

TERMINATION FOR DEFAULT

Are you informed about the Justification of a Termination for Default?

INTRODUCTION

The Federal Government inserts clauses, in efforts to protect itself, into Government contracts to ensure that a contractor that is hired to perform work or provide services does so in a timely manner, with the correct materials, and does not otherwise refuse or fail to prosecute the work as required. (<http://www.smithcurrie.com/commonsensecontractlaw>) One such clause is a Termination for Default, which is outlined under FAR 52.249-10 “Default (Fixed-Price Construction).”

A Termination for Default provides protection to the Government by allowing the Government to effectively terminate a contractor’s contract and the contractor is then liable to the Government for any “damages” that are a direct result of a contractor’s refusal or lack of success in completion of the project. *Id.* The causes or reasons are further outlined below.

REFUSAL OR FAILURE TO PROSECUTE THE WORK

The Government clauses inserted into most Government contracts provide that a contractor shall perform the work associated with the project in a timely manner so that work is completed within a certain timeframe. *Id.* As such, simply falling behind schedule does not necessarily warrant a Termination for Default. The Government, as the terminating party, has the burden of proof and must prove that timely completion would no longer be possible to warrant a Termination for Default. *Id.*

The only exceptions include situations that are not the contractor’s fault and are beyond the contractor’s control:

1. Acts of God or of the public enemy;
2. Acts of the Government in either its sovereign or contractual capacity;
3. Acts of another contractor in the performance of a contract with the Government;
4. Fires;
5. Floods;
6. Epidemics;
7. Quarantine restrictions;
8. Strikes;
9. Freight embargoes;
10. Unusually severe weather; or
11. Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractors or suppliers. (FAR 52.249-10(1)(i-xi))

In situations that are beyond the contractor’s control and are therefore considered a valid excuse, if the Government proceeds with termination, it is automatically converted to a Termination for Convenience.

FAILURE TO COMPLETE ON TIME

In Federal Government contracts, especially if the contract contains a statement stating “time is of the essence” and there are particular project completion dates, the Government “...can terminate immediately without notice and without affording the contractor an opportunity to cure.” If the contract does not have a statement about time

importance, other factors may be required to consider Default of contract performance. (<http://www.smithcurrie.com/commonsensecontractlaw>)

REPUDIATION BY THE CONTRACTOR

Even in instances where a contractor has declared that it will not continue to perform, in order to terminate the contract for default, prior cases such as *Mountain State Constr. Co.*, ENGBCA No 3549, 76-2 BCA ¶ 12,197, "...a positive, definite, unconditional and unequivocal manifestation of intent, by words or conduct, on the part of a contractor not to perform" are proof that a contractor either cannot or will not perform the work as required by its contract.

Other situations can result in what is considered a material breach of contract if the contractor either cannot or will not comply with contract provisions such as those that require bonds. See *Antonio Santisteban & Co.*, ASBCA No 5586, et al., 60-1 BCA ¶ 2497.

CONCLUSION

Contractors should educate themselves about what constitutes grounds for a Termination for Default and what the Government will be looking for when considering terminating a contract for default. Knowing what is considered grounds for a default termination can help a contractor know how to avoid such a situation. Knowing what constitutes a valid excuse can also prove very beneficial.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor's interests properly and thoroughly. The experts at Excell Consulting International, Inc. stand ready to assist and evaluate your company's position and provide valuable and cost-effective guidance for your business.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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