

## COMMERCIAL ITEM CONTRACTS REQUIRE CURE NOTICES BEFORE TERMINATION FOR CAUSE

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A cure notice identifies a deficiency in a contractor's performance that the Government considers to endanger performance of the contract, and warns the contractor that the contract may be terminated for default if the problem is not "cured" or addressed, within a specified time period. *See generally* FAR 49.607(a). *Decker & Co. v. W.*, 76 F.3d 1573, 1576 n.2. (Fed. Cir. 1996). While it is abundantly clear that cure notices are required for non-commercial contracts, the Civilian Board of Contract Appeals recently reaffirmed that they are required in commercial item contracts, which use a slightly different clause known as the "termination for cause." *Brent Packer and Myrna Palasi v. Social Security Admin.*, CBCA 5038, 5039, Feb. 22, 2016.

The termination for default clause in noncommercial fixed price supply and service contracts requires that the contractor be given a cure notice, except where the contractor fails to deliver the supplies or to perform the services within the time specified in the contract. The clause states:

The Government's right to terminate this contract ... may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

FAR 52.249-8(a)(2).

The commercial item termination provision is included in FAR 52.212-4(m) and states:

*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. []If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Although not included in the termination for cause clause, the FAR expressly requires a contracting officer to issue a cure notice before terminating a contractor for failure to comply with contract provisions.

*Termination for cause.* (1) [] The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.

FAR 12.403 (c)(1).

This seems clear, but apparently the Social Security Administration did not fully comprehend it. Packer and Palasi were two doctors who each received a Blanket Purchase Agreement ("BPA") for medical consulting services. As required by FAR 13.303-3, the BPAs noted that they did not obligate any funds, that any services had to be ordered by call orders, and the government was only obligated to the extent of authorized call orders. The BPA included a conflict of interest clause whereby the contractors agreed not to perform services or be an employee of a state agency that carried out a disability or blindness determination function. The Social Security Administration issued each doctor one call order to assess impairment severity in disability

claims. The Contracting Officer discovered that both doctors had accepted positions with the California Disability Determination Services, and, two months later, retroactively terminated both call orders for cause. The doctors challenged the terminations at the Board.

First, the Board held that there were *contracts* at issue subject to the Contract Disputes Act. Although the board held that the BPA's themselves were not contracts (because there was no mutuality of obligation, and the government had no obligation to make any purchases or issue call orders), the call orders were valid contracts, and their terminations could be challenged. Noting that a cure notice was required but was never issued (for the reasons stated earlier), the Board stated that "Dr. Packer and Dr. Palasi were entitled to an opportunity to cure before ...terminat[ing] their call orders for cause. The contracting officer's failure to provide that opportunity renders the termination decisions invalid."