

HOW MANY MISTAKES CAN A DEFENSE LOGISTICS AGENCY CONTRACTING OFFICER MAKE?

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A Defense Logistics Agency (“DLA”) contracting officer (“CO”) terminated a contract to provide jet fuel to Bagram airfield in Afghanistan, (including construction of a pipeline). The termination, however, was so erroneous that the Armed Services Board of Contract Appeals (“ASBCA”) cited numerous reasons for converting the default to a termination for convenience of the government. *Asia Commerce Network*, ASBCA No. 58623, October 4, 2017 (hereafter “ACN”)

Probably the most important error was the CO’s waiver of the delivery date, and failure to establish a new delivery date. The CO issued a cure notice in October 2012 and ACN explained that the delays cited in the cure notice were beyond its control. The CO requested revised milestones, recognizing delays that were beyond the contractor’s control. ACN responded by submitting new milestones to the CO—but they were never issued to ACN and the contract was never changed by modification. The Board held that the government waived the delivery date, and failed to establish new delivery dates after the waiver. (Note: FAR 49.402-4 specifically states that “in lieu of termination for default, when in the government’s interest [the contracting officer] may permit the contractor ...to continue performance of the contract under a revised delivery schedule.”) This failure by the CO was enough to cause the Board to convert the default termination to a termination for convenience of the government.

But the failure to establish a new delivery date was not the only error by the CO. In the default notice, the government cited two failures of ACN to comply with contractual requirements:

- Failure to comply with “cathodic protection” (this is a technique used to control the corrosion of a metal surface by making it the cathode of an electrochemical cell. It is used in some pipelines).
- Failure to encapsulate the entire pipeline in a concrete culvert.

The Board rejected both “requirements,” noting that the contract required neither. Cathodic protection was not required by the contract, and had not been included in ACN’s proposal. With respect to the concrete culvert, it was only required for one small portion of the pipeline, and ACN was providing the culvert in that section.

The takeaway: Three strikes for the contracting officer, who failed to re-establish a new delivery schedule after waiving the original schedule, and who erroneously argued that the pipeline in the contract required certain technical features, even though it did not. (Further note: ACN’s pipeline expert testified that the facility and pipeline were 95 percent completed at the time the contract was terminated. The pipeline was less than 10 percent of the overall project, which included a tank farm, filtration, pumps, laboratory equipment, meters and strainers)

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