

## **DEFAULT AFFIRMED WHERE CONTRACTOR PROVIDED NO FACTS TO SUPPORT ITS NONPERFORMANCE**

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There is a fundamental concept in government contracting: the contractor either performs the tasks in its contract, or it will be defaulted (terminated for cause). And the only way out of a potential default, or a way to eliminate the consequences after default happens, is for the contractor to demonstrate that there was a reasonable excuse for nonperformance and it was beyond the control of the contractor. But the excuse must be supported by facts, including agency action or inaction that violates the contract. In *Caramazzi Glob Sol., Inc. v. Social Security Admin.*, CBCA 6265 et al., October 4, 2021, the contractor proffered numerous reasons and proposed various contractual changes, but never provided the factual basis for its excuses. The Civilian Board therefore affirmed the default.

The agency awarded multiple commercial item contracts and issued task orders to provide court reporters at disability hearings before administrative law judges. After a transition period under each contract, the contractor was required to provide 100% coverage for hearings and provide assurances in advance of each hearing that a reporter would be present. The contract failed to provide reporters under each of the 15 contracts before, during and after the agency had identified actual deficiencies and issued notices to cure and show cause-thereby resulting in the default. The contractor did not dispute these basic facts.

The contracts all contained a Termination for Cause that stated:

FAR 52.212-49 (m) *Termination for cause*. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

The contracts all included this provision regarding exceptions to any termination for cause:

(f) *Excusable delays*. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and

shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

When the contractor failed to perform, and the government issued notices of deficiencies and cure, the contractor responded with eight non-factual comments, proposing to:

- 1) Hold a joint meeting between executives of the contractor and government
- 2) Identify which contracts would be subject to the 100% requirement
- 3) Meet to address status, issues and milestones
- 4) Require the agency to provide advance payment with negotiated repayment terms
- 5) Allow the contractor 6 months to reach 100% compliance
- 6) Require the agency to pay invoices within 15 days of submission
- 7) Require the agency to provide security and suitability clearances within 4 weeks of receipt of submissions and
- 8) Provide weekly status reports

The problem, according to the Board, is that the contractor never identified any disputed fact or provided other facts, with support of the record, that excused its non-performance. There was no excusable delay in the record.

In the Appeal, the contractor again attempted to offer excuses as follows:

- 1) Asserting that agency personnel at local hearing offices held it to different invoicing standards (but those were the standards in the contract).
- 2) Other court reporting contracts got higher rates of compensation (but this contractor was paid what was in its contract.)
- 3) Other court reporting contractors held up the contractor's recruiting
- 4) Other court reporting contractors exerted pressure making it harder for this contractor to perform
- 5) Other court reporting contractors worked to dissuade new court reporters from working for this contractor
- 6) Agency personnel "did not welcome" the new court reporting recruits (but no specifics were asserted)
- 7) The agency was not transparent on what other court reporters were paid (but again, this contractor was paid at its contract rates) and
- 8) The agency provided fewer hearings than originally estimated in the contracts (but these types of contracts do not guarantee the estimates).

The Board concluded that the contractor failed to put forward any facts to support its theories of relief, and misinterpreted the contracts. The Board upheld the terminations for cause.

Takeaway. If you admit (as *Caramazzi* admitted), that it failed to perform as required, you must provide, as required by your own contract, facts showing that "nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or

contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers.” All of the other excuses offered by *Caramazzi* were really just “fluff” and had no bearing on the outcome of the case.

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