

DEFECTIVE CURE NOTICE-ACCEPTABLE PERFORMANCE

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The Civilian Board of Contract Appeals recently ruled that the Department of Veterans Affairs (“VA”) had improperly terminated two contracts for cause (default) because of defective cure notices and the exercise of options that demonstrated that the contractor’s performance had been acceptable. *Alan E. Fricke Memorials, Inc. v. Dept of Veterans Affairs*, CBCA 7352, 7253, Jan. 12, 2023.

Fricke received two contracts for labor and materials necessary to perform inscription services (i.e. providing markers for graves) at Calverton Cemetery and Long Island National Cemetery (“LINC”). The contracts included the Federal Acquisition Regulation (“FAR”) Commercial Items clause at FAR 52.212-4.

Here is a timeline for these contracts.

October 2020	Fricke received two contracts
January 2021	Fricke fell behind in delivering markers but by April 2021, Fricke had eliminated the backlog of overdue markers
August 2021	Backlog began to grow, and by August 2021 was 500 markers at Calverton and 200 markers at LINC. VA begins to send new orders to Other VA inscription contractors (causing higher costs)
Mid-Sept. 2021	VA issues a Contractor Deficiency Report (“CDR”) stating that Fricke was not meeting delivery deadlines in contract. VA advised that “the next step after CDR is a cure notice”
Late-September 2021	One day after issuing the CDR, the contracting officer (“CO”) exercised the options in both contracts for another year of performance. The CO “thought Fricke could catch up.”
Late October 2021	One month after exercising the options, the CO issued a cure notice on the LINC contract. On this date, Fricke was delinquent on two markers—which were delivered in Nov. 2021
Late Oct. 2021	The CO issued a second cure notice on Calverton, concerning 9 undelivered markers. These markers were delivered during the second week of November 2021. Although the CO testified that she expected Fricke to respond to the cure notices, by providing a plan to become compliant, the cure notices did not request such a plan
December 21, 2021	The CO terminated Fricke’s contract at LINC for failure to provide a plan
January 11, 2021	The CO terminated Fricke’s contract at Calverton for failure to provide a plan

The CO listed three reasons for the terminations:

- (1) Failure to provide inscription services within 10 days as per the contract. (Note: Frick was not delinquent on delivery of any orders at the time of the termination)
- (2) Failure to provide timely service for several types of markers (Note: Frick had no orders for these markers at the time of termination).

- (3) Failure to respond to the cure notice pursuant to FAR 52.212-4(m), which states “[t]he Government may terminate this contract for cause [if the contractor] fails to provide the Government, upon written request, with adequate assurances of future performance.” The Board noted that a cure notice must properly advise the contractor of the perceived failures that justify the CO’s action—a cure notice that fails to provide sufficient details regarding exactly what a contractor had to do, or not do, in order to avoid the threatened default termination, is defective.

Although the CO stated that she sought a plan from Fricke for future performance in response to the cure notice, the notice was not adequate in requesting a plan. The cure notice simply stated that Fricke was failing to provide inscription services in accordance with the terms and conditions. The Board held that there was no evidence that the VA communicated its need for a plan with specificity. Further, the Board noted that the VA had exercised its options despite Fricke’s record of delinquencies and inability to handle the orders. This exercise of options may only be made after the CO determines, among other things, that the contractor’s performance on this contract has been acceptable, e.g. received satisfactory ratings. The Board stated that the CO cannot exercise the options, seemingly accepting the performance difficulties, and then decide to terminate the contract *three months later*, finding that these same performance difficulties are no longer acceptable.

The Board held that the terminations for cause were without a proper basis, and converted them to terminations for convenience.

Takeaway. Contracting officers should be specific in cure notices, and base a subsequent default or cause termination (if any) on very specific issues raised in the cure notices. CO’s should not exercise options where a contractor has had uncured problems, and soon thereafter base a subsequent termination for cause on those same uncured problems.

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