

DEVELOPMENTS – TERMINATIONS FOR DEFAULT


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CLAUSE 52.249-10

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or separable part of the work) that has been delayed....

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- (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause if –
- (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor...
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- “(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay.”



Cure Notice: Required or Not?

1. Applicable Law – State or Federal
2. Contract Language
 - FAR 52.249-8 – Supplies and Services
 - FAR 52.249-9 – Research and Development
 - FAR 52.249-10 – Construction



FAR Part 49.402-3

- (f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:
 - (1) The terms of the contract and applicable laws and regulations.
 - (2) The specific failure of the contractor and the excuses for the failure.
 - (3) The availability of the supplies or services from other sources.
 - (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.



FAR Part 49.402-3

- (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
- (6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
- (7) Any other pertinent facts and circumstances.



But, No Economic Analysis is Necessary

The Contracting Officer is not required to consider whether it is more economical to allow Contractor to complete contract and assess liquidated damages rather than terminate for default and reprocure.

Advance Construction Services, Inc., ASBCA No. 55232, 11-2 BCA ¶ 34,776



But See, FAR 31.204(a) on Cost Allowability

“Costs are allowable to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, and 31.205...”

Query: Can reprocurement costs be determined to be reasonable without an economic analysis?



Practical Considerations in Terminations for Default

- Review contract default provisions
- Is cure notice necessary or advisable?
- Terminate for Convenience instead?
- Is there a bond?
- Notice to Bonding Company
- Review Performance History for Waiver
- Necessary documentation to sustain burden of proof
- Litigation Forum



Common Grounds for Termination

- Anticipatory Repudiation
- Failure to Make Progress
- Stopping Work



Anticipatory Repudiation - Elements

- Definite and unequivocal statement by Contractor that it refused to perform;

OR

- Actions (or failure to act) that constitute abandonment of performance



Repudiation

Repudiation Found:

Free & Ben Inc., ASBCA No. 56129, 11-1 BCA ¶ 34,719

Repudiation Not Found:

Environmental Safety Consultants, Inc., ASBCA No. 51722, 11-2 BCA ¶ 34,848



Stopping Work

Stopping Work Justified:

Tzell Airtrak Travel Group Corp., ASBCA No. 57313,
2011 WL 4551498

Stopping Work Not Justified:

Haddon Housing Associates, LLC v. United States, 99
Fed. Cl. 311 (2011)



Failure to Make Progress

Advanced Construction Services, Inc., ASBCA No. 55232, 11-
2, BCA ¶ 34,776

Martin Construction, Inc. v. United States, 102 Fed. Cl. 562
(2011)

K-Con Building Systems, Inc., v. United States, 97 Fed. Cl. 41
(2011)



Supply Contracts

Matrix Research, Inc., ASBCA No. 56430, 11-2 BCA ¶ 34,789

Smart Power Systems, Inc., ASBCA No. 56743, 11-1 BCA ¶ 34,615



Waiver

Waiver Found:

Martin Construction, Inc. v. United States, 102 Fed. Cl. 562 (2011)

Environmental Safety Consultants, Inc., ASBCA No. 51722, 11-2 BCA ¶ 34,848

But See:

Fitnet International Corp., ASBCA No. 56604, 11-1 BCA ¶ 34,697