

## **MARKET SHORTAGE NOT AN EXCUSE FOR NONPERFORMANCE—DEFAULT JUSTIFIED**

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In a recent Army commercial contract for leasing and maintenance of trucks, the Armed Services Board of Contract Appeals held there was a prima facie showing of default, and found no merit in any of the excuses for failure to deliver the required trucks. *SBA Contracting, LLC*, ASBCA No. 63320, October 3, 2023.

The Army awarded a commercial items contract to Sama Bna Aliraq Company (“SBA”) which required SBA to lease and maintain several types of trucks. The contract included FAR 52.212-4, Contract Terms and Conditions-Commercial Products and Commercial Services. The delivery date for all 12 of the trucks in the contract was May 1, 2022. When SBA failed to deliver all but one truck by the delivery date, the Army had the right to terminate the contract for cause, which it did.

The only remaining significant issue was whether the failure to deliver the trucks was excusable. On this point the Board held the following:

- The contract required a single delivery date, and various trucks in the contract were not severable
- Although SBA asserted that the delivery date had been extended to July 1, 2022, the Board could find no formal or informal agreement to so extend the date.
- SBA alleged that the default should be excused because SBA had insufficient time to deliver the trucks in light of a vehicle shortage in Iraq which was beyond its control. The Board rejected that excuse, noting that “market shortage is not an excusable cause for nonperformance” and SBA could not demonstrate that it was impossible to obtain the trucks
- The Board rejected SBA’s excuse for the COVID-19 pandemic as a cause of its default. The Board could find no contract language that shifted the risk in this firm fixed price contract from the contractor to the Government for COVID-19.
- The Board rejected the SBA’s “prior course of dealing” argument, where SBA alleged that the government had relaxed requirements for other contractors. The Board noted that “[j]ustifiable reliance on a prior course of dealing requires proof of the same contracting agency, the same contractor and essentially the same contract provisions.” SBA was not a party to the prior contracts that it cited.
- The Board rejected SBA’s view that the termination decision was arbitrary, capricious or an abuse of discretion. The Board noted the contracting officer’s broad discretion in terminating for cause, and applied a four factors test:
  1. Whether the government official acted with subjective bad faith
  2. Whether the official had a reasonable contract-related basis supporting the decision
  3. The amount of discretion vested in the official whose action is being reviewed and

4. Whether a proven violation of relevant statutes or regulations can render the decision arbitrary and capricious

The Board rejected this argument and found no evidence of bad faith, that the CO had a reasonable contract-related basis to terminate for cause, and the CO had broad discretion.

The Board held that SBA failed to demonstrate that the default was excusable or that the termination was arbitrary, capricious or an abuse of the CO's discretion.

Takeaway. Any challenge to a termination for cause (default) requires clear cut evidence of reasons that grant the contractor the right to have its default excused. Similarly, the bad faith argument also requires valid proof.

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