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## THE WAIVER DOCTRINE

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### *The Government May Waive the Project Completion Date— Requirements and Consequences*

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#### INTRODUCTION

The Armed Services Board of Contract Appeals (“ASBCA” or “Board”) recently addressed the “waiver” doctrine as it applies to government construction contracts: that is, the circumstances under which the government waives the scheduled project completion date, and thus waives its right to assess liquidated damages or terminate for default. The decision provides useful guidance on contracts in situations which are fairly rare, but happen often enough to be addressed in case law.

#### HISTORY

In the *Appeal of ASFA Int’l Constr. Indus. And Trade, Inc.*, ASBCA NO. 57880 , the U.S. Air Force awarded a contract to ASFA International Construction Industry and Trade, Inc. (“ASFA”) for the construction of a hazardous waste storage facility. An NTP was issued in June of 2005 with a completion date of November 6, 2005. The project encountered various problems and delays during the next 16 months. Amid unsuccessful negotiations regarding extensions of time and change orders, the Air Force issued a certification of substantial completion on April 18, 2007 — **well past the scheduled completion date**.

The contractor protested this late substantial completion date. The contracting officer later issued a final decision in 2011, assessing Liquidated Damages through that date. ASFA appealed the CO’s final decision to the ASBCA, arguing in part that liquidated damages were improper because the Air Force “waived” the scheduled completion date for the project.

The Board held that that the Air Force had not waived the completion date because it had mentioned several times the potential assessment of liquidated damages as a result of ASFA’s failure to meet the completion date. In its ruling, the Board explained the applicability of the “waiver” doctrine.

#### THE “WAIVER” DOCTRINE

Under the waiver doctrine as set forth in *Devito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969), a contractor may establish that the Government waived the scheduled completion date (and

therefore the right to assess liquidated damages and terminate for default) **if two elements are met**:

- (1) the government did not terminate the contract within a reasonable time after the missed completion date, and the surrounding circumstances indicate that it did not intend to terminate the contract; **and**
- (2) the contractor substantially relies on the failure to terminate the contract by continuing to perform work under the contract (which the Government allows to occur).

It should be noted *that Devito* originally applied the waiver doctrine to supplies contracts, where time is no longer of the essence once the fixed delivery date passes, as long as the Government does not terminate the contract afterward, and the contractor continues to perform on the contract by delivering supplies.

However, the waiver doctrine is rarely applicable to construction contracts because FAR clauses are spelled out and contractually incorporated into **federal construction contracts**, which allow for and encourage contractor performance after the unmet completion date. Therefore, it is especially difficult to establish detrimental reliance by the contractor in construction contracts where the government simply does not terminate for default after the completion date, and the contractor continues with work on the contract. For this reason, the waiver doctrine does not apply to construction contracts unless “unusual circumstances” exist. To develop and understanding of the meaning of “unusual circumstances,” the following explanation is helpful.

## “UNUSUAL CIRCUMSTANCES”

Typically, an indication by the government that it no longer considers the completion date to be enforceable amounts to the “unusual circumstances” that must exist in order for the waiver doctrine to apply.

The Board has held that the waiver doctrine applied to construction contracts where the Government constructively indicated that it no longer considered the contract completion date enforceable. See *B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-01 BCA ¶ 32,604 at 161,350-51. For example, the Board held that “unusual circumstances” were present and the “waiver” doctrine applied where the Government allowed the scheduled completion date to pass **without concern or mention**, the contractor continued to work on the project, and the government **did not mention or assess liquidated damages**. See *Corway, Inc.*, ASBCA No. 20683, 77-1 BCA ¶ 12,357 at 59,804.

The Board again applied the “waiver” doctrine where the Government allowed the scheduled completion date to pass without taking action, did not establish a new completion date, and **did**

**not mention** or assess liquidated damages based on the original completion date. See *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,472.

Another example of “unusual circumstances” necessary to invoke the waiver doctrine is the appeal of *Technocratica*, ASBCA No. 47992, *et al.*, 06-2 BCA ¶ 33,316 (2006). In that appeal, the government decided not to terminate the contract after the scheduled completion date had passed, but advised the contractor to “muddle through,” stating that 100% of the contract time had elapsed but only 27% of the work had been completed.

In that instance, the Government asked the contractor to submit a revised progress schedule showing a realistic completion date, and how they would meet the new date. In its communications to the contractor, the Government **never stated that the original completion date was in effect or that liquidated damages were accruing**. This lack of communication was considered an indicator that time was no longer of the essence in the contract, and the scheduled completion date was thus no longer enforceable. Accordingly, the Government *constructively* indicated that it no longer considered the original completion date in force, and therefore showed that it had waived the completion date. *Id.*

The Board found that these actions by the Government met the elements necessary for waiver, because: (1) the Government did not terminate the contract within a reasonable time after default, (2) the contractor continued to perform its contract knowing that the Government did not consider time to be of the essence, and (3) the Government did not mention the original completion date or liquidated damages. Therefore, the Government waived the completion date and could not terminate the contract for default or assess liquidated damages.

(**Note:** the Board also held in *Technocratica* that a 10% retainage on various invoices was not an assessment of liquidated damages, but was being withheld under FAR 52.232-5(e) as an indemnity for the Government and incentive for the contractor to stay up to speed on its work. Therefore, the retainage was not a mention of liquidated damages for purposes of evaluating the “waiver” requirements).

## CONCLUSION

In summary, a **contractor must establish 3 elements** in order to successfully assert that the Government has waived the scheduled completion date:

- (1) The government does not terminate the contract within a reasonable time after the missed completion date, and the surrounding circumstances indicate that the Government does not intend to do so;
- (2) The contractor relies on the failure to terminate by continuing to perform work under the contract; and

- (3) Unusual circumstances must exist (such as failing to mention the completion date or assess liquidated damages).

Although rare with construction contracts, the waiver doctrine may be applicable in the right set of “unusual circumstances.” Knowing the elements of the waiver doctrine will aid contractors in raising the question of whether the doctrine applies to its contract when a scheduled completion date passes. If the question arises at all, an experienced expert can help to determine the applicability of this, or other doctrines. Please give us a call at Excell Consulting to discuss potential claims and the waiver doctrine.

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

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