

IMPOSSIBILITY IS NOT A DEFENSE TO A DEFAULT IF CONTRACTOR FAILS TO EXPLORE ALTERNATIVES

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A termination for default or a termination for cause requires the government to bear the burden of proof that its action was justified. If the agency presents a prima facie case that the termination was proper, the contractor must then rebut the government's case. The boards and courts will sustain a termination for default or cause if the contractor did not perform in accordance with the contract, and the contractor cannot show that its failure to perform was excused.

In *Master's Trans., Inc., v. General Services Administration*, CBCA 6565, Dec. 8, 2021, the GSA placed 90 delivery orders with Master's for wheelchair vans. The specifications required that a mechanical wheel ramp lift be provided, and further required the ramp to comply with Federal Motor Vehicle Safety Standards ("FMVSS") and Americans with Disability Act ("ADA") requirements. The contract also required Master's to submit a first production vehicle for inspection to ensure compliance with contract specifications and stated that GSA could refuse acceptance of all vehicles until corrective action was taken on a failed first production inspection.

Master's elected to produce most of the 90 vehicles prior to receiving approval of its first production vehicle. When GSA conducted first vehicle inspection, it found that the slope of the wheelchair ramp did not comply with ADA requirements. GSA issued two cure notices and a show cause notice, but Master's refused to make any changes to its product. The contracting officer then issued a termination for cause of the delivery orders and issued a partial termination for cause on Master's contract. The Board found that the contract contained clear technical requirements for the vehicles, which Master's did not meet. The Board rejected Master's assertion that the specifications were defective, finding that the ADA requirements had not been met and were not defective.

Then the Board addressed the doctrine of impossibility as a defense to a default termination, stating that a contractor must prove:

- 1) A supervening event made performance impractical or impossible
- 2) The non-occurrence of the event was a basic assumption upon which the contract was made
- 3) The occurrence of the event was not appellant's fault
- 4) Appellant did not assume the risk of occurrence.

The Board concluded that the fact that Master's could not perform was not, by itself, conclusive evidence that the specifications were defective or that performance was impossible. In situations such as this, the contractor is also required to show that no other similarly situated contractor could perform the specifications. This required the contractor to show that it explored and exhausted alternatives before concluding that the contract was either legally impossible or commercially impracticable to perform—and Master's provided no

evidence that it had explored any alternatives before declaring the contract impossible to perform.

The Board denied the appeal, finding that Master's failure to produce a fully compliant wheelchair ramp was not excused and the termination was justified.

Takeaway. Be sure that you examine and exhaust possible alternatives before declaring specifications defective and performance impossible.