made no such distinction but have chosen instead to enforce the writing requirement for government contracts. In Lomas & Nettleton Co. v. United States, the court held that if a statute or regulation requires a written acceptance, then an oral acceptance is insufficient. The Lomas court focused on the controlling regulation's use of the word "shall" to imply that such writing was mandatory.

The case of Prevado Village Partnership v. United States generally reaffirmed American General Leasing and applied its principles to the context of an alleged implied-in-fact contract. The Prevado court noted that the FAR charges a party to a contract with the government with knowledge of the law and regulations governing the formation of such a contract. Prevado also recognized that when applicable governmental regulations require a writing, "no contract exists absent such a final, executed writing."

In Edwards v. United States, the court cited a statutory provision defining a contract to necessarily include a writing to support its holding that no oral agreement could be enforced. The Edwards court further noted "that generally oral agreements provide a very shaky basis for the granting of relief by way of money judgments."

61. 1 Cl. Ct. 641 (1982).
62. See id. at 644 (citing SCM Corp. v. United States, 219 Ct. Cl. 459, 464 (1979); American Gen. Leasing, Inc. v. United States, 218 Ct. Cl. 367, 373-75 (1978); McCarty Corp. v. United States, 204 Ct. Cl. 768, 774-75 (1974); International Telephone & Telegraph v. United States, 197 Ct. Cl. 11, 24-26 (1972); G.C. Casebolt Co. v. United States, 190 Ct. Cl. 783, 788-90 (1970)).
63. See id.; cf. 48 C.F.R. § 1.602-1(b) (1998) ("No contract shall be entered into unless the contracting officer ensures that all requirements of law . . . have been met." (emphasis added)).
64. 3 Cl. Ct. 219 (1983).
65. See id. at 224 n.2.
66. Id. n.3.
68. See id. at 419.
69. Id. at 423.
Most recently, the rationale supporting strict enforcement of a regulatory writing requirement has been applied in *Aronson v. Resolution Trust Corp.* and *Harbert/Lummus Agrifuels Projects v. United States*. In *Aronson*, the court refused to enforce the oral agreement at issue because the controlling federal procurement regulation required the agreement to be in writing and to be approved by the association's board of directors. The *Harbert/Lummus* court focused on the relationship between a contracting officer's authority and a writing requirement. *Harbert/Lummus* involved the government's loan guarantee issued to Agrifuels Refining Corporation to guarantee payment to Harbert/Lummus. Harbert/Lummus requested an accelerated payment schedule that the contracting officer ultimately denied despite the fact that some government officials had approved the plan. The *Harbert/Lummus* court noted that the contracting officer "never expressed to Harbert/Lummus an intent to enter into a contract to modify th[e] written schedule." Relying heavily on the doctrine of agency authority, the *Harbert/Lummus* court noted that even if there had been a contract modification, it would not be enforceable because the contracting officer had no authority to bind the government without obtaining the required written approval. The *Harbert/Lummus* court cited *American General Leasing* for the proposition that a contracting officer who fails to meet a writing requirement lacks authority

---

70. 38 F.3d 1110 (9th Cir. 1994).
71. 142 F.3d 1429 (Fed. Cir. 1998).
72. See *Aronson*, 38 F.3d at 1112-13. Faced with seemingly mandatory precedent, the Ninth Circuit in *PacOrd* tried to distinguish *Aronson* on the basis that in the latter the agent lacked authority because he did not obtain approval from the board of directors. See *PacOrd*, Inc. v. United States, 139 F.3d 1320, 1323 (9th Cir. 1998). The attempt by the *PacOrd* court to distinguish *Aronson* is unpersuasive for two reasons. First, the court in *PacOrd* failed to recognize that the contracting officer in that case similarly lacked authority to bind the government without a writing, unless otherwise authorized. See 48 C.F.R. § 2.101 (1997). Second, *PacOrd* completely overlooked the court's focus in *Aronson* on the agent's failure to reduce the agreement to writing as required by the applicable regulation. See *Aronson*, 38 F.3d at 1112.
73. See *Harbert/Lummus*, 142 F.3d at 1431.
74. See id.
75. Id.
76. See id. at 1432.
to bind the government. Clearly, the majority of cases have adhered to the historical precedent for requiring a writing in government contracts, thereby creating a line of cases that favors a writing requirement for government contracts.

**THE VIRTUAL STATUTE OF FRAUDS UNDER THE FAR**

There is no precise statute of frauds governing government contracts, but "the concept is well established that the Federal Government must be protected from fraud and cannot be legally bound by contract in the absence of a written agreement." As detailed above, although the proposition does not enjoy unanimous support, the majority of cases have found a writing requirement for government contracts and have refused to enforce such contracts absent a writing. History, the language of the FAR, the purposes behind the FAR, and the doctrine of contracting officer authority all support the idea of a virtual statute of frauds for government contracts.

**The Guiding Hand of History**

Historically, Congress and the courts both have emphasized the importance of a writing to evidence a contract in government contracts. It has been noted that "Congress historically had established controls over federal contracts, and one of the most important was the requirement for a written contract." Courts have interpreted statutes similar to today's FAR as the equivalent of a statute of frauds. The *American Renaissance Lines* holding was not an innovation but was in accord with case law dating back to the Civil War Era. For example, an 1862 statute required that "all contracts issued by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior be in writing." The primary purpose of the statute was "to impose a

---

77. See id. at 1433.
79. See supra notes 21-77 and accompanying text.
80. See infra notes 81-150 and accompanying text.
81. Cox, supra note 78, at 8.
82. Id. at 7 (citing 12 Stat. 411 (1862)).
restraint upon the officers themselves, and prevent them from making reckless engagements for the government." To meet this goal the statute made it "unlawful for contracting officers to make contracts in any other way than by [a] writing signed by the parties." The necessary conclusion that followed was to prohibit all other modes of contracting.

The Supreme Court interpreted this 1862 statute in Clark v. United States as the equivalent of a statute of frauds. In Clark, the owner of a steamboat orally agreed to rent the steamboat to the Army. After the steamboat wrecked, it was deemed a "total loss." When the owner sued the government for the value of the steamboat, the government relied on the 1862 statute to deny liability for the action of its officer. The Court held the statute to be a virtual statute of frauds and noted that it was "manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this." Although the Court denied the steamboat owner's claim for the value of the steamboat, the owner did recover the value for the use of the vessel on a quantum meruit basis. The statutes at issue in Clark and American Renaissance Lines were the predecessors to the FAR governing government contracts. As is evident from the cases interpreting these predecessor statutes, history supports interpreting the FAR to require a writing before the government will be bound.

The Language of the FAR

The language of the FAR is clear with respect to the writing requirement and is in accordance with past statutes interpreted by the courts to be a virtual statute of frauds. Congress delegat-

---

84. Id.
85. See id.
86. 95 U.S. 539 (1877).
87. See id. at 542.
88. See id. at 539.
89. Id. at 540.
90. See id. at 541.
91. Id. at 542.
92. See id.
ed the authority to draft the FAR to the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautic and Space Administration (NASA). These agencies' collective interpretation of whether the FAR has an absolute writing requirement, that is, no implied-in-fact contracts may be found under the FAR, is crucial because "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 94

Under the *Chevron* test, review of an agency's construction of its own statute is a two-part analysis. First, a court must examine "whether Congress has directly spoken to the precise question at issue." 95 If the congressional intent is clear, "that is the end of the matter." 96 If not, then the court must determine whether the agency's interpretation of the statute on a point that is not specifically addressed "is based on a permissible construction of the statute." 97 The test for permissible construction in this situation is reasonableness. 98 To evaluate the construction's reasonableness it is necessary to examine the regulatory language, the legislative history, and the policies to be served under the FAR.

In applying the *Chevron* test to the FAR, a court must first examine whether Congress had a clear intent regarding the writing requirement. Specifically, the court must ask whether finding an implied-in-fact contract goes against the intent of

---

93. See 10 U.S.C. §§ 2302b, 2303(a) (1994) (noting that the FAR applies to the DoD, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, and NASA); 40 U.S.C. § 751(f) (1994) (granting the authority in the GSA to prescribe regulations to carry out its functions which includes procurement of property for the government); 42 U.S.C. § 2473(c)(1) (1994) (granting NASA the power "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law"). The source of the FAR derives from 48 Fed. Reg. 42,102 (1983) (noting that the DoD, GSA, and NASA, all under the auspices of their relevant statutory authority, issued the FAR to replace the procurement regulations of each of these agencies), and 54 Fed. Reg. 5054 (1989), unless otherwise noted.


95. *Id.* at 842.

96. *Id.*

97. *Id.* at 843.

98. See *id.* at 845.
Congress, acts indifferently to such intent, or furthers the intent of Congress. The answer appears to be indifference. Contracting methods were not a concern to Congress; instead Congress wanted different agencies to have the ability to formulate regulations to carry out the agencies’ functions, which might include government contracting.99

A clear intent on the part of Congress regarding a writing requirement for government contracts is lacking; therefore, courts must next look to the language of the regulation and the construction of the regulation by the agencies administering the FAR. Under the FAR, a contract is defined as including a writing unless otherwise authorized.100 Furthermore, under the FAR, the contracting officer has the authority to bind the government only when all the requirements of law have been met.101 Presumably, if the FAR has the force and effect of law, and therefore, the law requires a writing, then the contracting officer does not have the authority to bind the government without a writing (or authorization) because he would then not meet a requirement of law. Finally, the language of the regulation gives specific examples of what constitutes an enforceable contract under the FAR including bilateral instruments, awards, notices of awards, job orders, task letters, letter contracts, purchase orders, and bilateral contract modifications.102 The fact that the drafters took the time to give examples of contracts, all of which contain writings, creates a strong presumption, direct from the language of the regulation, that contracts under the FAR must be in writing.103

99. Congress ensured that the agencies administering the FAR would be able to carry out their duties but did not control to a large extent how these agencies could contract, leaving that instead to the agencies’ discretion. See, e.g., 42 U.S.C. § 2473(c)(1) (1994) (granting NASA the power to make regulations to carry out their duties); id. § 2473(c)(5) (allowing NASA to enter into contracts to perform its duties, but not prescribing how to contract, with the minor exception of encouraging the participation of small businesses).


101. See id. § 1.602-1(b).

102. See id. § 2.101. Although the language of this provision recognizes that the mentioned contracts are not exclusive, see id., it remains significant that the provision mentions no examples of contracts without a writing.

103. This conclusion is buttressed by the requirement that the contract be signed which obviously presumes a writing. See id. § 1.601(a).
The next step is to survey the regulatory history of the FAR. In promulgating the FAR, DoD, GSA, and NASA jointly issued a statement regarding the overall purpose of the FAR. One of the goals in drafting the FAR was to "produce a clear, understandable document that maximizes feasible uniformity, in the acquisition process." Consider how a statute of frauds, universally enforced, aids the spirit and purpose of the FAR by furthering the interests of clarity and uniformity. A consistently enforced statute of frauds makes it clear to the government, and government contractors, that without a writing and absent unusual circumstances, the government will not be bound under the FAR. The existence of a writing is a much simpler issue to resolve than litigating whether a contract can be inferred from the circumstances absent a writing. The simplicity of the rule and its consistent enforcement puts government contractors on notice not to rely to their detriment on promises without a writing. Moreover, the costs of litigation are reduced significantly because these issues should be fairly easy to settle in an efficient manner. Such a result is consistent with the policy of the Executive Branch in procuring goods and services "to ensure the economical and efficient administration and completion of Federal Government contracts."

Another goal in drafting the FAR was to "implement recommendations made by the Commission on Government Procurement, the Federal Paperwork Commission, various Congressional groups, and others." The study and research that accompanied the implementation of the FAR demonstrates the care in—

105. Id.
106. See infra notes 178-95 and accompanying text (discussing a narrow exception for fraudlike circumstances).
107. That is, litigating the existence of an implied-in-fact contract.
108. Exec. Order No. 12,954, 3 C.F.R. 329 (1995), reprinted in 40 U.S.C. § 486 (1996 Supp. II). Although Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), held that the National Labor Relations Act (NLRA) preempted Executive Order Number 12,954, the court based its decision on the regulatory nature of the Executive Order regarding a labor law issue. See id. at 1339. Although the court overruled the substance of the executive order, the policy of the Executive Branch with regard to efficiency in government contracting remains unaffected by the court's decision.
volved in drafting the regulations. To go against the clear langu-

age of the FAR would also go against the careful study and recommenda-
tions of the various groups that offered input into how the process of government contracting should be conducted. To find implied-in-fact contracts goes against the clear language of the FAR requiring a writing unless otherwise authorized.

The final step is to examine the policy to be served. Enforcing the statute of frauds under the FAR serves three policy goals: predictability, uniformity, and lower transaction costs in the formation of government contracts.110 Predictability in government contracts should be the paramount goal of all parties involved. The government puts billions of dollars annually into government contracting, and such a burden cannot be taken lightly.111 The government must know when and to whom it is bound.112 Guessing whether a contract should be inferred from the circumstances undercuts this goal because it creates doubt as to whether the government is bound. If the government can point to a writing in every case, then the government can better assess its overall obligations, and thus manage its costs more effectively. The flip side reveals a benefit for the contractors as well. By following the simple rule of obtaining a writing, contractors have no doubt whether they have incurred obligations. Instead, the writing expresses both the clear duties of the contractor and its compensation. The implied-in-fact view breeds uncertainty and may pressure a contractor to begin work without a writing, thus risking lost compensation for services rendered. The clear notice that the writing requirement provides can decrease the competitive feeling to take a chance and begin work for the government based on a mere oral promise just to beat the other contractors to the punch. If every contractor knows the government will not be bound absent a writing, then no contractor should feel pressure to proceed on an oral promise because the contractor knows that doing so will return no fruits for its labor.

110. See infra notes 111-18 and accompanying text.
111. See Brian R. Levey, Tortious Government Conduct and the Government Con-
112. See supra note 31 and accompanying text.
A second policy goal of the FAR is uniformity. One goal in drafting the FAR included "provid[ing] for coordination, simplicity and uniformity in the Federal acquisition process." The drafters intended the FAR to address the concern of "reduc[ing] the proliferation of agency acquisition regulations." Before the FAR, different regulations applied depending on what agency of the government a contractor was dealing with. Deciphering which regulations applied made contracting with the government a very difficult maze through which to run. The idea of uniformity in regulations was conceived to make contracting with the government a far less frustrating ordeal. Requiring a writing in all cases of government contracting furthers this goal of uniformity. The converse would necessarily entail differing and contradictory results far too often. Inevitably, court decisions will differ on the same set of facts regarding whether a contract was implied-in-fact, promoting doubt as to whether the contractor should obtain a writing. The contractor who risks performing the work without a writing may get the contracting job and benefit if the oral contract is honored, or if a court enforces it as an implied-in-fact contract. The risk, however, may be great if the contract is not enforced in the face of the government's breach. Conversely, the contractor who does not risk a court finding an implied-in-fact contract, and consequently waits on a writing before beginning performance, still bears the

114. Id.
115. Before the FAR, procurement agencies were governed according to their civilian or military status. See Steven W. Feldman, Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques, 17 PUB. CONT. L.J. 211, 216 n.8 (1987). The Defense Acquisition Regulation governed most military procurement agencies, whereas the Federal Procurement Regulation controlled civilian agencies. See id.
risk of the government choosing another contractor whose financial pressures, coupled with government-imposed time constraints, encourage it not to wait for a writing. There are risks involved and no matter which side the contractor chooses he risks losing money. If a writing is uniformly required, regardless of a court's determination of an implied-in-fact contract, all contractors know which path to take: obtain a writing before beginning any work. To do otherwise would open the door to the risk of the government not honoring the promise. In the case of a writing, if the government does not honor its part of the bargain, the remedy is quick and painless: present the writing and secure a judgment in the contractor's favor.

A final policy benefit served by consistent enforcement of the writing requirement under the FAR is that it reduces the costs of contracting. This result is consistent with the stated goal of the FAR to "[m]inimize administrative operating costs."\(^{118}\) Strict enforcement of the writing requirement will lower contracting costs for both the government and the contractor in two significant aspects. First, the government will expend less time and money monitoring its contracting officers. With a writing, the government can examine the writing to determine if the officer acted appropriately. Without a writing, the government has no way to know all of the oral assurances made by its officers. Consequently, the conduct of the contracting officers may go largely unchecked. Second, the litigation costs associated with determining the existence of a contract will decrease given that the existence of a writing should resolve the uncertainties that lead to litigation. These policies, taken together with the regulatory history and language of the FAR, point toward a construction of the FAR that absolutely requires a writing before the government can be bound.

*Contracting Officer Authority Under the FAR*

The language of the FAR, its regulatory history, and public policy all support consistent enforcement of the writing require-

---

118. 48 C.F.R. § 1.102(b)(2).
The regulatory writing requirement under the FAR may be inferred similarly on the basis of a contracting officer's authority to contract. Under the FAR, "[c]ontracting officers may bind the Government only to the extent of the authority delegated to them." The FAR limits a contracting officer's authority to enter into a contract. Specifically, a contracting officer cannot enter into a contract without "ensur[ing] that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." Finally, by its terms, the law requires the contracting officer to contract in writing. The inevitable conclusion is that because contracting officers can contract only in writing, unless otherwise authorized, the contracting officers have no authority to bind the government to an implied-in-fact contract.

Those contracting with the government must know the scope of a contracting officer's authority to bind the government. In Federal Crop Insurance Corp. v. Merrill, the Supreme Court best stated the duty of those contracting with the government:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes

---

119. See supra notes 100-18 and accompanying text.
121. A contracting officer is "[t]he person executing or terminating a contract on behalf of the government." W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 50 (2d ed. 1996).
122. 48 C.F.R. § 1.602-1(a) (footnote added).
123. Id. § 1.602-1(b).
124. See id. § 2.101 (defining a contract as "all types of commitments that oblige the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing").
125. This line of argument is consistent with the court's analysis in Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429 (Fed. Cir. 1998). In Harbert/Lummus, the Department of Energy (DoE) required all contracting officers to obtain written approval for contract modifications that exceeded in value a certain "dollar threshold." Id. at 1432. Without the written approval, the Harbert/Lummus court concluded that the contracting officer lacked authority to bind the DoE to an oral contract. See id.
126. Indeed, a contractor has no reason not to know the scope of the contracting officer's authority because "[i]nformation on the limits of the contracting officers' authority shall be readily available to the public and agency personnel." 48 C.F.R. § 1.602-1(a).
the risk of having accurately ascertained that he who pur-
ports 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.\textsuperscript{128}

The government cannot be bound by an agent who attempts to
enter into a contract without satisfying the regulatory require-
ments.\textsuperscript{129} A party to a contract with the government is charged
with knowledge of the law governing formation of the contract.\textsuperscript{130}
As previously noted, a contract under the FAR is presumed to be
in writing.\textsuperscript{131} For example, it is important to note the presump-
tion of a writing in the requirement that the contracting officer’s
“name and official title must be typed, stamped, or printed on
the contract.”\textsuperscript{132} The policy rationale for not allowing a contract-
ing officer to bind the government beyond the contracting
officer’s authority is based on the governmental delegation of
powers.\textsuperscript{133}

Under the doctrine espoused in \textit{G.L. Christian & Associates v. United States},\textsuperscript{134} contracting officers have the authority to con-
tract only in accord with the regulations that have “the force and
effect of law.”\textsuperscript{135} In light of the \textit{Christian} doctrine, two questions
must be answered. First, does the FAR have the force and effect
of law, and second, what does the FAR have to say about the
contracting officer’s authority to bind the government? If the FAR
does have the force and effect of law, and there is a writing re-

\textsuperscript{128} \textit{Id.} at 384.

\textsuperscript{129} \textit{See Harbert/Lummus, 142 F.3d at 1433 ("[A]gency procedures must be fol-
lowed before a binding contract can be formed."); Augusta Aviation, Inc. v. United
States, 671 F.2d 445, 449-50 (11th Cir. 1982) (noting that the contracting officer
lacked the authority to enter into the contract without complying with the require-
ment of a written application); Kenney v. United States, 41 Fed. Cl. 353, 358 (1998)
("[T]he United States government may generally deny unauthorized acts of its
agents.").}

\textsuperscript{130} \textit{See Prevado Village Partnership v. United States, 3 Cl. Ct. 219, 224 nn.2-3

\textsuperscript{131} \textit{See supra notes 102-05 and accompanying text.}

\textsuperscript{132} \textit{KEYES, supra note 121, at 54.}

\textsuperscript{133} \textit{See id. at 55 ("In a government of delegated powers, no activity may be un-
taken by the government except pursuant to such power.").}

\textsuperscript{134} 312 F.2d 418 (Cl. Ct. 1963).

\textsuperscript{135} \textit{KEYES, supra note 121, at 41; see Christian, 312 F.2d at 424.}
quired for the contracting officer to bind the government, then a contracting officer cannot bind the government to an implied-in-fact contract because that is beyond the scope of his authority.\textsuperscript{136}

Federal procurement regulations, such as the FAR, have the force of law.\textsuperscript{137} Furthermore, a study of the regulatory language, its history, and the policies to be served have shown that the FAR requires a writing.\textsuperscript{138} The case law interpreting the predecessor statutes to the FAR supports this conclusion.\textsuperscript{139} The impact of an agreement entered into by a contracting officer without the authority to do so is significant. It has been noted that "[c]ontracting officers have unique authority to bind the government and if an agent is without authority, payment under a contract will generally be refused."\textsuperscript{140} Furthermore, "lack of knowledge of actual authority is normally not reason enough to hold the government liable if such authority is absent."\textsuperscript{141}

\begin{flushright}
\textsuperscript{136} See 48 C.F.R. § 2.101 (1998) (establishing that "except as otherwise authorized," contracts must be in writing).

\textsuperscript{137} See 44 U.S.C. § 1510(a) (1994) (noting that the Code of Federal Regulations has legal effect); American Gen. Leasing, Inc. v. United States, 587 F.2d 54, 58 (Ct. Cl. 1978); see also KEYES, supra note 121, at 40-41 ("Regulations published in the Federal Register have the force and effect of law—i.e., they are binding on federal agencies and the general public.").

\textsuperscript{138} See supra notes 100-18 and accompanying text.

\textsuperscript{139} See, e.g., Aronson v. Resolution Trust Corp., 38 F.3d 1110 (9th Cir. 1994) (holding that the alleged oral agreement was unenforceable because the controlling regulation required the agreement to be in writing and gain approval of the association's board of directors); Lomas & Nettleton Co. v. United States, 1 Cl. Ct. 641, 644 (1982) (holding that if a statute or regulation requires a written acceptance, then an oral acceptance is insufficient); American Gen. Leasing, 587 F.2d at 58 (refusing to enforce an oral agreement in the face of an applicable procurement regulation requiring a writing to bind the government, when there has been no actual performance of the contract, no detrimental reliance, and the parties intended that a binding contract could be created only by a formal writing).

\textsuperscript{140} KEYES, supra note 121, at 51.

\textsuperscript{141} Id. at 55-56; see also Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (noting that those contracting with the government bear the risk of determining the scope of the contracting officer's authority and that "this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority"); Kenney v. United States, 41 Fed. Cl. 353, 357 (1998) ("[T]he burden is on plaintiffs to ascertain the scope of authority of those government officials with whom they deal."). A leading commentator in the field of government contracts, Ralph C. Nash, noted that "contractors must aggressively find out the limits of the contracting officer's authority or risk damage to their 'financial health.'" Major David A. Wallace et al., Contract and Fiscal Law
The impact of an agreement made by a contracting officer without the authority to do so is equally apparent in the context of an alleged implied-in-fact contract. An essential element of an implied-in-fact contract is that the "[contracting] officer whose conduct is relied upon must have had actual authority to bind the Government." Given the writing requirement under the FAR and the rule that an agent cannot contract beyond the scope of his authority, the necessary conclusion to be drawn is that a government contracting officer cannot enter into an oral, or an implied-in-fact contract. Note, however, that there is an


142. See, e.g., KEYES, supra note 121, at 57 ("Although a contractor may be able to recover costs based on implied-in-fact contract to pay for such costs there can be no recovery if the contracting officer lacked the requisite authority to bind the government.").

143. Petrini v. United States, 19 Cl. Ct. 41, 46 (1989) (applying this rule, the court found that the controlling government regulation requiring a writing precluded finding an implied-in-fact contract in part because the contracting officer did not have such authority); see also OAO Corp. v. United States, 17 Cl. Ct. 91, 98-99 (1989) (noting that an agent of the government can bind the government only to the extent of its authority and that no implied-in-fact contract could be formed if the agent did not have such authority).

The doctrine of apparent authority is no defense to a contracting officer's lack of actual authority to bind the government. See, e.g., Consortium Venture Corp. v. United States, 5 Cl. Ct. 47, 49 (1984) (holding that the doctrine of apparent authority is not applicable to the federal government), aff'd, 765 F.2d 163 (Fed. Cir. 1985); KEYES, supra note 121, at 62 ("[N]o one may rely upon the apparent authority of an agent of the government and the government may not be estopped by the action or representation of an agent not within the scope of his actual authority. . . .") (quoting United States v. Zenith-Godley Co., 180 F. Supp. 611, 616 (S.D.N.Y. 1960), aff'd, 295 F.2d 634 (2d Cir. 1961)).

144. See, e.g., Chavez v. United States, 18 Cl. Ct. 540 (1989) (noting that "equitable exceptions" to the law of contract are labeled more properly as contracts implied-in-law, and that the formation of an implied-in-fact contract depends on the authority of the contracting officer to bind the government, regardless of the court's "good conscience"); Spring St. Found., Inc., 94-2 B.C.A. (CCH) ¶ 26,737, at 133,046 (1994) (finding no implied-in-fact contract because the government representative lacked the authority to modify the contract). One further argument supports this conclusion. When both parties contemplate a writing, then there can be no implied-in-fact contract. See, e.g., Maimon v. United States, 219 Ct. Cl. 684, 686-87 (1979) (holding that a government agent lacked authority to bind the government through an oral statement, especially when both parties intended their agreement to be completed by a formal writing). Because the FAR mandates a writing requirement, see 48 C.F.R. § 2.101 (1998), and parties to a contract with the government are charged with knowl-
obvious and easy way to otherwise authorize a contracting officer to bind the government without a writing: the government could expressly give this authority to the contracting officer in the warrant.\footnote{145} Express authorization communicates the government's choice to allow the contracting officer to bind the government without a writing, and such choice is evidenced in the warrant, simplifying any subsequent litigation of the existence of an implied-in-fact contract.\footnote{146}

In \textit{PacOrd}, the government did not otherwise authorize the contracting officer to bind it without a writing.\footnote{147} Strict enforcement of the writing requirement in \textit{PacOrd} would have left PacOrd without compensation for work completed.\footnote{148} Although sympathy may side with PacOrd,\footnote{149} the law and policy must, for the greater good, side with enforcement of the writing requirement.\footnote{150}

degree of the existing laws, \textit{see} Prevado Village Partnership \textit{v.} United States, 3 Cl. Ct. 219, 224 nn.2-3 (1983); \textit{American Gen. Leasing}, 587 F.2d at 58, then certainly both parties must be presumed to contemplate a writing. If a writing is contemplated, then no implied-in-fact contract may be found. \textit{Cf.} New Am. Shipbuilders, Inc. \textit{v. United States}, 871 F.2d 1077, 1080 (Fed. Cir. 1989) (noting that there is no intent to be bound until all agency procedures are followed and that, until then, no enforceable contract exists regardless of oral assurances or implied-in-fact theories).

\footnote{145} \textit{See} Elyce K.D. Santerre, \textit{From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield}, 124 MIL. L. REV. 111, 126 (1989). The "warrant" (also known as the "Certificate of Appointment") is the means used to delegate contracting authority. \textit{See} id.

\footnote{146} \textit{Cf.} 48 C.F.R. § 2.101 (1998) (noting that the government can, apart from a writing, "otherwise authorize" its contracting officers to enter into contracts). \textit{See generally} Santerre, \textit{supra} note 145, at 125-27 (discussing a contracting officer's authority to bind the government).

\footnote{147} Although not expressly stated by the court, this is implicit in its factual discussion. \textit{See} PacOrd, Inc. \textit{v. United States}, 139 F.3d 1320, 1321-22 (9th Cir. 1998).

\footnote{148} Note that under such a rule, PacOrd might attempt recovery on a quantum meruit basis. Yet, the United States paid A & E for its services and should not be forced to pay a second time. The only quantum meruit action PacOrd could bring would be against A & E, yet PacOrd already has a breach of contract action against A & E. Either way, PacOrd must stand in line as any other creditor against the bankrupt A & E.

\footnote{149} The Supreme Court justified a similarly harsh result in \textit{Federal Crop Insurance Corp. v. Merrill}, 332 U.S. 380 (1947), on the rationale that "[m]en must turn square corners when they deal with the Government" . . . [because of] the duty of all courts to observe the conditions defined by Congress for charging the public treasury." \textit{Id.} at 385 (quoting Rock Island, Ark. & La. R.R. \textit{v. United States}, 254 U.S. 141, 143 (1920)). The "square corner" to turn in the case of government contracts is simply to obtain a writing to evidence the contract.

\footnote{150} Cases in which the contracting officer contracts beyond the scope of his au-
THE RATIONALE FOR STRICT ENFORCEMENT OF THE WRITING REQUIREMENT IN GOVERNMENT CONTRACTS

The endurance of a law depends on its underlying rationale. The PacOrd decision raises the issue of whether the writing requirement under the FAR should be strictly enforced or abandoned. "In deciding whether the requirement of writing for any particular category . . . ought to be retained, the advantages of retaining that category must be weighed against the potential harm or injustice likely to result from retention."151 The courts should adhere to the statutory writing requirement under the FAR for the following reasons. First, the writing requirement serves the evidentiary function needed in contract law.152 Preliminarily, it should be noted that "[i]t is beyond question that the bulk of the procurement community is composed of dedicated, hardworking, and honest public employees and contractors."153 Moreover, there is a "presumption that government officials act conscientiously and in good faith in the discharge of their duties."154 Nevertheless, the dangers of fraud in contracts require that "even today certain important transactions should be required to be evidenced in writing in order to be enforceable."155

151. INSTITUTE OF LAW RESEARCH AND REFORM, STATUTE OF FRAUDS 6 (1979) [hereinafter STATUTE OF FRAUDS].
152. It is important to note the fear of the court in Clark v. United States, 95 U.S. 539 (1877), if oral contracts could bind the government:
   The facility with which the government may be pillaged by the present-
   ment of claims of the most extraordinary character, if allowed to be sus-
   tained by parol evidence, which can always be produced to any required
   extent, renders it highly desirable that all contracts which are made the
   basis of demands against the government should be in writing.
Id. at 541-42.
155. STATUTE OF FRAUDS, supra note 151, at 6; cf. Overview of the Procurement
Second, enforcement of the writing requirement serves the related goals of predictability, consistency, and uniformity.\(^\text{156}\) Finally, routine enforcement of the writing requirement will lower transaction costs by decreasing litigation through its "channelling function."\(^\text{157}\) The channelling function is the manner in which a writing requirement identifies an enforceable agreement and thereby provides a simple test for a court to apply.\(^\text{158}\) Although the channelling function has been questioned under the traditional statute of frauds,\(^\text{159}\) this function makes the dispute simpler regarding when one knows whether he will be bound.\(^\text{160}\)

Despite the advantages of enforcing the writing requirement under the FAR, problems arise with a virtual statute of frauds. The main criticism is that a statute of frauds will actually perpetuate fraud.\(^\text{161}\) The rebuttal to this criticism examines which fraud is greater: the government’s, perpetrated through enforcement of the writing requirement, or the fraud against the gov-

---

\(\text{Process, supra note 153, at 6 (noting that a repeated theme of the Model Procurement Code is “the requirement of the filing of written records at numerous critical stages in the procurement process [to prevent fraud]”).}\)

\(\text{156. Cf. Konigsberg Int’l Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994) (noting that “Congress’ paramount goal” in drafting the copyright statute of frauds in 17 U.S.C. § 204(a) was to increase the “predictability and certainty of ownership” (quoting Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990))).}\)

\(\text{157. Statute of Frauds, supra note 151, at 8.}\)

\(\text{158. Id. at 8-9 (citing Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799 (1941)).}\)

\(\text{159. See, e.g., id. at 8, 10 (noting that other requirements of contract, such as consideration, must still be resolved and are therefore not simple, and further criticizing the Statute of Frauds as resulting “in a mass of litigation”). Note, however, that under the FAR the opposite should be true. That is, once it is determined that the FAR governs, then the contract is automatically subject to the writing requirement. Unlike the traditional statute of frauds, there are no limitations on the FAR writing requirement (with the minor suggested exception for fraud). Under the FAR, for example, no limitation exists for “contracts not to be performed within a year.” See, e.g., Coan v. Orsinger, 265 F.2d 575, 577-78 (D.C. Cir. 1959) (analyzing such a limitation). The authors of Statute of Frauds acknowledge as much by suggesting that their criticism may be muted “by making the application of the Statute clearer.” Statute of Frauds, supra note 151, at 11.}\)

\(\text{160. See Statute of Frauds, supra note 151, at 9 (citing Fuller, supra note 158).}\)

\(\text{161. See, e.g., Halstead v. Murray, 547 A.2d 202, 204 (N.H. 1988) (recognizing the criticism but noting that “the Statute of Frauds has been judicially interpreted in such a way as to attempt to prevent fraud rather than to promote it”); see also Statute of Frauds, supra note 151, at 9 (noting that the Statute of Frauds has “caused more injustice than it has prevented”).}\)
ernment that inevitably follows if government contractors are given the chance to offer oral evidence of a contract as a substitute for a writing. 162 To conduct this balance, three factors should be considered to determine "whether a particular category merits a special evidentiary requirement."163 First, the "pecuniary importance of that category" must be examined.164 Second, the "intrinsic importance of that category" must be taken into account.165 Third, and finally, the "type of individual who will be 'protected' by the evidentiary requirement" should be identified.166 Applying these factors, the overwhelming preference in favor of enforcing the writing requirement in the context of government contracts is readily seen. First, the pecuniary interest involved is compelling if one considers the fact that government contracts involve billions of dollars annually.167 Second, the intrinsic importance of government contracts cannot be questioned given the entities involved.168 Finally, the writing requirement serves not only to protect the government but also to protect the public in the use of their funds.169

162. See, e.g., STATUTE OF FRAUDS, supra note 151, at 7 ("[I]f it is thought that the frauds which may occur as a consequence of allowing proof by parol evidence more than outweigh the injustice which will occur as a result of not enforcing legitimate bargains then the evidentiary function of the Statute of Frauds may still be a justification for its retention.").

163. Id.

164. Id.

165. Id.

166. Id.

167. See PacOrd, Inc. v. United States, 139 F.3d 1320, 1324 (9th Cir. 1998) (Nelson, J., dissenting); see also Chamber of Commerce v. Reich, 74 F.3d 1322, 1324 (D.C. Cir. 1996) ("In 1994, federal procurement exceeded $400 billion and constituted approximately 6.5% of the gross domestic product."); Levey, supra note 111, at 1 n.1 (noting that "in fiscal year 1991, the federal government entered into 20,152,308 contract awards, modifications, and other actions worth $210,689,057,000" (citing FEDERAL PROCUREMENT DATA CENTER, U.S. GEN. SERVS. ADMINISTRATION FEDERAL PROCUREMENT REPORT 2 (1992)).

168. See, e.g., JAMES F. NAGLE, FEDERAL PROCUREMENT REGULATIONS: POLICY, PRACTICE AND PROCEDURES 2 (1987) (noting "the government contracts with virtually all major companies in the country. These contractors employ at least one-third of the nation's workers. Adding the affected subcontractors and suppliers compounds the effect . . . ").

169. See Augusta Aviation, Inc. v. United States, 671 F.2d 445, 449 (11th Cir. 1982) (noting that "[i]f the rule were otherwise, the government would be put at risk every time its agents failed to follow instructions to the last detail, and their mistakes could impermissibly decrease the public treasury to the detriment of every
A second criticism of a statute of frauds is that a writing requirement "prescribes a method of contracting which is not in conformity with the way business or transactions of that sort are normally carried." 170 Although this criticism may have merit under the traditional statute of frauds, it has no application in the context of government contracts given the reality that most government contracts are reduced to writing. In short, the normal business of government contracting conforms with the statute of frauds. 171

In formulating analogous regulations, drafters have chosen to avoid a statute of frauds. The virtue of a writing requirement has been debated over the last few years in the drafting committee for the revision of Article 2 of the Uniform Commercial Code. 172 As the revised version presently reads, an implied-in-fact contract could be found absent the otherwise required writing. 173 Another useful comparison comes from Article 11 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which explicitly rejects any statute of frauds requirement. 174 The United States did not exercise its option to preserve the statute of frauds for the sale of consumer goods. 175 A feature of the writing requirement in the FAR distinguishing it from the one proposed for revised Article 2, as well

170. STATUTE OF FRAUDS, supra note 151, at 11.
171. Cf. Clark v. United States, 95 U.S. 539, 542 (1877) (noting that "there is no class of cases in which a statute for preventing frauds and perjuries is more needed than [government contracting]").
172. See U.C.C. § 2-201 n.1 (Council Draft No. 3, 1998) [hereinafter Council Draft No. 3] (noting that the "[e]arly drafts of revised Article 2 repealed the statute and motions to restore it were defeated at the 1995 and 1996 annual meetings of the Conference. The statute of frauds, however, was restored by the Drafting Committee at the January, 1997 meeting . . .").
173. See U.C.C. § 2-201(c)(2)-(3) (Reporter's Interim Draft Nov. 1999) (providing for the enforcement of a contract, notwithstanding the writing requirement, if certain circumstances arise that involve (1) an admission under oath by the party to be bound, (2) goods paid for and accepted, or (3) goods "received and accepted").
174. See United Nations: Conference on Contracts for the International Sale of Goods, May, 1980, art. 11, 19 I.L.M. 668, 674 [hereinafter CISG] ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.").
175. See id. art. 12; id. art. 96, at 693-94; Council Draft No. 3, supra note 172, § 2-201 n.6.
as the one absent from the CISG, is that the latter two involve the sale of goods, which usually implicates a disparity of bargaining power, whereas in the former context, sophisticated parties sit at both sides of the bargaining table. Based on this distinction, the rationale for finding an implied-in-fact contract in the context of consumer sales makes sense equitably but arguably does not apply in the government contracts arena.

Giving up on a writing requirement because it tends to perpetrate a fraud is not the best answer in the context of government contracts. Government contractors work in the field daily and would not be susceptible to misplaced reliance on oral promises if these same contractors knew of the writing requirement. The better way to address fraud is to carve out a narrow exception to the writing requirement when the requirement perpetuates fraud, rather than prevents fraud. This solution protects against fraud and maintains the other benefits that a writing requirement serves, namely predictability, uniformity, and decreased transaction costs.

**AN EXCEPTION FOR FRAUD**

The writing requirement for government contracts should be strictly, but not blindly, enforced in light of the facts that

---

176. For an example of just such a distinction, see Deborah Kemp, *Limitations Upon the Software Producer's Rights*: Vault Corp. v. Quaid Software Ltd., 16 RUTGERS COMPUTER & TECH. L.J. 85, 114 n.123 (1990) (noting that "sophisticated" parties arguably could be precluded from a "contract of adhesion analysis" because "only a contract for consumer goods could be a contract of adhesion").

177. Another way to avoid the harsh consequences of a writing requirement is through ratification. This narrow option can lead to enforcement of oral contracts if "the head of the contracting activity," 48 C.F.R. § 1.602-3(b)(2) (1998), has knowledge of the facts of the oral contract and accepts the otherwise unauthorized agreement. In this situation, the oral promise has been ratified and is enforceable. See Willard L. Boyd, III, *Implied-in-Fact Contract: Contractual Recovery Against the Government Without an Express Agreement*, 21 PUB. CONT. L.J. 84, 118 (1991). This option of course should remain because the problem of policing a contracting officer's authority is eliminated and arguably the FAR is complied with because the method of contracting was de facto "otherwise authorized." 48 C.F.R. § 2.101. This option, however, does not address the problem of the contracting officer who attempts to bind the government orally without approval by the head of the government entity.

178. See NAGLE, *supra* note 168, at 545 ("Certainly uniformity is important both to the government and to contractors but inflexibility, despite a universe of varied
fraud "[u]nravels [e]verything,"179 and is no stranger to government contracts.180 To maintain the benefits of a writing requirement in government contracts, but still prevent the hardships of a per se rule, an exception for fraud should be carved out from strict enforcement of the writing requirement when such enforcement would have the unintended and ironic result of perpetrating a fraud.181

Requiring fraud to excuse the absence of a writing to bind the government serves two important purposes. First, the exception directly answers the harshest criticism of enforcing a writing requirement, namely that it may promote rather than prevent fraud.182 Second, the exception to the rule should be invoked only in rare instances because the standard of fraud is so high, and consequently the goals to be served by a writing requirement will not be undermined.183 The typical elements of actionable fraud include: (1) a knowingly false statement of material fact; (2) that induces reliance by the subsequently injured party, causing them to do something they otherwise would not have done; and (3) proximately causing the injured party's damage.184

contracting problems, is misguided.


180. See, e.g., Cox, supra note 78, at 3 (noting that fraud has historically "afflicted the federal procurement process"); Austin J. McGuigan & John M. Massameno, Prosecuting Government Corruption Cases: Dangers and Pitfalls, 1984 A.B.A. SEC. PUBL. CONT. L. & SEC. URB., ST. AND LOC. GOV'T L. 63 ("Government corruption is nothing new.").


182. See supra notes 161-69 and accompanying text.

183. See infra notes 184-94 and accompanying text.

184. See, e.g., Hess v. Hess, 580 A.2d 357, 359 (Pa. Super. Ct. 1990) (noting that "the elements of fraud are (1) a misrepresentation, (2) a fraudulent utterance, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as the proximate result"); Ritchie v. Clappier, 326 N.W.2d 131, 134 (Wis. Ct. App. 1982) ("The elements of fraud are a false representation made with intent to defraud and reliance by the injured party on the misrepresentation.").
The appropriate standard will strike the right balance between enforcing the writing requirement to protect the government, promote predictability, and relax the requirement to prevent abuse by the government.

Three basic elements should make up the exception for fraud. The first element should require that a false statement be made by the government or its agent. The falsity must be more than the promise itself. Rather, the falsity should relate to the ability of the contracting officer to contract without a writing. For example, a contracting officer's statement that the deal did not need a writing because the agent would handle the matter would clearly be false because the agent does not have such authority. Second, the false statement must be reasonably calculated to deceive and made directly or indirectly to the aggrieved party. This should prove the toughest prong to meet because the typical case does not involve the contracting officer intentionally misleading the other party, but rather involves ignorance of at least one of the contracting parties regarding the scope of authority of the contracting officer to bind the government. Finally, the aggrieved party must actually and reasonably rely on the statement to his detriment. Actual reliance will be the easiest to demonstrate. If the government contractor completed, or even began the work orally contracted for, he has relied on the false statement to his detriment. The toughest part of this prong will involve whether such reliance was reasonable.

185. See, e.g., Farrar v. Churchill, 135 U.S. 609, 615 (1890) (noting that for an action in fraud to lie "[t]he representation must be in regard to a material fact, [and] must be false . . .").

186. Cf. Mid-South Cogeneration, Inc. v. Tennessee Valley Auth., 926 F. Supp. 1327, 1339 (E.D. Tenn. 1996) (requiring the alleged fraudulent conduct to be a false promise made with the intention to defraud).

187. See, e.g., Hess, 580 A.2d at 359 (noting that the falsity must be made with the intention of inducing the other contracting party to act).

188. The "typical case" is based on the presumption noted earlier that most contracting officers are honest and act in good faith. See supra notes 153-54 and accompanying text.

189. See, e.g., Farrar, 135 U.S. at 615 (noting that the false statement "must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true"); Pearson v. Norton, 40 Cal. Rptr. 634, 639 (Cal. App. 1964) (noting that the rightful reliance must result in damage); Hess, 580 A.2d at 359 (noting that the reliance must be justifiable).
Requiring reasonable reliance, as opposed to justifiable reliance, is inconsistent with the common law elements for actual fraud but consistent with the goal of making this exception difficult to meet. In *Field v. Mans*, the Court noted "that a person is justified in relying on a representation of fact 'although he might have ascertained the falsity of the representation had he made an investigation.'" Incorporating justifiable reliance into the exception for strictly enforcing the writing requirement would contravene a major premise of the agency authority argument that those contracting with the government have a duty to ascertain the scope of the contracting officer's authority. By requiring reasonable reliance instead, the standard is objective, measured against community standards, and more difficult to meet. This difficult burden can be met, however, if the falsity with intent to deceive is proven, and the contractor made reasonable efforts to verify the veracity of the contracting officer's representations, but did not discover the falsity. With this said, the actual fraud exception is a high standard, and rarely will be met. Setting such a difficult standard is consistent with the efficiency-promoting goals in government contracting and accommodates the criticism of stringently enforcing the writing requirement in those exceptional cases of actual fraud in which the writing requirement might otherwise be used to perpetrate a fraud.

On the facts of *PacOrd*, it is clear that the subcontractor received a bad deal, assuming there really was a promise by the contracting officer guaranteeing payment. More information is needed to determine if the government's conduct rose to the level of fraud. Absent facts that show the contracting officer told *PacOrd* that he did have authority to contract orally, the likelihood that *PacOrd* would meet the fraud exception seems slim.

192. *Id.* at 70 (quoting *RESTATEMENT (SECOND) OF TORTS* § 540 (1976)).
194. *See, e.g.*, Edward R. Christian, Recent Decision, *Howard v. Mutual Savings*, 45 ALA. L. REV. 303, 305 (1993) (noting that the standard "was, of course, an objective standard," and that if the fraud could have been discovered had ordinary care been taken, then the plaintiff should not recover).
More important to this analysis is the telling observation that had the writing requirement been strictly enforced over time, and therefore, strictly adhered to by government contractors, the subcontractor in the instant case never would have been harmed. The subcontractor never would have performed the work, or at least, would have held out until it obtained the promise in writing.

CONCLUSION

The holding in *PacOrd* has opened the door for increased uncertainty in government contracts regarding when the government will be bound in the absence of a writing, and when the contracting officer acts beyond the scope of his authority. If the past is prologue, then history provides two important principles to guide the analysis. First, contracting officers cannot bind the government beyond the scope of their authority. Second, writing requirements have been circumvented to enforce oral contracts, but only to the extent consistent with serving the goals of the writing requirement. The writing requirement in the FAR serves the goals of preventing fraud, increasing certainty of contract and uniformity of practice, and decreasing transaction costs. The writing requirement should be relaxed only when the regulation as applied goes against its goal of preventing fraud. This relaxation should occur only to the extent necessary to correct the ill while preserving the benefits.

*Arnie Bruce Mason*

---

195. That is, if cases like *Narva Harris* did not stray from the general writing requirement.