

## Termination for Default: What Should You Do?

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It does happen— it’s unfortunate, but your company **could be fired** from a Government contract — **terminated for default!** All Government contracts contain the Default clause provided under 52.249-8 (Default [Fixed-Price Supply and Service]) in the Federal Acquisition Regulations (FAR), and the Government has the right under FAR 49.402-1 (The Government’s Right), subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to:

- a) Make delivery of the supplies or fail to perform the services within the time specified in the contract;
- b) Perform any other provision of the contract; or
- c) Fails to make progress and endangers performance of the contract.

In order to terminate a contractor for default, the Government must first deliberate and decide the most appropriate action to take. The Government must review and ultimately prepare a Memorandum for Record (MFR) addressing the following considerations FAR 49.402-3 (Procedure for Default) before deciding 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 in which deliver could be obtained from the delinquent contractor;
- 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; and/or
- 7) Any other pertinent facts and circumstances.

FAR 49.607 (Delinquency Notices) requires that the Government notify the contractor that the contractor is responsible for a condition that is endangering performance of the contract. This is typically done through a “Cure Notice” and unless the condition is cured within 10 days after receipt of the notice, the Government may Terminate for Default. This is provided that the time remaining in the contract performance period is sufficient to allow for “...an amount of time equal to or greater than the period of “cure” remains in the contract delivery schedule or any extension to it.” (See FAR 49.607(a))

If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period of 10 days or more, the Government may issue a Show Cause Notice advising the contractor that the Government is considering terminating the contract for default and, “...pending a final decision as to this

matter, it will be necessary to determine whether the contractor's failure to perform arose from causes beyond its control and without fault or negligence on the contractor's part."

Thus, the contractor is given the opportunity to present, in writing, any facts bearing on the questions to the contracting officer within 10 days after receipt of the notice. Failure to present any excuses within the 10 day period may be considered an admission that none exist.

The contractor should present the following information in response to a Cure Notice:

- Discussion of issue alleged to be a condition endangering contract performance
- Corrective plan to cure the alleged condition
- Who will bear the cost of the corrective work
- Schedule for performance of corrective work
- Impact of corrective work on completion of contract
- Actions contractor has taken and will take to mitigate the effect of the condition upon completion
- Government's role in causing the condition
- Any other factors bearing on timely completion

The Contractor should present the following information in response to a Show Cause Notice:

- Discussion of contractor's performance of the work for the term of the contract
- Discussion of contractor's control of work
- Discussion of reasons why the contractor is not at fault or negligent as to alleged deficiency
- Percent cost completion of contract
- Delay to project completion caused by Wrongful Termination
- Potential conversion of Default Termination to a Convenience Termination

A Termination for Default has serious consequences for both the contractor and the Government. A contractor must disclose such a Default Termination in bidding for new work. The Government may be held responsible for costs if the default is converted to a Convenience Termination, because the contractor may pursue recovery of allowable costs associated with the termination.

Of further consideration for the Contracting Officer, if the contract work is at the stage of 80% complete, it would be economically wasteful to terminate for default because the reprocurement costs would probably be excessive. This does not restrict the Government from Terminating for Default; however, the contracting officer must be able to show that he considered the cost and time impact at the time the termination decision was made.

Excell can help a contractor to gain a better understanding of the intricacies of Termination for Default. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment. Please feel free to fill out the form below, return it to us and one of our consultants will contact you right away to discuss your particular situation.

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

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