

GOVERNMENT WAIVER OF DELIVERY DATE: AN IMPORTANT DEFENSE TO DEFAULT

By Richard D. Lieberman, Consultant and Retired Attorney

When a contractor faces a potential default, one of its most important defenses, if the right circumstances exist, is that the Government waived the delivery date. Sometimes conditions exist that might enable the Government to invoke Federal Acquisition Regulation (“FAR”) 52.249-8, Default, or FAR 52.212-4(m), Termination for Cause, in a Commercial contract. This would include a failure to deliver the supplies or perform the services within the time specified in the contract. (Principles governing terminations for default also apply to terminations for cause, see *Genome-Comm.*, ASBCA No. 57267, 11-1 BCA para 34,699).

In *American AquaSource, Inc.*, ASBCA No. 56677, Jan. 8, 2013, the Armed Services Board explained when the waiver of delivery date defense is and is not available. American AquaSource (“AAS”) was awarded a commercial items contract to deliver purified bottled water to an American logistics staging area in Iraq. When AAS failed to deliver, the contracting officer issued a show cause notice, and finding AAS’s response unsatisfactory, terminated the contract for cause. AAS appealed the termination for cause, asserting that the Government had waived the delivery date because the government waited 49 days between the failure to deliver (the actual default) and the termination. AAS asserted that during that period, it relied on the government’s delay to its detriment and continued to perform with the knowledge, consent and encouragement of the government. AAS sought the standard remedy, namely, the conversion of the termination for cause (default) into a termination for convenience of the Government.

The ASBCA noted that the elements of a waiver of delivery date are:

- Failure to terminate within a reasonable time after the default under circumstances indicating forbearance; and
- Reliance by the contractor and continued performance under the contract, with the Government’s knowledge and implied or express consent.

DeVito v. United States, 413 F. 2d 1147 (Ct. Cl. 1969).

The Board noted that in order to constitute reliance, “activities performed by the contractor after the delivery date must amount to *productive performance or tangible progress on the contract.*” (Italics added). AAS, as evidence of its reliance stated it had (a) conducted one site survey; (b) its construction subcontractor was seeking \$5,000 a day in liquidated damages; and (c) it attempted to purchase water from another source.

The Board rejected all three items because they were not substantial enough to constitute reliance. Liquidated damages does not constitute productive performance or tangible progress, and the other AAS actions were minimal. AAS had failed to prove reliance, and the ASBCA upheld the termination for cause.

Copyright 2013 Richard D. Lieberman.

This article does not provide legal advice as to any particular transaction.

TIPS: If a contractor is unable to deliver, it may advise the government of the reasons, and seek written concurrence with continued performance. If written concurrence is not possible, the contractor should seek the government's implied concurrence. Furthermore, the contractor should continue to conduct real, tangible and significant performance to get the contract back on track. If default occurs, the contractor may be able to successfully argue that the Government waived the delivery schedule. Note: The period between actual failure to deliver and the termination for cause or default under the contract (which was 49 days for AAS) is not the most important issue—reliance and continued performance is most important. The time period between default and termination simply must be “reasonable.”