BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

HOW TO AVOID & OVERTURN TERMINATIONS FOR DEFAULT

By Paul J. Seidman and Robert D. Banfield

A termination of a contract for default can have disastrous consequences for the contractor. There is a sudden loss of work and its contribution to overhead. An opportunity to make a profit is lost. The contractor also faces the prospect of being forced to return progress payments, of being liable to the Government for any excess costs of reprocurement, and of having to resort to litigation to resolve the dispute. To make matters even worse, having a default termination on its record may limit the contractor's ability to obtain additional Government work.

The standard "Default" clauses used in fixed-price Government contracts generally give the Government the right to terminate a contract for default if a contractor fails to (a) deliver supplies or to perform the services or work within the time specified in the contract, (b) make progress so as to endanger contract performance or to prosecute the work with the diligence that will ensure its completion, or (c) perform any other provisions of the contract.[1] The clauses would appear to permit the Government to terminate based on any failure by the contractor to strictly comply with the contract. However, court and agency board of contract appeals decisions have limited the Government's right to terminate by requiring the Contracting Officer to exercise sound discretion and by recognizing various contractor defenses.

This BRIEFING PAPER focuses on how contractors can avoid and, if necessary, seek to overturn a termination for default. After discussing the consequences of a default termination, the PAPER reviews the grounds for default termination and the possible contractor defenses and provides practical advice on how to avoid default termination, to respond to "cure" notices and "show cause" notices, and to challenge a default termination if it occurs. Although not expressly addressed in this PAPER, the techniques for avoiding and challenging default terminations it discusses are generally also applicable to *terminations for cause* under Government contracts for commercial items.[2]

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Consequences Of Default Termination

When the Government terminates a contract for default, the Government may be entitled to recov-

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er from you, the contractor, unliquidated *progress payments*, the *excess costs* of *reprocuring* the same or similar items, services, or work, and any *other damages* resulting from your failure to perform.[3] The excess costs of reprocurement are the difference between the price of the affected deliverables in the defaulted contract and what the Government pays to reprocure the supplies or services or complete the work.[4]

Even if you are ultimately able through litigation to overturn the Government's decision to terminate your contract for default, you still may incur substantial losses. Litigation is costly and disruptive. Time of key personnel is diverted from income-producing work to litigation-related tasks such as responding to interrogatories and requests for production of documents, depositions, and meetings with lawyers. In addition, a default termination results in poor past performance evaluations and negative responsibility determinations for your company that can seriously impede your ability to obtain other Government work.

A *past performance evaluation* is a comparative evaluation of the offeror's performance under previously awarded contracts with that of other offerors.[5] Under the Federal Acquisition Regulation, past performance is a required evaluation factor in source selection decisions for negotiated acquisitions over $1 million issued before January 1, 1999, and over $100,000 if issued on or after that date.[6] In addition, the FAR provides that past performance "should be an important element of every evaluation and contract award for commercial items."[7] A CO may consider a default termination in evaluating past performance even if the termination is being appealed to the applicable board of contract appeals or challenged in the U.S. Court of Federal Claims.[8]

Similarly, before awarding a contract, a CO must determine that the intended awardee is *responsible*, i.e., capable of performing.[9] This requirement applies to all awards, irrespective of dollar amount or whether they resulted from negotiation or sealed bidding.[10] Since one of the mandatory elements of responsibility is that the prospective contractor must have a "satisfactory performance record,"[11] a prior default termination may lead to a negative responsibility determination.

Grounds For Default Termination

■ Failure To Deliver Or Perform On Time

"Time is of the essence" in any Government contract with fixed dates for performance.[12] If you do not meet a due date, the Government may terminate the contract for default. Specifically, under the "Default" clauses for fixed-price supply and service contracts and research and development contracts, the Government has the right to terminate the contract for default if the contractor fails to deliver supplies or perform the work or services within the time specified in the contract or any extension.[13] Under the "Default" clause for fixed-price construction contracts, the Government may terminate for default if the contractor fails to complete the work within that time.[14] Generally, the Government can terminate an entire contract based on a single late installment.[15] The due date for delivery of supplies or performance of services or work is that set forth in the contract plus additional time for any excusable delays.[16]

■ Failure To Meet Specifications

The Government has the right to "strict compliance" with contract specifications,[17] and the CO can terminate a contract for default for failure to

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★ Although prepared by experts, these papers are, of course, generalized and should not be considered a substitute for professional advice in specific situations. ★

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comply strictly with specifications.[18] You are not entitled to substitute even superior products or performance without approval of the CO.[19]

■ Failure To Make Progress Or Prosecute The Work

Failure to make progress so as to *endanger performance* of the contract is a ground for termination for default under fixed-price supply and service contracts.[20] A similar concept, failure to prosecute the work so as to endanger performance or to *ensure timely completion*, is a ground for default termination under fixed-price R&D[21] and construction contracts.[22] The common thread under either concept is that the failure is a ground for default termination only if contract performance is endangered.[23]

A termination for default for failure to make progress or to prosecute the work is justified only if the CO has a reasonable basis to conclude that the contractor had *no reasonable likelihood* of providing timely performance. The Government must prove this to prevail if a contractor challenges the default termination in litigation.[24] In one case, for example, the Government argued that termination for default for failure to make progress was justified because the contractor refused to provide information requested by the CO about its workforce and equipment needed to complete the job. The U.S. Court of Appeals for the Federal Circuit held that since the Government had the burden of proof, the contractor's failure to provide the requested information, standing alone, was insufficient to justify the default termination.[25]

Before the termination for default of a fixed-price supply and service or R&D contract for failure to make progress or to prosecute the work, a CO must issue a *"cure" notice.* The cure notice must advise the contractor that it has 10 days or a longer specified period to provide adequate assurances that timely performance will be forthcoming.[26] Absent such a cure notice, a default termination is defective and, as discussed below, will be converted to a termination for the convenience of the Government.[27]

On the other hand, a CO is *not* required to issue a cure notice before terminating for default a fixed-price *construction* contract for failure to prosecute the work.[28] However, it is usually in the Government's interest to issue a cure notice to avoid improperly terminating a contract for default.

■ Failure To Perform "Other" Contract Provisions

Under the "Default" clauses for fixed-price supply and service and R&D contracts, the contractor's failure to satisfy "other provisions" of the contract is also a ground for default termination.[29] "Other provisions" refers to requirements of the contract other than those requiring timely delivery or performance and progress or prosecution of the work so as not to endanger performance.[30]

On its face, the Government's right to terminate on this basis would appear to encompass any and all failures by the contractor to meet "other provisions" of the contract. However, this ground for default termination has been judicially limited. Default termination for failure to satisfy "other provisions" appears to be proper only where the provision is a "material" or significant requirement of the contract.[31] Noncompliances with "other provisions" must be more than "mere technicalities."[32] For example, default terminations have been upheld where contractors failed to comply with labor provisions,[33] Buy American Act requirements,[34] and "Cargo Preference" clause provisions,[35] and where contractors failed to secure required insurance[36] and to provide a performance bond.[37]

Whether the contractor's noncompliance amounts to a breach of a material provision of the contract depends upon the deficiency and the particular contract provision with which the contractor has failed to comply.[38] For example, the "Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan" clause provides that a failure to meet subcontracting plan requirements is "a material breach of the contract."[39] Based on this language, it would appear that any failure to meet small business subcontracting plan requirements is a ground for default termination. However, given the forfeiture resulting from a default termination, the courts and boards would likely limit the right to terminate for default to serious departures from subcontracting plan requirements.

Any conviction of the contractor for fraud under the contract may be a breach sufficiently material to justify termination of the entire contract, even if

the fraud relates to only one of hundreds of change orders issued under the contract.[40] However, a mere suspicion of fraud would appear to be insufficient to justify a default termination.[41]

Under the "Default" clauses for fixed-price supply and service and R&D contracts, a CO must issue a "cure" notice providing a contractor 10 days to correct (cure) a purported deficiency before terminating for failure to meet "other provisions."[42] Otherwise, the default termination is defective and results in a constructive termination for convenience.[43] However, if the CO proceeds outside the "Default" clause under other contract clauses or under statutory provisions that independently provide for default termination, compliance with the cure notice requirement of the "Default" clause is not required.[44] (To the extent that the independent clause or statute relied upon sets forth notice or other procedural requirements, however, the procedural requirements must be followed or a default termination would be improper.[45])

■ Anticipatory Repudiation

Another basis on which the Government can terminate a contract for default is for so-called "anticipatory repudiation—when a contractor *unequivocally* indicates by word or action that it *will not* or *cannot* meet contract requirements when they will become due.[46] An anticipatory repudiation may be accomplished by either words or conduct, but it arises only when the word or action upon which it is premised is "positive, definite, unconditional and unequivocal."[47] For example, in one case, a contractor's reduction of staff at the worksite coupled with a request by the contractor for Government financial assistance did not express an "unequivocal" unwillingness to perform the contract, even though the contractor advised the Government that it could not continue to incur costs due to financial restrictions imposed by its surety.[48] However, a default termination for anticipatory repudiation was upheld where a contractor removed its equipment from the jobsite and stated it would not resume performance unless the Government agreed to conditions not required by the contract.[49]

The concept of anticipatory repudiation is grounded in common law.[50] It is not specifically mentioned in the standard "Default" clauses. A termination for default for anticipatory repudiation falls under the last paragraph of the standard "Default" clauses, which reserves to the Government all "other rights and remedies provided by law."[51] Since an anticipatory repudiation is neither a failure to "make progress" or to "prosecute the work" nor a failure to meet "other provisions," contractors are not entitled to a cure notice before a default termination on this basis.[52]

Contractor Defenses

■ All Contracts

(1) *Excusable Delay*—The standard FAR "Default" clauses provide that a delay is excusable and does not provide a valid basis to terminate the contract for default if it is "beyond the control and without the fault or negligence" of the contractor.[53] For a delay to be excusable under a construction contract, it must also be "unforeseeable."[54]

The fixed-price supply and service, R&D, and construction contract "Default" clauses all list the following nine "examples" of excusable delays: (a) acts of God or of the public enemy, (b) acts of the Government in either its sovereign or contractual capacity, (c) fires, (d) floods, (e) epidemics, (f) quarantine restrictions, (g) strikes, (h) freight embargoes, and (i) unusually severe weather.[55] In addition, the construction contract "Default" clause lists "acts of another contractor in the performance of a contract with the Government" as an excusable delay.[56] However, this category of excusable delay would appear also to be available under supply and service and R&D contracts as acts of the Government in its contractual capacity.

Additionally, the "Default" clauses provide that subcontractor delays are not excusable unless they are "beyond the control" and "without the fault or negligence" of both the prime and subcontractors and, under supply and service and R&D contracts, the subcontracted supplies or services are not obtainable from other sources in sufficient time for the contractor to meet the required delivery schedule.[57]

There are three things to keep in mind in determining whether a delay is excusable and thus not a ground for default termination. First, the occurrence of an event listed in the clause does not automatically result in excusable delay. To be excus-

able, the delay must also be "beyond the control and without the fault or negligence" of the contractor.[58] Second, excusable delays are not limited to events listed in the clause. The events listed are merely "examples."[59] Other delays are also excusable if they are "beyond the control and without the fault or negligence" of the contractor.[60] Third, as noted, to be excusable, a delay under a construction contract must also be "unforeseeable."[61]

Where there are two causes of delay for the same time period—one excusable and the other the fault of the contractor—the Government's right to terminate the contract for default appears to turn on whether the excusable delay was caused by the Government.[62] In one case, the National Aeronautics and Space Administration Board of Contract Appeals overturned a termination for default where there were concurrent delays, one caused by the Government and the other caused by the contractor.[63] In another case, however, the Armed Services Board of Contract Appeals upheld a termination for default where one delay was excusable but not Government caused and the other was the contractor's responsibility.[64]

(2) *Defective Specifications and Impossibility*—A contractor's failure to perform is excused to the extent it is caused by defective specifications furnished by the Government. Defects in specifications range from inconsistencies, legibility problems, and ambiguities that may entitle a contractor to additional time or money to defects that render performance commercially impracticable or impossible and may excuse the contractor from further performance.

Excusable delay or excuse of performance for defective specifications is based on the *implied warranty* of Government-furnished specifications. Under this doctrine, the Government warrants that contractor compliance with Government-furnished *design specifications* will result in acceptable contract performance.[65] Specifications are not required to be completely accurate. All that is required is that they be "reasonably accurate" or "adequate for the task."[66]

Defective specifications result in a "constructive change" to the contract entitling the contractor to an equitable adjustment for the additional time and money expended in attempting to comply with defective specifications.[67] Performance is excused if it is *impossible*[68] or *commercially impracticable.*[69]

An objective standard is used in determining whether performance is impossible[70] or commercially impracticable.[71] The fact that a particular contractor cannot perform is insufficient to establish impossibility. "Impossibility" exists only where (a) no one can perform, and (b) the contractor did not assume the risk of impossibility.[72] "Commercial impracticability" exists where (1) performance is vastly different from that contemplated by the parties, (2) the change in performance results in significantly greater costs or time for contract performance, and (3) the contractor did not assume the risk.[73]

(3) *Waiver of Contract Due Date*—Under the standard FAR "Default" clauses, the Government "may," but is *not required* to, terminate for default for failure to meet a contract delivery or performance date (supply and service and R&D contracts) or completion date (construction contracts).[74] The Government may waive a due date through actions or inactions *inconsistent* with enforcing the due date. Thus, the Government waives a due date if it fails to terminate the contract within a reasonable time and the contractor continues performance in reliance on that failure to act with the Government's actual or constructive knowledge.[75] Other circumstances indicative of waiver include the Government's entering into negotiations with a contractor to establish a new delivery date,[76] requesting a price for reinstating a portion of the contract previously terminated for convenience,[77] or accepting supplies[78] or services[79] after the due date has passed.

After a due date is waived, a new due date must be established before the Government can terminate the contract for default. A new due date can be established either by agreement between the contractor and the CO or unilaterally by the CO.[80] If established unilaterally by the CO, the new due date is enforceable only if it is reasonable in view of the capabilities of the contractor at the time the date is established.[81] If the date used was provided by the contractor, it is considered to be reasonable even if the due date later proves to be unrealistic.[82] Thus, as discussed in more detail later in this PAPER, to avoid default terminations, you should never propose or agree to a contract schedule you cannot meet.

Waiver of due dates by the Government is seldom found in construction contracts containing

liquidated damages provisions. By assessing liquidated damages for delays, the Government effectively communicates that the completion date has not been waived.[83] For a waiver of the completion date to be found in a construction contract, it appears the Government would have to fail to assess or to mention liquidated damages, and the contractor would have to continue performance in reliance on that failure by the Government.[84]

(4) *CO's Failure To Follow Procedural Requirements*—As previously noted, under fixed-price supply and service and R&D contracts, the Government must issue a cure notice giving the contractor at least 10 days to cure a deficiency before issuing a termination for default for failure to make progress or to prosecute the work or to comply with other provisions of the contract. The failure of a CO to provide a cure notice renders a default termination based on such grounds invalid.[85]

(5) *CO's Failure To Exercise Discretion*—The CO must exercise discretion in terminating a contract for default. A contract cannot be terminated for default based solely on the direction of a person outside the contracting agency. For example, a termination for default of a Navy contract at the direction of the Secretary of Defense was held to be improper,[86] as was a default termination at the direction of a U.S. Senate subcommittee.[87]

(6) *CO's Abuse of Discretion*—The decision to terminate for default must be the result of the CO's exercise of sound discretion.The failure of a contractor to satisfy contract performance requirements alone is insufficient to support a termination for default. Specifically, the standard "Default" clauses state that upon default the CO *"may"* terminate not shall terminate.[88] In other words, the CO must look beyond the mere default and consider the other interests of the Government when deciding whether to terminate a contract.[89] If the CO abuses the discretion to terminate, the default termination is invalid.

The FAR lists the factors that a CO "shall consider" in determining whether to terminate a contract for default:[90]

> (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.
>
> (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.

Although the FAR states that consideration of these factors is mandatory, i.e., the CO "shall consider" them, courts and boards have refused to find an abuse of discretion by a CO for not considering all of the factors unless considering all of the factors would have made a difference in the decision to terminate the contract for default.[91] An abuse of discretion by the CO has been found where (a) no other contractor could deliver sooner and the Government did not have urgent need for the work,[92] (b) the contract was terminated because the items were no longer needed,[93] (c) the default termination was motivated by a desire not to do business with the contractor rather than by deficiencies in the contractor's performance,[94] and (d) the contractor was technically in default but the CO terminated the contract because the Director of Contracting instructed the CO to terminate "if the smallest thing goes wrong."[95]

■ Supply Contracts

(a) *Substantial Compliance*—As previously discussed, the Government is entitled to strict compliance with contract specifications.[96] However, under supply contracts, it has been held that default termination is improper if the contractor has substantially complied with the contract requirements. The test for "substantial compliance" is whether (1) the contractor made a timely tender of goods reasonably believed to conform and (2) the defects are minor in nature and correctable in a reasonable time. Under such circumstances, the contractor is entitled to a *reasonable* time to correct the defects.[97]

(b) *Minor Defects in First Article Contracts*—First article contracts must incorporate either the FAR "First Article Approval—Contractor Testing" clause[98] or the FAR "First Article Approval—Government Testing" clause.[99] These clauses require the Government to approve, conditionally approve, or disapprove first articles.[100] Boards have held that the "conditional approval" option limits the Government's right to reject first articles to *major* defects. Major defects are defects *other than minor* defects readily correctable in production. The ASBCA explained this rule in one case as follows:[101]

> The first article approval clause does not give the Government the right to disapprove a first article for any noncompliance with specifications that would be a valid reason for rejection of supplies tendered for delivery under the contract. Ordinarily the primary purpose for requiring first article submission is to prove the capability of the contractor to produce end products that will meet the contract requirements.... Deficiencies in a first article that are correctable in production are not a valid basis for an outright disapproval of a first article, and, in recognition of this, the first article approval clause expressly provides for conditional approval.

Applying this rule in another case, the ASBCA held that it was improper for the Government to reject a first article of prepackaged "chicken ala king" because it was too bland and thus invalidated the default termination of the contract.[102] Similarly, the ASBCA overturned the default termination of a contract for 20-millimeter gun boosters where the defects could be corrected by 15 minutes of precision machining.[103] In each of these cases, the board reasoned that the defects were minor and readily correctable in production.

■ Construction Contracts

(1) *Substantial Completion*—Construction contracts involve countless detailed requirements that must be met before completion. Where only "punch list" items remain to be completed, however, the substantial completion doctrine may be available as a defense to a default termination. The doctrine is based on the principle that it would be inequitable to permit a default termination based on incomplete punch list items where the building or construction site is substantially complete. Under such circumstances, the Government is receiving the benefit of its bargain.

In determining the applicability of the doctrine, the focus is on whether a building can be occupied or the site used for its "intended purpose."[104] A high level of functionality is required to satisfy this standard. The Department of Veterans Affairs Board of Contract Appeals has held that performance is substantially complete for purposes of avoiding a termination for default when only punch list-type items remain to be finished and the incomplete items (a) do not effect the overall functionality of the project, (b) constitute no more than a minor inconvenience, and (c) do not substantially defeat the object of the parties' bargain.[105]

In formulating this three-part test, the VABCA discounted a more stringent standard applied in an earlier decision by a four-judge panel of the ASBCA. In that case,[106] the ASBCA held that a contractor *forfeiture* must also result from the default termination for the substantial completion defense to apply. And, since the Government usually pays the contractor for the work performed if a construction contract is terminated for default, the ASBCA ruled that in such circumstances the substantial completion doctrine is inapplicable because there is no forfeiture.[107] This forfeiture requirement has been criticized in a treatise on construction contract law.[108]

Substantial completion is a temporary defense. Even where the defense is initially applicable, the contract may later be terminated for default for the unfinished work if the contractor does not diligently complete the punch list items.[109]

(2) *Economic Waste*—The economic waste doctrine is based on the premise that it makes no sense to expend great sums to correct deficiencies that do not detract from the intended performance. The doctrine was born[110] and has been used primarily in construction contract cases.[111] Whereas the substantial completion doctrine generally addresses incomplete but otherwise conforming work, the economic waste doctrine applies to *nonconforming* work. The Federal Circuit has stated the economic waste rule as follows:[112]

> We recognize that the government generally has the right to insist on performance in strict compliance with the contract specifications and may require a contractor to correct nonconforming work.... However, there is ample authority for holding that the government should not be per-

> mitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose. In such cases, the government is only entitled to a downward adjustment in the contract price.

In Government construction contract cases, the doctrine has generally been applied in the context of contractors requesting additional compensation for economically wasteful work that COs directed them to perform to correct minor deficiencies.[113] However, in one case, the ASBCA applied the doctrine to overturn a termination for default where the contractor had refused to follow the CO's direction to remove functional roofs that met industry standards on completed buildings and to install an asphalt strip required by the specifications. The board overturned the default termination because following the Government's direction would have resulted in unreasonable economic waste through the destruction of usable property.[114]

■ Service Contracts

The typical service contract includes tasks to be performed repeatedly. The failure to perform one task, while technically a default under the "Default" clause,[115] will not by itself generally support a termination for default. In service contracts, a default termination is only justified where *instances* of noncompliance result in the contract not being substantially performed. What is *substantial performance* must be determined on a *case-by-case* basis. In one case, for example, the ASBCA found that the contractor's under-manning of certain guard posts during peak traffic periods on more than one occasion indicated less than exemplary performance but did not rise to the level of a substantial failure to perform.[116] However, in another case, the ASBCA concluded that the contractor's failure to provide any guard service for 21 hours, with sporadic compliance over a weekend, justified termination for default for failure to perform.[117]

Avoiding Default Termination

■ Before Award

(a) *Never propose or agree to a contract schedule you cannot meet.* Solicitations often contain delivery, performance, or completion schedules a contractor knows it cannot meet. A contractor is sometimes faced with a similar predicament when negotiating a new schedule on an existing contract. Contractors sometimes submit bids or proposals agreeing to contract due dates they cannot meet because they need the work and know that the Government usually grants extensions rather than terminates the contract for late performance. Contractors also sometimes propose a new schedule they cannot meet on an existing contract to please the customer or to avoid a termination for default.

You should never, however, agree to or propose a contract schedule you cannot meet. Although contractors may bid schedules they cannot meet to obtain more work, in the long run they usually get less work instead. A history of delinquencies can lead to negative past performance evaluations[118] and nonresponsibility determinations[119] that will likely result in the loss of future contracts.

When faced with a contract due date in a solicitation you cannot meet, your first tactic should be to ask the CO to modify the solicitation to provide more time. A CO will often do this voluntarily to facilitate competition where the supplies, services, or other work are not urgently needed.

If the CO refuses, and it appears that the schedule exceeds the Government's minimum needs, you have a ground for a bid protest. A delivery schedule that exceeds the Government's minimum needs is unduly restrictive of competition and therefore illegal.[120] Since this is a defect in the solicitation, any protest on this basis would have to be filed before award.[121]

(b) *Closely review specifications.* The Government has the right to insist on strict and timely compliance with contract specifications.[122] To avoid a default termination for failure to comply with specifications, you should carefully review the contract's specifications before submitting a bid or proposal on the contract to determine if you can comply with the specifications fully and on time.

■ After Award

(1) *Maintain good working relationships with Government personnel.* Human relations are an important aspect of Government contracting. COs and Government quality assurance representatives are

vested with considerable discretion. Government contracting personnel are more inclined to give the benefit of the doubt to contractors they like and with whom they have a good working relationship.

(2) *Maintain credibility by not making promises you cannot keep.* To curry short-term favor with Government officials, contractors sometimes makes promises they cannot keep. This does not work in the long run. Where there is a problem, a CO is more likely to accept explanations and projections from a credible contractor. A contractor with a history of broken promises is much more likely to have its contract terminated for default.

(3) *Formalize extensions for excusable delays.* Absent a contract modification, Government personnel often consider a contract to be delinquent even if the delay in delivery or performance is excusable. To protect yourself, you should notify the Government of any excusable delays and receive a formal commensurate extension before the CO issues a cure notice, a show cause notice, or a termination for default notice. However, as previously discussed, you should never propose a due date you cannot meet.

A CO can unilaterally extend the delivery date for excusable delays. If the CO tenders a contract modification for your signature, you should scrutinize it for *release* language that would compromise your right to any additional compensation to which you are entitled.

(4) *Provide timely conforming performance.* Most default terminations are based on either the failure to perform on time or the failure to meet contract specifications. It is axiomatic, but most default terminations can be avoided by timely tendering conforming performance.

(5) *Never refuse to perform.* As previously discussed, anticipatory repudiation is ground for default termination without notice and arises when a contractor unequivocally refuses to perform. Additionally, the standard "Disputes" clause requires the contractor to proceed with performance pending resolution of any disputes.[123] Although there are situations in which a contractor is justified in stopping performance—such as where a CO has directed a so-called "cardinal change" (i.e., a change beyond the scope of the contract)[124]—these cases are rare and closely scrutinized in litigation. Therefore, as a general rule, you should never refuse to perform, especially without advice of counsel.

(6) *Engage in cross-contract horse-trading.* Many contractors have several contracts with the same Government buying activity. The Government will often trade your agreement to accelerate performance on a contract where performance is urgently needed for an extension of time to complete another contract.

(7) *Offer consideration.* The Government will often accept consideration from a contractor in return for additional time to complete a contract and for refraining from terminating the contract for default. Consideration can take many forms including money or acceleration on another contract. Where you offer money, you can often avoid making an immediate cash outlay by offering a reduction in the contract's price.

You should think about offering consideration to avoid a default termination, especially where the Government appears to have valid grounds for terminating the contract and you have few if any defenses.[125] Before signing a modification in which the Government extends the delivery date in return for consideration, however, you should carefully review any proposed *release* language to make sure you do not give up more than you intend.

(8) *Consider proposing the use of alternative dispute resolution.* Problems sometimes arise during contract performance that the Government and the contractor are unable to resolve amicably through negotiation. The FAR authorizes COs to agree to use ADR techniques at any time during contract performance.[126] You should consider requesting ADR where it appears that a dispute that you cannot resolve through negotiation could result in termination for default.[127]

Responding To Cure & Show Cause Notices

The FAR sets forth when the CO *must* issue a "cure" notice and *should* issue a "show cause" notice.[128] As discussed earlier in this PAPER, under the "Default" clauses for fixed-price supply and service and R&D contracts, the CO can terminate for default before the due date if the contractor fails to

make progress or prosecute the work so as to endanger timely performance or fails to perform any other contract provisions[129] only if the CO first provides the contractor notice allowing 10 days to "cure" the default.[130] If the contractor is not provided a written cure notice, the default termination is procedurally defective and will be converted to a termination for convenience.[131] The FAR provides the following suggested format for cure notices:[132]

CURE NOTICE

[Dear Contractor:]

You are notified that the Government considers your .....[*specify the contractor's failure or failures*] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [*or insert any longer time that the Contracting Officer may consider reasonably necessary*], the Government may terminate for default under the terms and conditions of the ..... [*insert clause title*] clause of this contract.

[Sincerely,]
[Contracting Officer]

Once the date for performance has passed or nonconforming goods are tendered on or after the due date, the CO can terminate a contract without prior notice.[133] However, if practical, the CO should first issue the contractor a notice requesting that it "show cause" why the contract should not be terminated for default.[134] The FAR provides the following suggested format for show cause notices:[135]

SHOW CAUSE NOTICE

[Dear Contractor:]

Since you have failed to ..... [*insert* "perform Contract No. ..... within the time required by its terms," *or* "cure the conditions endangering performance under Contract No. ..... as described to you in the Government's letter of ..... (date)"], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ..... [*insert the name and complete address of the contracting officer*], within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

[Sincerely,]
[Contracting Officer]

■ Drafting The Response

You should take any cure notice or a show cause notice seriously. On a given set of facts, the quality of your response to the notice can often mean the difference between default termination and being allowed to proceed with performance of the contract.

(a) *Provide information to demonstrate the response is timely.* You should include a statement in your response identifying when you received the notice and demonstrating that your response is timely. If you need additional time to respond, request it promptly and before the time in the cure notice or show cause notice expires.

(b) *Present applicable defenses.* Your response should present all applicable defenses. The failure to present all applicable defenses may result in a termination for default and litigation that could have been avoided.

(c) *Provide adequate assurances (cure notice only).* In issuing a cure notice, the CO is seeking assurances that timely performance will be made despite appearances to the contrary. You can respond to a cure notice by either (1) indicating that there is no failure to make progress that needs to be cured or (2) explaining how you cured the failure to make progress. Under the first approach, you would argue that you are entitled to additional time as a result of excusable delays and that the Government is therefore measuring your performance against the wrong milestones. In other words, the Government should not have issued the cure notice. Under the second approach, you would explain how delivery or performance due dates will be met.

As discussed above, the Government bears a heavy burden of proof if it terminates a contract for default for failure to make progress or to prosecute the work.[136] Therefore, any plausible explanation of how you will perform on time will generally allow you to avoid a default termination for failure to make progress.

(d) *Avoid statements that could be construed as an anticipatory repudiation.* It is important to understand that a poorly conceived response to a show cause notice or a cure notice could be construed by the Government as an indication that you *cannot* or *do not intend to* perform and therefore justify a default termination based on anticipatory repudiation. For example, an anticipatory repudiation occurred when a contractor stated that it was "working with skeleton crew to prepare lot for resubmission [and] full scale operations cannot be reinstated until proper financing is forthcoming."[137] Similar declarations of *inability*[138] or *unwillingness*[139] to perform or a reply that is *not responsive*[140] to concerns voiced in the CO's notice have also been found to support a finding of anticipatory repudiation.

(e) *Provide visual aids.* Sometimes a picture is worth a thousand words. Where default termination is threatened concerning a contract item that is almost ready for delivery or involves facts where a visual aid would enhance your explanation, you should consider including a photograph, computer-generated representation, or other visual aid with your response.

(f) *Think about offering consideration.* In addition to setting forth applicable defenses, you should think about offering consideration in your response to a cure notice or show cause notice. An offer of consideration is especially appropriate if there appear to be valid grounds for a default termination and your defenses are weak.[141]

(g) *Explain why a termination for default is not in the Government's best interest.* You should always explain why a termination for default is not in the Government's best interest. In deciding whether to issue a termination for default, the CO must exercise discretion.[142] Even if a contractor is in default, the CO *may* elect to terminate for convenience, to allow additional time, or to modify or waive specification requirements.[143] It is therefore imperative to explain why default termination is not in the Government's interest, i.e., why the CO should exercise discretion not to terminate the contract. A good place to start is the list of factors (quoted earlier in this PAPER) that the FAR states that the CO should consider before terminating for default.[144]

Additionally, do not let the CO lose sight of the potential impact on the Government of an improper termination for default. If a default termination is later found to have been improper, it will be converted to a termination for convenience under which the Government must pay the defaulted contractor its costs[145] while receiving little or nothing in return. A small business contractor may also be able to recover litigation expenses and its attorney fees under the Equal Access to Justice Act.[146]

Remember that your goal is to communicate that a default termination *would be improper* or, at best, *a gamble* and, *in either case,* is an action that is *not in the Government's best interest.*

(h) *Obtain legal help.* It is easier to avoid the occurrence of a default termination than to overturn a termination after it has occurred. Once a default termination is issued, Government personnel rally to justify their position and refuse to consider arguments they might have accepted at the cure notice or show cause notice stage. Although contractors are often reluctant to consult counsel at the cure notice or show cause notice stage because of the expense, a good response to the notice can often help you avoid default termination and years of costly litigation.

■ Sample Responses To Cure Notices

Set forth below are examples of responses to cure notices.

(1) *There Is No Failure To Make Progress To Cure*— In this response, the contractor asserts that there is no failure to make progress that needs to be cured because the contractor is entitled to additional time for Government-caused delays.

> Dear Contracting Officer:
>
> I am writing in response to the Cure Notice dated December 5 and received by Contractor on December 15. The notice alleges that there has been a failure to make progress so as to endanger performance. More specifically, the Government alleges that the December 30, 1997, delivery date that appears in the contract will not be met because 30 days of work are needed for completion and Contractor's plant is closed down for the Christmas holidays from December 15 to January 2.
>
> A default termination for failure to make progress so as to endanger delivery on December 30 would be legally insupportable. The Government was required to provide Contractor with Government-furnished pins necessary to begin production by March 1, 1997, but did not provide them until March 31. As a result,

Contractor is entitled to an additional 30 days to deliver.

A default termination would be legally insupportable because there is no failure to make progress that endangers performance for Contractor to cure.

Also, a termination for default is not in the Government's best interest. Contractor is one of two domestic manufacturers of light sabers. A default termination would force Contractor out of business. The resulting erosion of the defense industrial base would threaten national security by limiting the domestic ability to surge production of light sabers in time of crisis. It would also eliminate competition and thereby result in costly, noncompetitive procurements.

If you have any questions concerning any of the above, please let me know.

Sincerely,
Counsel for Contractor

(2) *The Failure To Make Progress Has Been Cured*—In this response, the contractor demonstrates how it has cured the failure to make progress by subcontracting final assembly.

Dear Contracting Officer:

I am writing in response to the Cure Notice dated September 5 and received by Contractor on September 12. The notice alleges there has been a failure to make progress so as to endanger performance. More specifically, the Government alleges that the October 30 delivery date that appears in the contract will not be met because the contractor has sold its old plant and its new plant will not be operational until November 15.

Contractor will meet the purported October 30 delivery date. All that remains to be done is final assembly. Contractor has subcontracted this task to ABC Company. ABC Company has the facilities and personnel necessary to meet the purported October 30 due date.

A default termination would be legally insupportable for the reasons set forth above.

Even if there were a failure to make progress, a default termination would not be in the Government's best interest because no other contractor is in a position to deliver before Contractor. In *Monaco Enterprises v. U.S.*, 907 F.2d 159 (Fed. Cir. 1990), the U.S. Court of Appeals for the Federal Circuit held a default termination under such circumstances to be an abuse of discretion and therefore invalid.

If you have any questions concerning any of the above, please let me know.

Sincerely,
Counsel for Contractor

■ Sample Responses To Show Cause Notices

Set forth below are examples of responses to show cause notices.

(a) *Waiver of Delivery Date*—In this sample response, the contractor is asserting that the contract should not be terminated for default because the Government has waived the delivery date.

Dear Contracting Officer:

I am writing in response to the Show Cause Notice dated November 1 and received by Contractor on November 3.

The notice alleges that, since Contractor failed to make delivery in accordance with the terms of the contract, termination for default is being considered.

A termination for default would be insupportable because the Government has clearly waived all delivery dates under the contract. As stated in *D. Joseph DeVito v. U.S.*, 188 Ct. Cl. 979, 990, 413 F.2d 1147, 1153 (1969), "[w]here the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the "Default" clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given."

The last due dates established under the contract were June 30, July 30, and August 30. Four months have passed since the first installment was allegedly due. Waiver of delivery dates and thus waiver of the right to terminate for not meeting the delivery dates have been found for much shorter periods. For example in *Cecile Industries, Inc.*, ASBCA 24600, 83-2 BCA ¶ 16842, the board found the right to terminate for default was waived where the default notice was issued only two and one-half months after the first delivery date and just two weeks after the last delivery date.

The record shows that the Government is aware that Contractor has continued to incur costs and perform during the waiver period. [Insert examples.] Clearly a termination for default is insupportable where, as here, no delivery schedule is in effect because the Government has waived the last established delivery schedule, and Contractor continued performance in reliance on the Government's failure to terminate.

For these reasons, termination of the contract for default is insupportable and not in the best interest of the Government.

Please be assured that Contractor is ready, willing, and able to perform. If you have any additional questions concerning this matter please contact this office.

Sincerely,
Counsel for Contractor

(b) *Defective Specifications, Excusable Delay, and Minor Defects in First Articles*—The following sample response argues that default termination of a first article contract is improper because (1) the Government-furnished specifications are defective, (2) the delay is excusable since it was caused by the

Government's suspension of the work, and (3) the defects in the first articles are minor and correctable in production.

> Dear Contracting Officer:
>
> Contractor, through its counsel, hereby responds to your Show Cause Notice dated November 4 and received November 8. The notice alleges that Contractor tendered nonconforming first articles and has therefore failed to make delivery in accordance with the terms of the contract and that termination for default is being considered.
>
> As will be discussed below, a termination for default would be improper because (1) Government-furnished specifications are defective, (2) the Government constructively suspended performance by soliciting technical information from Contractor on how to correct the defects and then failing to authorize Contractor to take corrective action, and (3) any alleged defects in the first articles are readily correctable in production.
>
> (a) *Defective specifications.* The technical data provided with the contract did not include the latest drawing revision. The latest revision replaces the defective component with one manufactured by Vendor X.
>
> (b) *Constructive suspension.* The Government requested Contractor to investigate why the first articles failed to pass performance testing. The Contractor investigated and reported that the specifications must be revised to provide for Vendor X's component. The Government allowed the due date to pass without revising the specifications to provide for use of Vendor X's component.
>
> The Government therefore constructively suspended performance by soliciting technical information from Contractor on how to correct the defects and then failing to authorize Contractor to take corrective action. More specifically, a request for clarification suspends performance and justifies stopping work even if the specifications were not defective. As stated by the board in *Monitor Plastics Co.*, ASBCA 11187, 67-2 BCA ¶ 6408 at 29690:
>
> > In our view any period of performance is tolled by the negotiations which were never concluded due to the failure of respondent to furnish a decision in the dispute over the modified specifications. We think appellant was entitled to withhold performance until the matter was settled.
> >
> > In his termination notice the contracting officer denied that appellant had excusable cause for nonperformance based on defective specifications. We do not think it necessary to determine whether the specifications were defective. Appellant contended they were defective and respondent entered into negotiations to modify them. Until these negotiations were completed and a decision made as to the form of the modified specifications appellant had no duty to proceed with performance.
>
> Until the Contracting Officer advises Contractor how to proceed, performance is suspended. Default termination for an alleged failure to perform under a suspended contract is clearly improper.
>
> (c) *Defects are readily correctable in production.* Even assuming the first articles are nonconforming, any defects are minor and readily correctable in production. Contractor submits that it delivered first articles that comply with the *Government-furnished specifications* and any alleged defects are corrected by using Vendor X's component. Installing Vendor X's component requires the same time and effort as the specified component. Even if this defect were attributable to Contractor, which it clearly is not, the defect is minor and readily correctable in production through use of Vendor X's component. Under the contract's FAR 52.209-3 "First Article Approval—Contractor Testing" clause, *conditional approval* of the first articles is therefore required. See *National Aviation Electronics, Inc.*, ASBCA 18256, 74-2 BCA ¶ 10677.
>
> For the above reasons, a termination for default would be totally without justification. In addition, Government actions and inactions in failing to revise the specifications have suspended the contract and delayed performance, which entitles Contractor to an equitable adjustment including extra time to perform.
>
> If Contractor is forced to litigate to overturn a default termination, it would likely be entitled to recover its attorneys fees under the Equal Access to Justice Act because it is a small business and the Government's position is not "substantially justified."
>
> Contractor remains willing to meet with Government engineers to work out the technical difficulties with the first articles or to proceed with production subject to use of Vendor X's component.
>
> If you have any questions concerning any of the above please let me know.
>
> Sincerely,
> Counsel for Contractor

Challenging A Default Termination

Under the standard FAR "Default" clauses, an improper termination for default results in a termination for convenience.[147] A termination for convenience essentially converts a fixed-price contract to a cost-reimbursement contract and entitles the contractor to a favorable recovery.[148] (Previous BRIEFING PAPERS have discussed general strategies you can follow to maximize recovery of termination for convenience costs and how to claim those costs.[149]) Therefore, any contractor facing default termination of its contract should attempt first to reach a termination settlement with the CO. If that fails, you should consider filing a claim under the contract's "Disputes" clause to challenge the CO's

default termination decision and be prepared to litigate the claim to final resolution.

■ Submit A Timely Appeal

You can appeal the CO's decision to terminate your contract for default to either (1) the applicable board of contract appeals[150] or (2) the U.S. Court of Federal Claims.[151] An appeal to the board must be filed within 90 calendar days of receipt of the notice of termination.[152] Alternatively, you may file suit with the Court of Federal Claims within one year of receipt of the notice of termination.[153]

These time periods run from when you *first* receive written notice of the termination. Agencies routinely issue the final decision by facsimile and follow up with a confirming contract modification. However, the first written notice starts the clock for determining the deadlines for appealing to the board and filing suit in the Court of Federal Claims.[154]

■ Develop Facts & Defenses

Whether in informal dispute resolution, ADR, or litigation, you must develop the applicable facts and defenses. Neither you, the contracting agency, nor the trier-of-fact in the dispute or litigation process will be able to make meaningful decisions and recommendations without a fully developed record. Therefore, you must be prepared to commit the time and expense necessary to fully develop the facts and your defenses.

■ Seek A Negotiated Resolution

Litigation to overturn a default termination is expensive and time consuming, and your chances of succeeding are not favorable. Therefore, a negotiated resolution of the dispute is always in the best interests of both parties. Negotiable issues include conversion of the default termination to a termination for convenience, the amount of money to be paid by the Government or the contractor, and title to termination inventory.

The Government will often agree to issue a "no cost" termination for convenience, especially where there are no excess costs of reprocurement. A variation is a termination for convenience where no money changes hands and the contractor is allowed to retain progress payments.

■ Consider ADR

Agency and Department of Justice counsel are required by Executive Order to consider ADR as an alternative to litigation.[155] You should keep in mind that ADR does not toll the deadlines for filing an appeal of a default termination to the board or court.[156] If the termination for default has been issued, you should therefore file your appeal notice before becoming seriously involved in ADR. Boards and courts are receptive to requests to suspend proceedings so the parties can pursue ADR.

■ After Assessment Of Excess Costs

When the Government terminates a contract for default, it does not always proceed immediately with a reprocurement. Therefore, the contractor, believing it will not be liable for any excess costs of reprocurement, may choose not to challenge the default termination. If the Government later completes the contract work and seeks to recover its excess costs from the original contractor, the contractor may have a renewed interest in challenging the default termination. In *Fulford Manufacturing Co.*,[157] the ASBCA held that, if a contractor timely appeals an assessment of excess costs of reprocurement, it can challenge the propriety of the underlying default termination at the same time. The so-called *Fulford* doctrine therefore permits a defaulted contractor to elect to wait until the assessment of excess costs to decide whether to challenge a default termination. However, if the Government never assesses excess costs, the default termination is final if not appealed to the board within 90 days or to the Court of Federal Claims within one year.[158]

The *Fulford* doctrine has been adopted by most other boards of contract appeals[159] and the U.S. Court of Federal Claims.[160] However, the Department of Agriculture Board of Contract Appeals will not generally apply the *Fulford* doctrine.[161] Additionally, there are no decisions addressing the *Fulford* doctrine by the U.S. Court of Appeals for the Federal Circuit or its predecessor, the U.S. Court of Claims. An election not to appeal a default termination until after the Government assesses its excess costs against the contractor therefore poses significant risks, and any contractor faced with a default termination should consider a timely appeal to preserve its right to obtain review of the termination.

★ GUIDELINES ★

These *Guidelines* are designed to assist you in avoiding and overturning terminations for default. They are not, however, a substitute for professional representation in any specific situation.

1. Remember that default terminations result in *loss of work*, liability to the Government for *excess costs of reprocurement* and *other damages* under the terminated contract, and a *diminished ability to obtain future Government contracts.*

2. Be aware of the *grounds* for default termination and applicable *defenses.*

3. Recognize that the *first step* you can take to avoid a default termination is to submit a bid or proposal *only* if you can meet the *delivery* or *performance schedule* and the *specifications.*

4. Maintain good working relationships with Government personnel. Do *not* make promises you cannot keep.

5. Perform *on time* and in accordance with applicable *specifications.* Never refuse to perform or make other statements that could be construed as *anticipatory repudiation* of your obligations under the contract.

6. If your performance is late, think about offering the Government *consideration* for a time extension—especially if there are grounds for default termination of the contract and your defenses are weak.

7. Consider proposing the use of *alternative dispute resolution* techniques if you are unable to resolve a dispute with the Government that could result in a default termination.

8. Treat *cure notices* and *show cause notices* seriously and submit a *timely response* to the Government. Your response to a *cure notice* should either (a) present *applicable defenses* to explain why there is no failure to make progress or (b) explain the steps you have taken to *ensure timely performance.* Your response to a *show cause notice* should present *all applicable defenses.* Your response to either type of notice should explain why default termination is *not in the Government's best interest.*

9. Remember to include *pictures* or other *visual aids* in a response to a cure notice or a show cause notice if they will enhance your presentation.

10. Keep in mind that it is *easier to avoid* than to overturn a termination for default. Seek the advice of counsel at the cure notice or show cause notice stage or earlier.

★ REFERENCES ★

1/ See FAR 52.249-8, para. (a)(1) ("Default (Fixed-Price Supply and Service)" clause), 52.249-9, para. (a)(1) ("Default (Fixed-Price Research and Development)" clause), 52.249-10, para. (a) ("Default (Fixed-Price Construction)" clause).

2/ See FAR 52.212-4, para. (m). See generally Vacketta & Moynihan, "'Commercial Item' Contracts: Default & Related Topics," Briefing Papers No. 96-3 (Feb. 1996); Cibinic, "Commercial Item Terms and Conditions: Neither Fish Nor Fowl," 10 Nash & Cibinic Rep. ¶ 61 (Dec. 1996).

3/ See FAR 49.402-2(a), (e), 49.402-6, 49.402-7, 52.249-8, paras. (b), (h), 52.249-9, paras. (b), (h), 52.249-10, paras. (a), (d). See generally Williamson & Medill-Jones, "Government Damages for Default," Briefing Papers No. 89-7 (June 1989), 8 BPC 377.

4/ FAR 49.402-6(c). See Cascade Pac. Intl. v. U.S., 773 F.2d 287 (Fed. Cir. 1985), 4 FPD ¶ 49, 28 GC ¶ 38. See also Nash, Schooner & O'Brien, "The Government Contracts Reference Book" 220 (Geo. Wash. Univ. 2d ed. 1998). See generally Crowell & Johnson, "Excess Reprocurement Costs," Briefing Papers No. 67-6 (Dec. 1967), 1 PPC 281.

5/ FAR 15.305(a)(2). See 41 USC § 405(j).

6/ FAR 15.304(c)(3).

7/ FAR 12.206.

8/ MAC's General Contractor, Comp. Gen. Dec. B-276755, 97-2 CPD ¶ 29.

9/ FAR 9.103, 9.104-1. See generally Bodenheimer, "Responsibility of Prospective Contractors," Briefing Papers No. 97-9 (Aug. 1997).

10/ FAR 9.102(a), 9.103.

11/ FAR 9.104-1(c), 9.104-3(b).

12/ DeVito v. U.S., 188 Ct. Cl. 979, 413 F.2d 1147 (1969), 11 GC ¶ 307.

13/ FAR 52.249-8, para. (a)(1)(i), 52.249-9, para. (a)(1)(i).

14/ FAR 52.249-10, para. (a).

15/ Artisan Elecs. Corp. v. U.S., 205 Ct. Cl. 126, 499 F.2d 606 (1974), 16 GC ¶ 306; Flameco Engrg., Inc., ASBCA 39337, 92-1 BCA ¶ 24518. See also Phoenix Petroleum Co., ASBCA 40629 et al., 93-1 BCA ¶ 25334 (citing Norington v. Wright, 115 U.S. 188, 205 (1885)).

16/ FAR 52.249-8, para. (a)(1)(i), 52.249-9, para. (a)(1)(i), 52.249-10, para. (a).

17/ Cascade Pac. Intl. v. U.S., note 4, supra.

18/ Cascade Pac. Intl. v. U.S., note 4, supra.

19/ Strum Craft Co., ASBCA 34311, 89-1 BCA ¶ 21337. See Cibinic "Strict Compliance With Specifications: Looking the Gift Horse in the Mouth," 3 Nash & Cibinic Rep. ¶ 53 (July 1989).

20/ FAR 52.249-8, para. (a)(1)(ii).

21/ FAR 52.249-9, para. (a)(1)(ii).

22/ FAR 52.249-10, para. (a).

23/ See generally Speidel, "Default for Failure To Make Progress," Briefing Papers No. 64-5 (Oct. 1964), 1 BPC 87.

24/ Lisbon Contractors, Inc. v. U.S., 828 F.2d 759 (Fed. Cir. 1987), 6 FPD ¶ 113, 29 GC ¶ 296.

25/ Note 24, supra.

26/ FAR 52.249-8, para. (a)(2), 52.249-9, para. (a)(2), 49.402-3(d), 49.607(a).

27/ Fairfield Scientific Corp., ASBCA 21151, 78-1 BCA ¶ 13082, 25 GC ¶ 167 (Note), affd. on recon., 78-2 BCA ¶ 13429, 25 GC ¶ 167 (Note). See also Bailey Specialized Bldgs., Inc. v. U.S., 186 Ct. Cl. 71, 404 F.2d 355 (1968), 11 GC ¶ 12.

28/ FAR 52.249-10; ONI Const., Inc., ASBCA 45394 et al., 96-2 BCA ¶ 28277.

29/ FAR 52.249-8, para. (a)(1)(iii), 52.249-9, para. (a)(1)(iii).

30/ See Bailey Specialized Bldgs. Inc. v. U.S., note 27, supra; FAR 52.249-8, para. (a)(1)(i), (ii), 52.249-9, para. (a)(1)(i), (ii).

31/ See Composite Laminates, Inc. v. U.S., 27 Fed. Cl. 310 (1992), 12 FPD ¶ 9, 36 GC ¶ 27 (Note); Brandywine Prosthetic-Orthotic Svc., Ltd., VABCA 3441, 93-1 BCA ¶ 25250; Precision Prods., ASBCA 25280, 82-2 BCA ¶ 15981, 24 GC ¶ 337.

32/ Kelso v. Kirk Bros. Mechanical Contractors, Inc., 16 F.3d 1173 (Fed. Cir. 1994), 13 FPD ¶ 26, 36 GC ¶ 283.

33/ Giltron Assocs., Inc., ASBCA 14561 et al., 70-1 BCA ¶ 8316 (Service Contract Act); SanColMar Indus., Inc., ASBCA 15339 et al., 73-2 BCA ¶ 10086 (Walsh-Healey Act); Edgar M. Williams General Contractor, ASBCA 16058 et al., 72-2 BCA ¶ 9734, 15 GC ¶ 106 (Davis-Bacon Act and Contract Work Hours and Safety Standards Act).

34/ Ballantine Labs., Inc., ASBCA 35138, 88-2 BCA ¶ 20660, 30 GC ¶ 136 (Note); Red Sea Trading Assocs., Inc. ASBCA 36360, 91-1 BCA ¶ 23567.

35/ Inter-Continental Equip., Inc., ASBCA 37422, 96-1 BCA ¶ 28048.

36/ Ray Serv. Co., ASBCA 35800, 89-1 BCA ¶ 21549; Petroleum Terminal Mgmt., Inc., ASBCA 33680, 89-2 BCA ¶ 21835.

37/ J. Carlton Hudson, Jr., ASBCA 11659 et al., 67-2 BCA ¶ 6503, 10 GC ¶ 280.

38/ See generally Cibinic, "Default Termination for Failure To Comply With 'Other Provisions': Requiring Contractors To Do the Complete Job," 8 Nash & Cibinic Rep. ¶ 24 (Apr. 1994).

39/ FAR 52.219-9, para. (i).

40/ See Joseph Morton Co. v. U.S., 757 F.2d 1273 (Fed. Cir. 1985), 3 FPD ¶ 121, 27 GC ¶ 224. See also Beech Gap, Inc., ENGBCA 5585 et al., 95-2 BCA ¶ 27879.

41/ See Art-Metal USA, Inc. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978) (mere suspicion of fraud held insufficient to support a termination for convenience), 20 GC ¶ 442.

42/ See FAR 52.249-8, para. (a)(1)(iii), (a)(2), 52.249-9, para. (a)(1)(iii), (a)(2).

43/ Bailey Specialized Bldgs., Inc. v. U.S., note 27, supra; Composite Laminates, Inc. v. U.S., note 31, supra.

44/ See SanColMar Indus., Inc., note 33, supra.

45/ Samuel A. Moore, PSBCA 1063, 83-1 BCA ¶ 16376, 25 GC ¶ 139.

46/ Kennedy v. U.S., 164 Ct. Cl. 507 (1964), 6 GC ¶ 106. See Black's Law Dictionary 93 (6th ed. 1990) ("anticipatory breach of contract"). See also Restatement of Contracts § 318 (Am. Law Inst. 1932).

47/ U.S. v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991), 10 FPD ¶ 2, 33 GC ¶ 37 (quoting Cascade Pac. Intl. v. U.S., note 4, supra, which followed Dingley v. Oler, 117 U.S. 490 (1886) and In re Smoot, 82 U.S. 36 (1872)).

48/ AEC Corp., ASBCA 42920, 98-2 BCA ¶ 29952, 40 GC ¶ 433 (Note), affd. on recon., 1998 WL 883200 (Dec. 11, 1998).

49/ Big 3 Contracting Corp., ASBCA 20929, 79-1 BCA ¶ 13601 (1978), 25 GC ¶ 167 (Note), recon. denied, 1979 WL 2442 (Aug. 10, 1979).

50/ Cascade Pac. Intl. v. U.S., note 4, supra.

51/ FAR 52.249-8, para. (h), 52.249-9, para. (h), 52.249-10, para. (d).

52/ See Howell Tool & Fabricating, Inc., ASBCA 47939, 96-1 BCA ¶ 28225. See also McDonnell Douglas Corp. v. U.S., 35 Fed. Cl. 358, 377 n.32 (1996), 15 FPD ¶ 37.

53/ FAR 52.249-8, para. (c), 52.249-9, para. (c), 52.249-10, para. (b)(1).

54/ FAR 52.249-10, para. (b)(1).

55/ FAR 52.249-8, para. (c), 52.249-9, para. (c), 52.249-10, para. (b)(1).

56/ FAR 52.249-10, para. (b)(1)(iii).

57/ FAR 52.249-8, para. (d), 52.249-9, para. (d), FAR 52.249-10, para. (b)(1)(xi).

58/ FAR 52.249-8, para. (c), 52.249-9, para. (c), 52.249-10, para. (b)(1). See U.S. v. Brooks-Calloway, Co. 318 U.S. 120 (1943).

59/ FAR 52.249-8, para. (c), 52.249-9, para. (c), 52.249-10, para. (b)(1).

60/ See ACE Elecs. Assocs. Inc., ASBCA 13899, 69-2 BCA ¶ 7922, 12 GC ¶ 70.

61/ FAR 52.249-10, para. (b)(1).

62/ See generally Nash, "Concurrent Delays: A Financial Checkmate," 2 Nash & Cibinic Rep. ¶ 3 (Jan. 1988).

63/ Tobe Deutschmann Labs., NASABCA 73, 66-1 BCA ¶ 5413, 9 GC ¶ 62.

64/ Metro-Tel Div. of Grow Corp., ASBCA 8471, 1964 BCA ¶ 4164, 7 GC ¶ 170.

65/ U.S. v. Spearin, 248 U.S. 132 (1918). See generally Allen & Villet, "Implied Warranty of Specifications," Briefing Papers No. 91-8 (July 1991), 9 BPC 439.

66/ John McShain, Inc. v. U.S., 188 Ct. Cl. 830, 412 F.2d 1281 (1969), 11 GC ¶ 310.

67/ Hol-Gar Mfg. Corp. v U.S., 175 Ct. Cl. 518, 360 F.2d 634 (1966), 8 GC ¶ 240.

68/ Defense Sys. Corp., ASBCA 42939 et al., 95-2 BCA ¶ 27721, 37 GC ¶ 469.

69/ Soletanche Rodio Nicholson (JV), ENGBCA 5796 et al., 94-1 BCA ¶ 26472, 36 GC ¶ 285 (Note); XPLO Corp., DOTBCA 1289, 86-3 BCA ¶ 19125, 28 GC ¶ 217. See also Transatlantic Fin. Corp. v. U.S., 363 F.2d 312 (D.C. Cir. 1966).

70/ Wild Wood Assocs., Inc., AGBCA 96-150-3 et al., 97-2 BCA ¶ 29263; Koppers Co. v. U.S., 186 Ct. Cl. 142, 405 F.2d 554 (1968), 11 GC ¶ 26.

71/ ESB, Inc., ASBCA 22914, 81-1 BCA ¶ 15012; Oak Adec, Inc. v. U.S., 24 Cl. Ct. 502 (1991), 10 FPD ¶ 140, 34 GC ¶ 11.

72/ Note 68, supra; Dynalectron Corp. v. U.S., 207 Ct. Cl. 349, 518 F.2d 594 (1975), 17 GC ¶ 307; Foster Wheeler Corp. v. U.S., 206 Ct. Cl. 533, 513 F.2d 588 (1975), 17 GC ¶ 137.

73/ XPLO Corp., note 69, supra. See also Transatlantic Fin. Corp. v. U.S., note 69, supra.

74/ FAR 52.249-8, para. (a)(1), 52.249-9, para. (a)(1), 52.249-10, para. (a).

75/ Note 12, supra; H.N. Bailey & Assocs. v. U.S., 196 Ct. Cl. 156, 449 F.2d 387 (1971), 13 GC ¶ 439. See generally Pettit, "Waiver of Delivery Date," Briefing Papers No. 71-6 (Dec. 1971), 2 BPC 151.

76/ Cecile Indus., Inc., ASBCA 24600 et al., 83-2 BCA ¶ 16842, 26 GC ¶ 10.

77/ Kitco, Inc., ASBCA 38184, 91-3 BCA ¶ 24190.

78/ Patten Co., ASBCA 35319, 89-3 BCA ¶ 21957.

79/ W.M. Grace, Inc. ASBCA 23076, 80-1 BCA ¶ 14256, 22 GC ¶ 311.

80/ Note 12, supra; Bailey Specialized Bldgs., Inc. v. U.S., note 27, supra.

81/ Note 12, supra; Lumen, Inc. ASBCA 6431, 61-2 BCA ¶ 3210, 4 GC ¶ 279.

82/ See Tampa Brass & Aluminum Corp., ASBCA 41314, 92-2 BCA ¶ 24865.

83/ Olson Plumbing & Heating Co., ASBCA 17965 et al., 75-1 BCA ¶ 11203, 17 GC ¶ 427, affd., 221 Ct. Cl. 197, 602 F.2d 950 (1979), 21 GC ¶ 344.

84/ See Corway, Inc., ASBCA 20683, 77-1 BCA 12357, 19 GC ¶ 172.

85/ Fairfield Scientific Corp., note 27, supra. See also Bailey Specialized Bldgs., Inc. v. U.S., note 27, supra.

86/ McDonnell Douglas Corp. v. U.S., note 52, supra.

87/ Schlesinger v. U.S., 182 Ct. Cl. 571, 390 F.2d 702 (1968), 10 GC ¶ 129.

88/ FAR 52.249-8, para. (a)(1), 52.249-9, para. (a)(1), 52.249-10, para. (a) (emphasis added).

89/ See McDonnell Douglas Corp. v. U.S., note 52, supra. See also FAR 49.402-3(a), (f), 49.402-4; Cibinic, "Default Terminations: To Be or Not To Be?," 2 Nash & Cibinic Rep. ¶ 33 (June 1988).

90/ FAR 49.402-3(f).

91/ See William A. Hulett AGBCA 91-230-3 et al., 93-1 BCA ¶ 25389; Precision Dynamics, Inc., ASBCA 42955, 97-1 BCA ¶ 28846. See also Minelli v. U.S., 61 F.3d 920 (Fed. Cir. 1995) (Table) (unpublished), 14 FPD ¶ 58, 37 GC ¶ 608 (Note).

92/ Monaco Enters. v. U.S., 907 F.2d 159 (Fed. Cir. 1990) (Table) (unpublished), 9 FPD ¶ 88, 32 GC ¶ 222.

93/ Standard Register Co., GPOBCA 25-94, 1998 WL 350448 (Mar. 23, 1998), 40 GC ¶ 405.

94/ Darwin Const. Co. v. U.S., 811 F.2d 593 (Fed. Cir. 1987), 6 FPD ¶ 19, 29 GC ¶ 66.

95/ Walsky Const. Co., ASBCA 41541, 94-1 BCA ¶ 26264, 35 GC ¶ 605, affd. on recon., 94-2 BCA ¶ 26698, 36 GC ¶ 203 (Note).

96/ Cascade Pac. Intl. v. U.S., note 4, supra.

97/ Radiation Technology, Inc. v. U.S., 177 Ct. Cl. 227, 366 F.2d 1003 (1966), 8 GC ¶ 489.

98/ FAR 52.209-3. See FAR 9.308-1.

99/ FAR 52.209-4. See FAR 9.308-2.

100/ FAR 52.209-3, para. (b), 52.209-4, para. (b). See generally Ewing, Lawrence & Zenner, "First-Article Contracts," Briefing Papers No. 93-6 (May 1993).

101/ National Aviation Elecs., Inc., ASBCA 18256, 74-2 BCA ¶ 10677, 16 GC ¶ 349.

102/ International Foods Retort Co., ASBCA 34954 et al., 92-2 BCA ¶ 24994, 34 GC ¶ 520.

103/ Dunrite Tool & Die, Inc., ASBCA 27538, 83-2 BCA ¶ 16830, recon. denied, 84-1 BCA ¶ 17107.

104/ See Capitol City Const. Co., DOTBCA 74-29, 75-1 BCA ¶ 11012, 17 GC ¶ 122, recon. denied, 75-1 BCA ¶ 11103, 17 GC ¶ 122; Wolfe Const. Co., ENGBCA 3610, 84-3 BCA ¶ 17701, 36 GC ¶ 191 (Note). See generally Jackson & DeLancey, "Substantial Completion in Construction Contracts," Briefing Papers No. 96-4 (Mar. 1996).

105/ R.M. Crum Const. Co., VABCA 2143 et al., 85-2 BCA ¶ 18132.

106/ Mark Smith Const. Co., ASBCA 25058 et al., 81-2 BCA ¶ 15306, 24 GC ¶ 152.

107/ See also Olson Plumbing & Heating Co., note 83, supra.

108/ Margulies, "Owner Remedies for Contractor Default," in Construction Contracting ch. 11 at 864 (Geo. Wash. Univ. 1991).

109/ Southland Const. Co., VABCA 2217, 89-1 BCA ¶ 21548, 31 GC ¶ 83. But see Wolfe Const. Co., note 104, supra.

110/ Jacobs & Young, Inc. v. Kent, 230 N.Y 239, 129 N.E. 889 (1921).

111/ See generally Cibinic, "Economic Waste: When 'Just As Good' Is Good Enough," 6 Nash & Cibinic Rep. ¶ 28 (May 1992). See also Eastern Steamship Lines, Inc. v. U.S., 125 Ct. Cl. 422, 112 F. Supp. 167 (1953).

112/ Granite Const. Co. v. U.S., 962 F.2d 998 (Fed. Cir. 1992), 11 FPD ¶ 42, 34 GC ¶ 293, cert. denied, 506 U.S. 1048 (1993).

113/ Note 112, supra; Armada/Hoffler Const. Co., DOTBCA 2437 et al., 93-1 BCA ¶ 25446, 34 GC ¶ 638; George Ledford Const., Inc., ENGBCA 6268, 98-2 BCA ¶ 30016

114/ Brand S Roofing, ASBCA 24688, 82-1 BCA ¶ 15513.

115/ FAR 52.249-8, para. (a)(1)(i).

116/ Swanson Group, ASBCA 44664, 98-2 BCA ¶ 29896.

117/ Sentry Corp., ASBCA 29308, 84-3 BCA ¶ 17601.

118/ USA Elecs., Comp. Gen. Dec. B-275389, 97-1 CPD ¶ 75; Quality Fabricators, Inc., Comp. Gen. Dec. B-271431, 96-2 CPD ¶ 22.

119/ Victor Graphics, Inc., Comp. Gen. Dec. B-249297, 92-2 CPD ¶ 252; Johnson Graphic Indus. Inc., Comp. Gen. Dec. B-205070, 82-1 CPD ¶ 409.

120/ Rampart Servs., Inc., Comp. Gen. Dec. B-219906, 65 Comp. Gen. 164 (1985), 28 GC ¶ 63; 41 USC § 253a(a); 10 USC § 2305(a)(1).

121/ FAR 33.103(e) (agency-level protest); 4 CFR § 21.2(a)(1) (GAO protest); Saco Defense Sys. Div. v. Weinberger, 629 F. Supp. 385 (D. Me. 1986), affd., 806 F.2d 308 (1st Cir. 1986), and Harris Corp. v. U.S., 628 F. Supp. 813 (D.D.C. 1986) (Federal District Court protests under *Scanwell* jurisdiction); Allied Technology v. U.S., 39 Fed. Cl. 125 (1997) (U.S. Court of Federal Claims preaward protest).

122/ Cascade Pac. Intl. v. U.S., note 4, supra.

123/ FAR 52.233-1, para. (i).

124/ See Airprep Technology, Inc. v. U.S., 30 Fed. Cl. 488 (1994), 13 FPD ¶ 18, 36 GC ¶ 285. See also Kakos Nursery, Inc., ASBCA 10989, 66-2 BCA ¶ 5733, 9 GC ¶ 350, affd. on recon., 66-2 BCA ¶ 5909, 9 GC ¶ 350.

125/ See generally Nash, "Consideration for Time Extensions: Now You See It, Now You Don't," 4 Nash & Cibinic Rep. ¶ 54 (Sept. 1990).

126/ See FAR 33.210, 33.214, and relevant definitions at FAR 33.201. See generally Arnavas & Hornyak, "Alternative Dispute Resolution/Edition II," Briefing Papers No. 96-11 (Oct. 1996).

127/ See Nash, "Alternative Dispute Resolution: When Should It Be Done?," 10 Nash & Cibinic Rep. ¶ 26 (June 1996).

128/ FAR 49.402-3(c),(d), (e), 49.607.

129/ FAR 52.249-8, para. (a)(1), 52.249-9, para. (a)(1).

130/ FAR 52.249-8, para. (a)(2), 52.249-9, para. (a)(2).

131/ Fairfield Scientific Corp., note 27, supra. See also Bailey Specialized Bldgs., Inc. v. U.S., note 27, supra.

132/ FAR 49.607(a).

133/ FAR 49.402-3(c).

134/ FAR 49.402-3(e)(1).

135/ FAR 49.607(b).

136/ Note 24, supra.

137/ Kennedy v. U.S., note 46, supra.

138/ Union Dev. Co., ASBCA 33684, 89-2 BCA ¶ 21582.

139/ PBI Elec. Corp. v. U.S., 17 Cl. Ct. 128, 133–34 n.7 (1989), 8 FPD ¶ 74.

140/ Roger James, ASBCA 18605, 75-1 BCA ¶ 11054.

141/ See note 125, supra.

142/ Notes 87 & 94, supra.

143/ See FAR 49.402-3(a), 49.402-4; Cibinic, "Default Terminations: To Be or Not To Be?", 2 Nash & Cibinic Rep. ¶ 33 (June 1988).

144/ FAR 49.402-3(f)(1)–(7).

145/ See FAR 52.249-2, paras. (f), (g), (i) ("Termination for Convenience of the Government (Fixed-Price)" clause). See also FAR 49.113, 49.201.

146/ 5 USC § 504 (EAJA statute applicable to board of contract appeals litigation); 28 USC § 2412 (EAJA statute applicable to litigation before the U.S. Court of Federal Claims and appeals to the U.S. Court of Appeals for the Federal Circuit). See generally Tobin & Stiffler, "Recovering Legal Fees Under EAJA/Edition II," Briefing Papers No. 91-7 (June 1991), 9 BPC 421.

147/ FAR 52.249-8, para. (g), 52.249-9, para. (g), 52.249-10, para. (c).

148/ See Durette, Gmbh, ASBCA 34072, 91-2 BCA ¶ 23756.

149/ Seidman & Banfield, "Maximizing Termination for Convenience Settlements," Briefing Papers No. 95-5 (Apr. 1995); Seidman & Banfield, "Preparing Termination for Convenience Settlement Proposals for Fixed-Price Contracts," Briefing Papers No. 97-11 (Oct. 1997).

150/ 41 USC § 606. See FAR 33.211(a)(4)(v).

151/ 41 USC § 609. See FAR 33.211(a)(4)(v).

152/ 41 USC § 606.

153/ 41 USC § 609(a)(1), (3).

154/ See Tyger Const. Co., ASBCA 36100 et al., 88-3 BCA ¶ 21149, 30 GC ¶ 344.

155/ Exec. Order 12988, 61 Fed. Reg. 4729 (Feb. 7, 1996).

156/ FAR 33.214(c).

157/ Fulford Mfg. Co., ASBCA 2143 et al., 6 CCF ¶ 61815 (May 20, 1955).

158/ See generally D. Moody & Co. v. U.S., 5 Cl. Ct. 70 (1984), 2 FPD ¶ 150, 26 GC ¶ 118.

159/ Jeff Talano, PSBCA 3695 et al., 97-1 BCA ¶ 28628; Southwest Marine, Inc., DOTBCA 1891, 96-1 BCA ¶ 27985, 37 GC ¶ 608; Primepak Co., GSBCA 10514, 90-3 BCA ¶ 23280; High Tech Group, Inc., ENGBCA 5685, 90-2 BCA ¶ 22822; Tom Warr, IBCA 2360, 88-1 BCA ¶ 20231, 29 GC ¶ 356 (Note); Irvin Fisher, HUDBCA 77-198-C10, 79-2 BCA ¶ 14076, 21 GC ¶ 446.

160/ Marshall Associated Contractors, Inc. v. U.S., 31 Fed. Cl. 809 (1994); note 158, supra.

161/ See ACE Reforestation, Inc., AGBCA 84-272-1, 87-3 BCA ¶ 20218.


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