

## WAIVER OF GOVERNMENT RIGHT TO TERMINATE

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In a very interesting appeal of an Termination for Default (“T/D”) of a janitorial services contract, the Civilian Board held that the Department of Veterans Affairs (“VA”) waived its right to terminate based on an initial cure notice, and failed to issue a second cure notice. *Hughes Group, LLC v. Dept of Veterans Affairs*, CBCA 5964, March 6, 2023. In summary, what happened was that Hughes had performance difficulties which led to issuance of a cure notice, but instead of terminating Hughes’s contract in the weeks following the cure notice, VA breached the contract by failing to pay Hughes anything, while the company continued performing. Then, some time later, after paying Hughes’ overdue invoices in full, the agency sought to terminate Hughes’ contract based on deficient work. The termination notice directed Hughes to continue performing until the contract nearly expired. The Board held that the VA had waived the right to terminate without first issuing a new cure notice, and VA’s actions were arbitrary and capricious.

The VA issued its cure notice on June 6, 2017, and Hughes responded with a corrective action plan, but VA never answered Hughes’ response to that cure notice. In August 2017 without notice or explanation, VA stopped paying Hughes’s invoices. Hughes kept working while contacting the contracting officer and requesting payment. Then on October 23, 2017, the VA paid Hughes in full without any reservations or exceptions to the invoice (no deductions). Ten days after that date, it paid all of Hughes’ invoices on November 2, 2017 and the contracting officer terminated the contract for cause (default), effective Nov. 25, 2017, pursuant to FAR 52.212-4(m). Hughes’ contract was due to expire on Nov. 30, 2017 (5 days after the effective date of the termination).

The Board noted that the non-payment of invoices was a material breach, while Hughes continued to work. (The Board noted that when an action or statement by the Government indicates a preference for a contractor’s continued performance rather than contract termination, the Government’s election in that regard opens the door to a claim of waiver.) The Board held that on October 23, 2017, when VA paid Hughes in full on the invoices, the VA had waived Hughes’ performance deficiencies, and any subsequent campaign to terminate the contract for default required that VA issue a new cure notice, which VA did not issue.

The waiver doctrine was described as follows:

An election becomes legally operative (as a waiver) if the contractor relies in a significant way on this election. In deciding whether a waiver has occurred, the courts and appeals boards weight both (a) the statements and acts of the Government indicating election, and (b) the amount of reliance on the contractor, to determine whether the Government should be held to have lost its right to terminate for default.

Citing Ralph C. Nash & John Cibinic, *Waiver of the Right to Term. For Default: the Impact of No-Waiver Language*, 13 Nash & Cibinic Report ¶ 64 (Dec. 1999).

VA's payment without reservation or deduction of the invoices was an election for continued performance. Hughes' continued performance was its reliance, and these two elements satisfied the elements of waiver—and a new cure notice was necessary for VA to properly default Hughes.

The Board considered whether the period between the default and the contracting officer's termination notice constituted a "reasonable time", and noted that this depended on the circumstances of the case. Here there was a five month period between cure notice and termination. The Board researched and found the following "reasonable time" periods allowed:

39 day delay  
49 day delay  
84 day delay

The Board was not persuaded that the five months it took VA to terminate was a reasonable period of time. Further the Board found that the discretion granted to the contracting officer to act fairly and reasonably is not without limits—and was in fact arbitrary and capricious in this termination. The contracting officer did not give reasoned consideration, which it was required to do.

For that reason, the Board refused to uphold the agency's termination for cause and converted it to one for convenience of the government.

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