

A FEW POINTERS ON ANTICIPATORY REPUDIATION

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The Armed Services Board recently reminded us of an important point about “anticipatory repudiation.” *Capy Machine Shop, Inc.*, ASBCA No. 59085, Oct 22, 2014. In order for a contractor to repudiate the contract, there must be a positive, definite unconditional and unequivocal manifestation by the contractor that he will not perform the contract. But what is anticipatory repudiation all about?

If you examine the standard default clause in a government contract, like FAR 52.249-8, Default (Fixed Price Supply and Service), you will note that the clause does not explicitly provide that the government may default terminate in the event that the contractor states (verbally or in writing) that it refuses to perform on the contract any more. A contractor’s refusal to perform may result from many different things, e.g., “I’m going broke on this contract;” “my suppliers refuse to supply to me;” “I can’t find a vendor who can make a critical part;” “my key employee left;” “I refuse to give you assurances that I will complete the contract,” etc.

The reasons for refusing to perform don’t really matter. What does matter is that when there is a “positive, definite, unconditional, and unequivocal manifestation of intent...on the part of a contractor of his intent not to render the promised performance when the time fixed therefor by the contract shall arrive, the contracting officer...may terminate the contract forthwith on the ground of anticipatory breach.” *Dingley v. Oler*, 117 U.S. 490, 503, *Kennedy v. United States*, 164 Ct. Cl. 507, 514, (1964). Even though the default clause does not explicitly provide for a default termination in response to an anticipatory repudiation, the Government possesses a right to assert breach of contract under the common law theory of anticipatory breach as one of the “other rights and remedies provided by law” under provision (h) of the Default clause (“The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.”)

You should be aware that anticipatory repudiation is specifically called out in the Uniform Commercial Code (“UCC”) §2-610, noting that “[w]hen either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may ...resort to any remedy for breach....”

In *Capy Machine Shop, Inc.*, the Government asserted that Capy had anticipatorily repudiated its contract for aviation splice fairings. Here is the relevant correspondence:

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| Nov. 7, 2013: | Capy emailed the Contracting Officer stating: “Please cancel the above contract at no cost to Capy Machine. Our forming vendor can’t locate his tooling.” |
| Nov. 13, 2013 | The Contracting Officer issued a show cause notice to Capy giving it 10 days to present reasons why the contract should not be defaulted because Capy couldn’t locate tooling. |

- Nov. 26, 2013 Capy emailed the contract administrator that “the cost of new tooling is \$19,647, which wasn’t included on the quote. That is the reason for asking to cancel this contract.”
- Dec. 12, 2013 The Contracting officer terminated Capy’s contract for default, stating that “the termination is based on your failure to perform in accordance with the terms and conditions of the contract.”

After it appealed the termination decision, the government argued that Capy had “anticipatorily repudiated” the contract. The Board, noting all of the communications, reiterated the requirement that repudiation requires a “positive, definite, unconditional and unequivocal manifestation by the contractor that it will not perform the contract. *Cascade Pac. Int’l v. United States*, 773 F. 2d 287, 293 (Fed. Cir. 1985). The Board concluded that “these communications do not reflect a positive, definite, unconditional and unequivocal refusal to perform,” and refused to sustain the default termination.

TIPS: (1) IF YOU WANT TO REPUDIATE YOUR CONTRACT: Write to your Contracting Officer and state: “XYZ company positively, definitely, unconditionally and unequivocally refuses to perform Contract No. _____” (You may or may not give a reason).

(2) IF YOU DON’T WANT TO REPUDIATE YOUR CONTRACT, OR DON’T THINK YOU WANT TO REPUDIATE IT, OR ARE NOT SURE ABOUT IT: Make all your statements to the Contracting Officer conditional, or indefinite, such as “XYZ is considering nonperformance, but we have not yet decided about this” or “We are uncertain about whether we can continue performance or will have to stop. We will provide specific statements on performance to you at a later date.”