

ANTICIPATORY REPUDIATION: GOOD, BAD AND UGLY

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One important aspect of the government's right to default terminate a contract is if the contractor refuses to perform, or unequivocally tells the government that it refuses to perform (and thereby "repudiates" the contract). Two recent cases tell the story about "anticipatory repudiation" – one where there was anticipatory repudiation, and the other in which there was not. The basic premise is that in order for a contractor to repudiate a contract, there must be a positive, definite unconditional and unequivocal manifestation by the contractor that he will not perform the contract. So let's look at the background and the two cases.

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*, ASBCA No. 59085, Oct 22, 2014, 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 Capy appealed the termination decision, the government argued that the contractor 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.

Having looked at a questionable repudiation, now let's look at an unquestionable one. In *Highland Al Hujaz Co., Ltd.* ("Highland") ASBCA No. 58243, March 30, 2016, the U.S. Army Corps of Engineers ("Corps") terminated a contract for the design, construction and installation of an Afghan Army Corps Support Battalion ("CSB") installation in Afghanistan. Here are the relevant facts and correspondence:

- June 3, 2009 Corps awarded a contract to Highland for the CSB
- Nov. 8, 2011 Modification P00013 was issued which required that Highland provide temporary power to the CSB until a revised contract completion date of March 1, 2012, at which time Highland was required to have permanent power in place. If temporary power was required after March 1, 2012, Highland was required to provide "all necessary power" at their own cost until the permanent power system was functioning.
- March 25, 2012 Corps withheld progress payment 44 entirely because of lack of progress and failure to pay subcontractors
- March 28, 2012 Corps issues a cure notice for failing to complete several facilities by the March 1, 2012 required completion date, including the power distribution system.
- March 31, 2012 Corps withheld progress payment 45 entirely because of lack of payment to subcontractors, lack of approved schedule, and lack of progress.

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| April 14, 2012 | Highland notifies Corps that “as of April 20, 2012, [Highland] will no longer be fueling or paying the lease for the generators that were used to provide temporary power” to the site |
| April 15, 2012 | Corps requests that Highland clarify if it will refuse to supply the fuel and generators that supply temporary power as required by Modification P00013 |
| April 16, 2012 | Highland states “we simply do not have the money” to pay for the fuel and generators for temporary power...we will no longer be able to supply this service.” |
| April 23, 2012 | Highland advises the Corps that “we don’t have any person that will supply us with diesel (for the generator), without any money to pay for it. |
| April 23, 2012 | Corps terminates the contract for default for Highland’s failure “to provide temporary power...according to Modification No. P00013”. |

The Armed Services Board held that the default termination was proper because:

- Highland anticipatorily repudiated its obligation to provide temporary power because it gave a positive, definite, unconditional and unequivocal refusal to continue providing power without additional fuel payments by the Corps;
- The obligation to provide power was a material aspect of the plain language of the contract, and could not be severed from or divided from the rest of the contract work
- Highland failed to show that its repudiation was excused by a prior material breach (Corps’ refusal to pay progress payments) because there were valid contractual reasons (non-payment of subs and failure to provide the Corps with an up-to-date schedule) for not paying the progress payments

Contrasting *Capy* with *Highland* demonstrates how specific the repudiation must be for the government to base its default termination on that ground. *Capy* didn’t repudiate unequivocally, but *Highland* did. The “good” parts about this is that a contractor must be very definite and unequivocal in its repudiation, otherwise a default will not be sustained, and also that the Government may default a contract where the contractor refuses to perform. The “bad” part about this is that the contractor may lose its contract. And the “ugly” part is that the government must insist on clear cut words (in writing) before they can act to terminate for default. Unless the contractor provides the specific words, any default based on repudiation will not be proper.

A few tips for contractors and the Agencies:

(1) IF YOU (contractor) **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 (contractor) **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.”

(3) If you are a contracting officer and face a possible anticipatory repudiation, follow the lead set by the Corps in *Highland*—identify the material aspect of the contract and request the contractor to unequivocally and definitely state, in a writing, that it will not perform that material aspect of the contract. When you receive that kind of written repudiation, you may properly terminate for default, unless there is something that excuses the contractor's actions. (Note the language in FAR 52.249-8(c), “failure to perform [was] beyond the control and without the fault or negligence of the Contractor,” citing such examples as acts of God, strikes, unusually severe weather, etc.)