

## **WAS YOUR DELIVERY DATE WAIVED? WAS YOUR DEFAULT TERMINATION IMPROPER?**

By Richard Lieberman, Consultant and Retired Attorney

Default terminations can be a nightmare for government contractors. To begin with, a profitable contract may end. Then the government will bill the contractor for “excess cost of procurement,” which is the additional cost for obtaining a substitute contractor for the same product or work at what most likely is a much higher price. The default will be included in the contractor’s past performance record, which may hurt in obtaining new contracts. And finally, the company could be suspended or debarred based on its “willful failure to perform in accordance with the terms of one or more contracts” (FAR 9.406-2) or where the government deems the default “so serious or compelling...that it affects the present responsibility [of the] contractor.” (FAR 9.406-2; FAR 9.407-2). While suspension or debarment based on one default is not very likely, multiple defaults are certain to affect a contractor’s ability to get new contracts, and might be used to debar or suspend the contractor.

Of course, there are many defenses to a default (incorrect facts, improper contract interpretation, etc.) But one of the more likely contractor defenses is the argument that the government waived the delivery date in the contract, and cannot base the default on that particular non-delivery. *MIC/CCS Joint Ven.*, ASBCA No. 58242, May 14, 2014, although the Armed Services Board of Contract Appeals (“ASBCA”) did not actually rule on a waiver of delivery date, because the contractor had moved for summary judgment and there were material facts in dispute, the case explains the waiver theory. It discusses the waiver in terms of supply and construction contracts (*MIC/CCS* involved a construction contract), and explains the elements of the waiver. Probably the most important thing about a waiver of delivery date is that if the contractor can establish it, the default termination will be converted to a termination for the convenience of the government, and all of the negative consequences discussed above will be avoided.

The waiver of delivery date is generally acknowledged to have been established in *DeVito v. United States*, 413 F. 2d 1147 (Ct. Cl. 1969), where, in a supply contract, the government waived the completion date and a default was converted to a termination for convenience. The key requirements to establish a waiver are as follows:

- (1) failure to terminate within a reasonable time after the default [failure to deliver] indicating forbearance,
- (2) reliance by the contractor on the failure to terminate, and
- (3) continued performance by [the contractor] under the contract, with the government’s knowledge and implied or express consent

*DeVito*, 413 F. 2d at 1154. Although the waiver doctrine normally does not apply to construction contracts because they generally contain provisions entitling the contractor to payment for work performed after the completion date and entitle the government to liquidated damages for late completion. *MIC/CCS* argued that there were special provisions in this contract which made it subject to the waiver, and apparently the Board agreed.

In order to demonstrate waiver, there must be a reasonable forbearance period, and this is dependent upon the facts. The waiver doctrine exists to protect contractors who are led to believe that time is no longer of the essence, and undertake substantial efforts after the due date in the contract. Furthermore, even if the government waives a completion date, it may still default the contract if the contractor abandons performance or materially breaches other obligations.

The Board analyzed all the *DeVito* factors, and concluded that there were material facts in dispute which precluded a summary judgment in this case. These material facts included:

- Did a subcontractor actually stop work and certain testing?
- Was work under the contract actually complete or not when the contractor said it was?
- Was the 5 month government delay in terminating the contract reasonable, even though it directed the contractor to continue to perform?
- Was the contractor's default excusable because it was caused by circumstances beyond its control and without its fault or negligence—there are questions concerning testing of a well, and water conditions in this case.

To find out the ultimate outcome, we must wait for the trial and the final Board ruling. But the case leads to several tips for contractors.

TIPS: (1) Make every effort to avoid a default termination. That is, comply fully with your contract but if you can't, seek to modify it (e.g. by extending delivery time in exchange for the contractor's offer of some consideration—less money for the contractor, more warranty to the Government, better quality in the product, etc.)

(2) If the government doesn't default you immediately, or within a "reasonable" time, you should probably appeal the default termination, if you can establish the elements of a waiver of delivery date, namely:

- a) failure to terminate within a reasonable time after the default. Typically this is only a short time period, but it may be longer, depending on circumstances
- b) reliance by the contractor on the failure to terminate—the contractor kept working, trying to perform, and
- c) the government knew (either by implication or express consent), that the contractor was continuing to work on the contract

If you can demonstrate all three, you have a good chance of converting the default to a termination for convenience.